Rules of Criminal Procedure for the District Courts

ARTICLE 1
General Provisions

5-101. Scope and title.

A. **Scope.** These rules govern the procedure in the district courts of New Mexico in all criminal proceedings.

B. **Construction.** These rules are intended to provide for the just determination of criminal proceedings. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.

C. **Title.** These rules shall be known as the Rules of Criminal Procedure for the District Courts.

D. **Citation form.** These rules shall be cited by set and rule numbers, as in NMRA, Rule 5-___.

Committee commentary. — The 1974 amendments to this rule eliminated a reference to proceedings in the magistrate courts. The adoption of revised magistrate rules, the Rules of Criminal Procedure for the Magistrate Courts, requires the attorney and magistrate to look to those rules for certain proceedings in felony cases which are handled by the magistrate.

This rule does not specifically provide that these rules apply to prosecutions for criminal contempt. Compare Paragraph B of Rule 11-1101 NMRA. New Mexico decisions suggest, but do not definitely hold, that indirect or constructive criminal contempt proceedings would be governed by the applicable rules of criminal procedure. *See*, *State v. New Mexico Printing Co.*, 25 N.M. 102, 177 P. 751 (1918). *Compare, Norton v. Reese*, 76 N.M. 602, 417 P.2d 205 (1966) with *Seven Rivers Farms, Inc. v. Reynolds*, 84 N.M. 789, 508 P.2d 1276 (1973). *See also*, 34-1-4 and 39-3-15A NMSA 1978.

ANNOTATIONS

Cross references. — For commencement of criminal prosecution in accordance with these rules, *see* Section 31-1-3 NMSA 1978.

Compiler's notes. — The supreme court order of May 3, 1972, adopting the Rules of Criminal Procedure for the District Courts, provided in part that "any rules of civil procedure governing criminal proceedings are hereby repealed . . . ". For provisions relating to jury instructions, *see* Rule 5-608 NMRA.

A trial court's inherent authority to review the sufficiency of the evidence does not end post-verdict. — Where Defendant was convicted of criminal sexual penetration and battery against a household member, and where two days after accepting the jury's verdicts, the district court, on its own motion, vacated both convictions, concluding that the State failed to provide sufficient evidence to identify Defendant as the person who actually committed the crimes, there was no error because a trial court, with jurisdiction over a criminal case, has the inherent authority to review the sufficiency of the evidence supporting conviction at any time while its jurisdiction over the case continues. *State v. Martinez*, 2022-NMSC-004, *rev'g* A-1-CA-37798, mem. op. (N.M. Ct. App. Sept. 16, 2019) (non-precedential).

Law reviews. — For article, "Survey of New Mexico Law, 1982-83: Criminal Procedure," see 14 N.M.L. Rev. 109 (1984).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law § 1 et seq.

Application of civil or criminal procedural rules in federal court proceeding on motion in nature of writ of error coram nobis, 53 A.L.R. Fed. 762.

22 C.J.S. Criminal Law § 1 et seq.

5-102. Withdrawn.

ANNOTATIONS

Withdrawals. — Pursuant to Supreme Court Order No. S-1-RCR-2024-00078, 5-102 NMRA, relating to rules and forms, was withdrawn effective July 1, 2024. For provisions of former rule, *see* the 2023 NMRA on *NMOneSource.com*.

5-103. Service and filing of pleadings and other papers.

A. **Service; when required.** Except as otherwise provided in these rules, every written order; every pleading subsequent to the initial indictment, information, or complaint; every paper relating to discovery required to be served upon a party, unless the court otherwise orders; every written motion other than one which may be heard ex parte; and every written notice, appearance, demand, designation of record on appeal, and similar paper shall be served upon each of the parties.

B. **Service; how made.** Whenever under these rules service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to the attorney or party, or by mailing a copy to the attorney or party at the attorney's or party's last known address. Service by mail is complete upon mailing.

C. **Definitions.** As used in this rule:

(1) “Delivering a copy” means:

(a) handing it to the attorney or to the party;

(b) sending a copy by facsimile or electronic transmission when permitted by Rule 5-103.1 NMRA or Rule 5-103.2 NMRA;

(c) leaving it at the attorney’s or party’s office with a clerk or other person in charge thereof, or, if there is no one in charge, leaving it in a conspicuous place in the office;

(d) if the attorney’s or party’s office is closed or the person to be served has no office, leaving it at the person’s dwelling house or usual place of abode with some person of suitable age and discretion then residing there; or

(e) leaving it at a location designated by the court for serving papers on attorneys, if the following requirements are met:

(i) the court, in its discretion, chooses to provide such a location; and

(ii) service by this method has been authorized by the attorney, or by the attorney’s firm, organization, or agency on behalf of the attorney.

(2) “Mailing a copy” means sending a copy by first class mail with proper postage.

D. **Filing by a party; certificate of service.** All papers after the complaint, indictment, or information required to be served upon a party, together with a certificate of service indicating the date and method of service, shall be filed with the court within a reasonable time after service.

E. **Filing of papers and pleadings by a party represented by counsel.** The clerk shall not file a pleading or paper of a defendant who is represented by an attorney, unless the paper is a request to dismiss counsel or to appear pro se. If the paper is a request to dismiss counsel or to appear pro se, the clerk shall serve a copy of the request on all counsel of record in the proceedings. Except for a request to dismiss counsel or to appear pro se, all documents or items received by the court from a defendant who is represented by an attorney shall be forwarded, without filing, to the defendant’s attorney of record. Nothing in this paragraph shall restrict a defendant’s right to file pro se post-conviction motions under Rule 5-802 NMRA.

F. **Filing with the court defined.** The filing of papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with the judge, in which event the judge shall note thereon the filing date and forthwith transmit them to the office of the clerk. “Filing” shall include filing a facsimile copy or filing an electronic copy as may be permitted under

Rule 5-103.1 NMRA or 5-103.2 NMRA. If a party has filed a paper using electronic or facsimile transmission, that party shall not subsequently submit a duplicate paper copy to the court. The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or any local rules or practices.

G. **Proof of service.** Except as otherwise provided in these rules or by order of court, proof of service shall be made by the certificate of service indicating the date and method of service signed by an attorney of record, or if made by any other person, by the affidavit of such person. Such certificate or affidavit shall be filed with the clerk or endorsed on the pleading, motion, or other paper required to be served.

H. **Filing and service by the court.** Unless otherwise ordered by the court, the court shall serve all written court orders and notices of hearing on the parties. For papers served by the court, the certificate of service need not indicate the method of service. For purposes of Rule 5-104(C) NMRA, papers served by the court shall be deemed served by mail, regardless of the actual manner of service, unless the court's certificate of service unambiguously states otherwise. The court may, in its discretion, serve papers in accordance with the method described in Subparagraph (C)(1)(e) of this rule.

I. **Filing and service by an inmate.** The following provisions apply to documents filed and served by an inmate confined to an institution:

(1) If an institution has a system designed for legal mail, the inmate shall use that internal mail system to receive the benefit of this rule.

(2) The document is timely filed if deposited in the institution's internal mail system within the time permitted for filing.

(3) Whenever service of a document on a party is permitted by mail, the document is deemed mailed when deposited in the institution's internal mail system addressed to the parties on whom the document is served.

(4) The date of filing or mailing may be shown by a written statement, made under penalty of perjury, showing the date when the document was deposited in the institution's internal mail system.

(5) A written statement under Subparagraph (4) of this paragraph establishes a presumption that the document was filed or mailed on the date indicated in the written statement. The presumption may be rebutted by documentary or other evidence.

(6) Whenever an act must be done within a prescribed period after a document has been filed or served under this paragraph, that period shall begin to run on the date the document is received by the party.

[As amended, effective December 1, 1998; as amended by Supreme Court Order No. 05-8300-013, effective September 15, 2005; as amended by Supreme Court Order No. 14-8300-016, effective for all cases pending or filed on or after December 31, 2014.]

Committee commentary. — Paragraphs A, B, C, and D of this rule are substantially the same as Paragraphs A, B, C, and E of Rule 1-005 NMRA. The exceptions from filing papers with the court found in Paragraph C of Rule 1-005 have been omitted from this rule.

Paragraph I governs the filing and service of documents by an inmate confined to an institution. As explained in Paragraph E of this rule, a court generally will not consider pro se pleadings filed by an inmate who is represented by counsel. *See, e.g., State v. Martinez*, 1981-NMSC-016, ¶ 3, 95 N.M. 421, 622 P.2d 1041 (providing that no constitutional right permits a defendant to act as co-counsel in conjunction with the defendant's appointed counsel); *State v. Boyer*, 1985-NMCA-029, ¶ 15, 103 N.M. 655, 712 P.2d 1 (explaining that "once a defendant has sought and been provided the assistance of appellate counsel, that choice binds the defendant, absent unusual circumstances" (citation omitted)).

[Amended October 15, 1998; as amended by Supreme Court Order No. 14-8300-016, effective for all cases pending or filed on or after December 31, 2014.]

ANNOTATIONS

The 2014 amendment, approved by Supreme Court Order No. 14-8300-016, effective December 31, 2014, authorized the court to designate a place of service on attorneys; provided for the filing and service of orders and notices by the court; provided for the filing and service of documents by an inmate; in Paragraph A, in the first sentence, "these rules, every", added "written", after "written order", deleted "required by its terms to be served", and after "information, or complaint", deleted "every order not entered in open court"; in Paragraph B, in the second sentence, after "last known address", deleted "or, if no address is known, by leaving it with the clerk of the court", in Paragraph C (1), at the beginning of the sentence, changed "delivery of" to "Delivering"; in Paragraph C (1)(c), after "in a conspicuous place", deleted "therein" and added "in the office"; deleted former Paragraph C (1)(e) which provided that delivery included depositing a copy in an outgoing mail container maintained in the usual and ordinary course of business of the serving attorney, and added the current language; in Paragraph D, in the title, after "Filing", added "by a party"; in Paragraph F, in the first sentence, after "The filing of", deleted "pleadings and other", deleted the former third sentence, which provided that a paper filed by electronic means constituted a written paper, added the current third sentence; and added Paragraphs H and I.

The 2005 amendment, effective September 15, 2005, conformed this rule with the 2004 amendments of Rule 1-005 NMRA of the Rules of Civil Procedure for the District Courts. The 2005 amendment substituted "a copy" for "it" in the second sentence of Paragraph B, designated the language therein as Subparagraph (1), deleted "within this

rule" preceding "means" in the introductory language of that subparagraph and added Subparagraph (2), redesignated former designated the Paragraph C as present Paragraph D and inserted "indicating the date and method of service", added Paragraph E relating to filing of papers and pleadings by a party represented by counsel, redesignated former Paragraphs D and E as Paragraphs F and G and inserted "indicating the date and method of service" in redesignated Paragraph G.

The 1998 amendment, effective December 1, 1998, inserted "pleadings and other" in the catchline; rewrote Paragraphs A through C to conform to Paragraphs A through C of Rule 1-005 NMRA; in Paragraph D, substituted "the judge" for "him" and for "he", respectively, inserted "forthwith" in the first sentence, and added the last three sentences; and deleted former Paragraph F, relating to definitions of "move" and "made".

Compiler's notes. — This rule is similar to Rule 49 of the Federal Rules of Criminal Procedure.

Cross references. — For prosecution by filing of information, *see* Rule 5-201 NMRA.

For defects or errors of indictment, *see* Rule 5-204 NMRA.

For civil rule governing service of pleadings and papers, *see* Rule 1-005 NMRA.

For magistrate court rules governing service of pleadings and papers, *see* Rules 2-203 NMRA and 6-209 NMRA.

For metropolitan court rules governing service of pleadings and papers, *see* Rules 3-203 NMRA and 7-209 NMRA.

For municipal court rule governing service of pleadings and papers, *see* Rule 8-209 NMRA.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 61A Am. Jur. 2d Pleading §§ 350 to 352.

71 C.J.S. Pleading §§ 407 to 415.

5-103.1. Service and filing of pleadings and other papers by facsimile.

A. **Facsimile copies permitted to be filed.** Subject to the provisions of this rule, a party may file a facsimile copy of any pleading or paper by faxing a copy directly to the court or by faxing a copy to an intermediary agent who files it in person with the court. A facsimile copy of a pleading or paper has the same effect as any other filing for all procedural and statutory purposes. The filing of pleadings and other papers with the court by facsimile copy shall be made by faxing them to the clerk of the court at a

number designated by the clerk, except if the paper or pleading is to be filed directly with the judge, the judge may permit the papers to be faxed to a number designated by the judge, in which event the judge shall note thereon the filing date and forthwith transmit them to the office of the clerk. Each judicial district shall designate one or more telephone numbers to receive fax filings.

B. **Facsimile service by court of notices, orders or writs.** Facsimile service may be used by the court for issuance of any notice, order or writ or receipt of an affidavit. The clerk shall note the date and time of successful transmission on the file copy of the notice, order or writ.

C. **Paper size and quality.** No facsimile document shall be filed with the court unless it is on plain paper and substantially satisfies all of the requirements of Rule 5-118 NMRA of these rules.

D. **Filing pleadings or papers by facsimile.** A pleading or paper may be filed with the court by facsimile transmission if:

(1) a fee is not required to file the pleading or paper;

(2) only one copy of the pleading or paper is required to be filed;

(3) unless otherwise approved by the court, the pleading or paper is not more than ten (10) pages in length excluding the facsimile cover page; and

(4) the pleading or paper to be filed is preceded by a cover sheet with the names of the sender and the intended recipient, any applicable instructions, the voice and facsimile telephone numbers of the sender, an identification of the case, the docket number and the number of pages transmitted.

E. **Facsimile copy filed by an intermediary agent.** Facsimile copies of pleadings or papers filed in person by an intermediary agent are not subject to the restrictions of Paragraph D of this rule.

F. **Time of filing.** If facsimile transmission of a pleading or paper faxed is begun before the close of the business day of the court in which it is being filed, it will be considered filed on that date. If facsimile transmission is begun after the close of business, the pleading or paper will be considered filed on the next court business day. For any questions of timeliness the time and date affixed on the cover page by the court's facsimile machine will be determinative.

G. **Service by facsimile.** Any document required to be served by Paragraph A of Rule 1-005 NMRA may be served on a party or attorney by facsimile transmission if the party or attorney has:

(1) listed a facsimile telephone number on a pleading or paper filed with the court in the action;

(2) a letterhead with a facsimile telephone number; or

(3) agreed to be served with a copy of the pleading or paper by facsimile transmission.

Service by facsimile is accomplished when the transmission of the pleading or paper is completed.

H. **Demand for original.** A party shall have the right to inspect and copy any pleading or paper that has been filed or served by facsimile transmission if the pleading or paper has a statement signed under oath or affirmation or penalty of perjury.

I. **Conformed copies.** Upon request of a party, the clerk shall stamp additional copies provided by the party of any pleading filed by facsimile transmission.

[Adopted, effective January 1, 1997; as amended by Supreme Court Order No. 05-8300-013, effective September 15, 2005.]

ANNOTATIONS

The 2005 amendment, effective September 15, 2005, conformed this rule with Rule 1-005.1 NMRA. The 2005 amendment substituted "service" for "transmission" in Paragraph B, revised Paragraph D to substitute "filed with the court by facsimile transmission" for "faxed directly to the court", revised Subparagraph (3) of Paragraph C to permit fax filing of pleadings and papers exceeding 10 pages when approved by the court, rewrote Paragraph G to change "transmission by facsimile" to "service by facsimile", deleted former Paragraph H and redesignated former Paragraph I as H and added Paragraph I relating to conformed copies.

Cross references. — For civil rule governing service of pleadings and papers by facsimile, *see* Rule 1-005.1 NMRA.

For magistrate court rules governing service of pleadings and papers by facsimile, *see* Rules 2-204 NMRA and 6-210 NMRA.

For metropolitan court rules governing service of pleadings and papers, *see* Rules 3-204 NMRA and 7-210 NMRA.

For municipal court rule governing service of pleadings and papers, *see* Rule 8-210 NMRA.

5-103.2. Electronic service and filing of pleadings and other papers.

A. **Definitions.** As used in these rules:

(1) “electronic transmission” means the transfer of data from computer to computer other than by facsimile transmission;

(2) “document” includes the electronic representation of pleadings and other papers; and

(3) "EFS" means the electronic filing system approved by the Supreme Court for use by the district courts to file and serve documents by electronic transmission in criminal proceedings.

B. **Electronic filing authorized; registration by attorneys required.**

(1) A district court may, by local rule approved by the Supreme Court, implement the mandatory filing of documents by electronic transmission in accordance with this rule through the EFS by parties represented by attorneys. Self-represented parties are prohibited from electronically filing documents and shall continue to file documents through traditional methods. Parties represented by attorneys shall file documents by electronic transmission even if another party to the criminal proceeding is self-represented or is exempt from electronic filing under Paragraph M of this rule. For purposes of this rule, unless a local rule approved by the Supreme Court provides otherwise, “criminal proceedings” includes proceedings under Article 2 of the Children’s Court Rules and does not include proceedings sealed under Rule 5-123 NMRA.

(2) Unless exempted under Paragraph M of this rule, attorneys required to file documents by electronic transmission shall register with the EFS through the district court’s web site. Every registered attorney shall provide a valid, working, and regularly checked email address for the EFS. The court shall not be responsible for inoperable email addresses or unread email sent from the EFS.

C. **Service by electronic transmission.** Any document required to be served by Paragraph A of Rule 5-103 NMRA may be served on a party or attorney by electronic transmission of the document if the party or attorney has agreed to be served with pleadings or papers by electronic mail or if the attorney for the party to be served has registered with the court’s EFS. Documents filed by electronic transmission under Paragraph A of this rule may be served by an attorney through the court’s EFS, or an attorney may elect to serve documents through other methods authorized by this rule, Rule 5-103 NMRA, or Rule 5-103.1 NMRA. Electronic service is accomplished when the transmission of the pleading or paper is completed. If within two (2) days after service by electronic mail, a party served by electronic mail notifies the sender of the electronic mail that the pleading or paper cannot be read, the pleading or paper shall be served by any other method authorized by Rule 5-103 NMRA designated by the party to be served. The court may serve any document by electronic transmission to an attorney who has registered with the EFS under this rule and to any other person who has agreed to receive documents by electronic transmission.

D. **Format of documents; protected personal identifier information; EFS user guide.** All documents filed by electronic transmission shall be formatted in accordance with the Rules of Criminal Procedure for the District Courts and shall comply with all procedures for protected personal identifier information under Rule 5-123 NMRA. The district court may make available a user guide to provide guidance with the technical operation of the EFS. In the event of any conflicts between these rules and the user guide, the rules shall control.

E. **No fees charged for use of the EFS.** No fees shall be charged for the filing or service of documents by electronic transmission through the EFS.

F. **Single transmission.** Whenever a rule requires multiple copies of a document to be filed only a single transmission is necessary. If an attorney files or serves multiple documents in a case by a single electronic transmission, the applicable electronic services fee under Paragraph E of this rule shall be charged only once regardless of the number of documents filed or parties served.

G. **Time of filing.** For purposes of filing by electronic transmission, a "day" begins at 12:01 a.m. and ends at midnight. If electronic transmission of a document is received before midnight on the day preceding the next business day of the court it will be considered filed on the immediately preceding business day of the court. For any questions of timeliness, the time and date registered by the court's computer will be determinative. For purposes of electronic filing only, the date and time that the filer submits the electronic filing envelope will serve as the filing date and time for purposes of meeting statute of limitations or any other filing deadlines, notwithstanding rejection of the attempted filing or its placement into an error queue for additional processing.

H. **Signatures.**

(1) All electronically filed documents shall be deemed to contain the filing attorney's signature pursuant to Rule 5-206 NMRA. Attorneys filing electronically thereby certify that required signatures or approvals have been obtained before filing the document. The full, printed name of each person signing a paper document shall appear in the electronic version of the document.

(2) If a document filed by electronic transmission contains a signature block from an original paper document containing a signature, the signature in the electronic document may represent the original signature in the following ways:

(a) by scanning or other electronic reproduction of the signature; or

(b) by typing in the signature line the notation "/s/" followed by the name of the person who signed the original document.

(3) All electronically filed documents signed by the court shall be scanned or otherwise electronically produced so that the judge's original signature is shown.

I. **Demand for original; electronic conversion of paper documents.**

(1) Original paper documents filed or served electronically, including original signatures, shall be maintained by the attorney filing the document and shall be made available, upon reasonable notice, for inspection by other parties or the court. If an original paper document is filed by electronic transmission, the electronic version of the document shall conform to the original paper document. Attorneys shall retain original paper documents until final disposition of the case and the conclusion of all appeals.

(2) For cases in which electronic filing is mandatory, if an attorney who is exempt under Paragraph M of this rule or a self-represented party files a paper document with the court, the clerk shall convert such document into electronic format for filing. The filing date shall be the date on which the paper document was filed even if the document is electronically converted and filed at a later date. The clerk shall retain such paper documents as long as required by applicable statutes and court rules.

J. **Electronic file stamp and confirmation receipt; effect.** The clerk of the court's endorsement of an electronically filed document shall have the same force and effect as a manually affixed file stamp. When a document is filed through the EFS, it shall have the same force and effect as a paper document and a confirmation receipt shall be issued by the system that includes the following information:

(1) the case name and docket number;

(2) the date and time of filing as defined under Paragraph G of this rule;

(3) the document title;

(4) the name of the EFS service provider;

(5) the email address of the person or entity filing the document; and

(6) the page count of the filed document.

K. **Conformed copies.** Upon request of a party, the clerk shall stamp additional copies provided by the party of any pleading filed by electronic transmission. A file-stamped copy of a document filed by electronic transmission can be obtained through the court's EFS. Certified copies of a document may be obtained from the clerk's office.

L. **Proposed documents submitted to the court.**

(1) A document that a party proposes for issuance by the court shall be transmitted by electronic mail to an email address designated by the court for that purpose. A judge may direct the party to submit a hard copy of the proposed document in addition to, or in lieu of, the electronic copy. The court's user guide shall give notice of

the email addresses to be used for purposes of this paragraph. The user guide also may set forth the text to be included in the subject-line and body of the email.

(2) Proposed documents shall not be electronically filed by the party's attorney in the EFS. Any party who submits proposed documents by email under this paragraph shall not engage in ex parte communications in the email and shall serve a copy of the email and attached proposed documents on all other parties to the action.

(3) Documents issued by the clerk under this rule shall be sent to the requesting party by email or through the EFS as appropriate, and the requesting party is responsible for electronically filing the document in the EFS if necessary and serving it on the parties as appropriate. Any document issued by a judge under this rule will be electronically filed by the court in the EFS and served on the parties as required by these rules.

M. **Requests for exemptions from local rules establishing mandatory electronic filing systems.**

(1) An attorney may file a petition with the Supreme Court requesting an exemption, for good cause shown, from any mandatory electronic filing system that may be established by this rule and any district court local rules. The petition shall set forth the specific facts offered to establish good cause for an exemption. No docket fee shall be charged for filing a petition with the Supreme Court under this subparagraph.

(2) Upon a showing of good cause, the Supreme Court may issue an order granting an exemption from the mandatory electronic filing requirements of this rule and any local rules. An exemption granted under this subparagraph remains in effect statewide for one (1) year from the date of the order and may be renewed by filing another petition in accordance with Subparagraph (1) of this paragraph.

(3) An attorney granted an exemption under this paragraph may file documents in paper format with the district court and shall not be charged an electronic filing fee under this rule or local rule for doing so. When filing paper documents under an exemption granted under this paragraph, the attorney shall attach to the document a copy of the Supreme Court exemption order. The district court clerk shall scan the attorney's paper document into the electronic filing system including the attached Supreme Court exemption order. No fee shall be charged for scanning the document. The attorney remains responsible for serving the document in accordance with these rules and shall include a copy of the Supreme Court exemption order with the document that is served.

(4) An attorney who receives an exemption under this paragraph may nevertheless file documents electronically in any district court that accepts such filings without seeking leave of the Supreme Court provided that the attorney complies with all requirements under this rule, and complies with all applicable local rules for the district

court's electronic filing system. By doing so, the attorney does not waive the right to exercise any exemption granted under this paragraph for future filings.

N. **Technical difficulties.** Substantive rights of the parties shall not be affected when the EFS is not operating through no fault of the filing attorney.

[Approved, effective July 1, 1997; as amended, effective January 1, 1999; as amended by Supreme Court Order No. 06-8300-028, effective January 15, 2007; as amended by Supreme Court Order No. 18-8300-022, effective for all cases pending or filed on or after January 14, 2019.]

ANNOTATIONS

The 2018 amendment, approved by Supreme Court Order No. 18-8300-022, effective January 14, 2019, substantially rewrote the rule for implementation of the mandatory filing of documents by electronic transmission; in added Subparagraph A(3); added new Paragraph B and redesignated former Paragraph B as Paragraph C; in Paragraph C, after the first occurrence of "electronic mail", added "or if the attorney for the party to be served has registered with the court's EFS. Documents filed by electronic transmission under Paragraph A of this rule may be served by an attorney through the court's EFS, or an attorney may elect to serve documents through other methods authorized by this rule, Rule 5-103 NMRA, or Rule 5-103.1 NMRA.", and added the last sentence; deleted former Paragraphs C and D; added new Paragraphs D and E, and redesignated former Paragraphs E and F as Paragraphs F and G, respectively; in Paragraph F, added the last sentence; in Paragraph G, added the last sentence; added new Paragraph H and redesignated former Paragraph G as Paragraph I; in Paragraph I, in the heading, added "electronic conversion of paper documents", and completely rewrote the remainder of the paragraph; added new Paragraph J and redesignated former Paragraph H as Paragraph K; in Paragraph K, added the last two sentences; and added new Paragraphs L through N.

The 2006 amendment, effective January 15, 2007, rewrote Paragraph B to delete the Supreme Court register of attorneys who have consented to be served by electronic transmission and to conform this rule with the January 3, 2005 amendment of Rule 1-005.2 NMRA, added the heading for Paragraph C and substituted "serve" for "send", "service" for "transmission" and "or party" for "registered" in that paragraph, inserted "with the court" in the introductory language of Paragraph D, revised Paragraph D to require compliance with technical specifications approved by the Supreme Court instead of specifications approved by the district court in which the papers or pleadings are filed to permit electronic filing of pleadings and papers that must be accompanied by the filing of a fee, deleted former Paragraph F, which dealt with service by electronic transmission, and redesignated former Paragraphs G and H as present Paragraphs F and G, and deleted former Paragraph I, which dealt with proof of service by electronic transmission, and redesignated former Paragraph J as present Paragraph H.

The 1998 amendment, effective January 1, 1999, in Paragraph G added the first sentence, rewrote the second sentence, which read: "If electronic transmission of a document is received before the close of the business day of the court in which it is being filed, it will be considered filed on that date"; and deleted the former third sentence, which read: "If electronic transmission is received after the close of business, the document will be considered filed on the next business day of the court".

Cross references. — For definition of a computer generated "signature", *see* Rule 5-206 NMRA.

For service by electronic transmission in civil cases, *see* Rule 1-105.2 NMRA.

For service by electronic transmission in the United States District Court for the District of New Mexico, *see* D.N.M.LR-CV 5.6 NMRA.

5-104. Time.

A. **Computing time.** This rule applies in computing any time period specified in these rules, in any local rule or court order, or in any statute, unless another Supreme Court rule of procedure contains time computation provisions that expressly supersede this rule.

(1) ***Period stated in days or a longer unit; eleven (11) days or more.*** When the period is stated as eleven (11) days or a longer unit of time

(a) exclude the day of the event that triggers the period;

(b) count every day, including intermediate Saturdays, Sundays, and legal holidays; and

(c) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

(2) ***Period stated in days or a longer unit; ten (10) days or less.*** When the period is stated in days but the number of days is ten (10) days or less

(a) exclude the day of the event that triggers the period;

(b) exclude intermediate Saturdays, Sundays, and legal holidays; and

(c) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

(3) ***Period stated in hours.*** When the period is stated in hours

(a) begin counting immediately on the occurrence of the event that triggers the period;

(b) count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays; and

(c) if the period would end on a Saturday, Sunday, or legal holiday, the period continues to run until the same time on the next day that is not a Saturday, Sunday, or legal holiday.

(4) ***Unavailability of the court for filing.*** If the court is closed or is unavailable for filing at any time that the court is regularly open

(a) on the last day for filing under Subparagraphs (A)(1) or (A)(2) of this rule, then the time for filing is extended to the first day that the court is open and available for filing that is not a Saturday, Sunday, or legal holiday; or

(b) during the last hour for filing under Subparagraph (A)(3) of this rule, then the time for filing is extended to the same time on the first day that the court is open and available for filing that is not a Saturday, Sunday, or legal holiday.

(5) ***"Last day" defined.*** Unless a different time is set by a court order, the last day ends

(a) for electronic filing, at midnight; and

(b) for filing by other means, when the court is scheduled to close.

(6) ***"Next day" defined.*** The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

(7) ***"Legal holiday" defined.*** "Legal holiday" means the day that the following are observed by the judiciary:

(a) New Year's Day, Martin Luther King Jr.'s Birthday, Presidents' Day (traditionally observed on the day after Thanksgiving), Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day; and

(b) any other day observed as a holiday by the judiciary.

B. **Extending time.**

(1) ***In General.*** When an act may or must be done within a specified time, the court may, for cause shown, extend the time

(a) with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires; or

(b) on motion made after the time has expired if the party failed to act because of excusable neglect.

(2) ***Exceptions.*** The court shall not extend the time for a determination of probable cause, for filing a motion for new trial, for filing a notice of appeal, for filing a motion for acquittal, for filing a notice of intent to seek the death penalty, for filing petitions for writs of certiorari seeking review of denials of habeas corpus petitions by the district court, or for filing a motion for an extension of time for commencement of trial, except as otherwise provided in these rules.

C. **Additional time after certain kinds of service.** When a party may or must act within a specified time after service and service is made by mail, facsimile, electronic transmission, or by deposit at a location designated for an attorney at a court facility under Rule 5-103(C)(1)(e) NMRA, three (3) days are added after the period would otherwise expire under Paragraph A. Intermediate Saturdays, Sundays, and legal holidays are included in counting these added three (3) days. If the third day is a Saturday, Sunday, or legal holiday, the last day to act is the next day that is not a Saturday, Sunday, or legal holiday.

D. **Public posting of regular court hours.** The court shall publicly post the hours that it is regularly open.

[As amended, effective October 1, 1995; as amended by Supreme Court Order No. 06-8300-023, effective December 18, 2006; by Supreme Court Order No. 09-8300-009, effective May 6, 2009; 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. 16-8300-030, effective for all cases pending or filed on or after December 31, 2016.]

Committee commentary. — This rule is derived from civil procedure Rule 1-006 NMRA.

In 2014, the Joint Committee on Rules of Procedure amended the time computation rules, including Rules 1-006, 2-104, 3-104, 5,104, 6-104, 7-104, 8-104, 10-107, and 12-308 NMRA, and restyled the rules to more closely resemble the federal rules of procedure. *See* Fed. R. Civ. Pro. 6; Fed. R. Crim. Pro. 45. The method of computing time set forth in this rule may be expressly superseded by other rules. *See, e.g.*, Rule 5-301 NMRA (requiring the court to make a probable cause determination within forty-eight (48) hours of a warrantless arrest, notwithstanding the time computation provisions in this rule).

Subparagraph (A)(4) of this rule contemplates that the court may be closed or unavailable for filing due to weather, technological problems, or other circumstances. A

person relying on Subparagraph (A)(4) to extend the time for filing a paper should be prepared to demonstrate or affirm that the court was closed or unavailable for filing at the time that the paper was due to be filed under Subparagraph (A)(1), (A)(2), or (A)(3).

[As amended by Supreme Court Order No. 09-8300-009, effective May 6, 2009; as amended by Supreme Court Order No. 14-8300-016, effective for all cases pending or filed on or after December 31, 2014.]

ANNOTATIONS

The 2016 amendment, approved by Supreme Court Order No. 16-8300-030, effective December 31, 2016, made punctuation changes throughout the rule.

The 2014 amendment, approved by Supreme Court Order No. 14-8300-016, effective December 31, 2014, completely rewrote the rule; deleted former Paragraph A which provided rules for computation of time by excluding the day of the event from which the period of time began to run, including the last day of the period of time, excluding Saturdays, Sundays, legal holidays and days of severe inclement weather, and defined legal holidays; deleted former Paragraph B which provided for the enlargement of the period of time by the court; deleted former Paragraph C which provided for the service of motions for the enlargement of the period of time and for ex parte applications; deleted former Paragraph D, which provided for a three day enlargement of the period of time when a party was served by mail; and added current Paragraphs A through D.

The 2009 amendment, approved by Supreme Court Order No. 09-8300-009, effective May 6, 2009, in Paragraph B(2), at the beginning of the sentence in the last paragraph, added "Except as otherwise provided in these rules," and at the end of the same sentence, added ", for filing a notice of intent to seek the death penalty, for filing petitions for writs of certiorari seeking review of denials of habeas corpus petitions by the district court".

The 2006 amendment, effective December 18, 2006, revised the last sentence of Paragraph B to substitute "filing a motion" for "making a motion", "for filing a notice of appeal" for "taking an appeal", "filing a motion for acquittal" for "or making a motion for acquittal" and "for filing an extension of time" for "for extending time".

The 1995 amendment, effective October 1, 1995, in Paragraph A, inserted "or, when the act to be done is the filing of a paper in court, a day on which weather or other conditions have made the office of the clerk of the district court inaccessible", substituted "one of the aforementioned days" for "a Saturday, a Sunday or a legal holiday", and added the last two sentences.

Compiler's notes. — This rule is similar to Rule 45 of the Federal Rules of Criminal Procedure.

Cross references. — For time limits, *see* Rule 5-604 NMRA.

For computation of time in civil cases filed in the district court, *see* Rule 1-006 NMRA.

Time for ruling on motion for extending time for commencement of trial under Rule 5-604. — Because Rule 5-604 NMRA does not provide a time within which the applicable court must rule on a timely-filed motion for extending the time for commencement of trial, it must be construed according to other rules of criminal procedure. Specifically, Rule 5-601(F) NMRA establishes a general rule that all motions shall be disposed of within a reasonable time after filing and Subparagraph (1) of Paragraph B of this rule recognizes the discretion of the district court to enlarge a time limitation contained in the Rules of Criminal Procedure if requested before the applicable time limitation expires. Under those rules, the district court has reasonable time after filing to rule on a timely-filed petition under Rule 5-604(E) NMRA, regardless of the expiration of the six-month period of Rule 5-604(B) NMRA. *State v. Sandoval*, 2003-NMSC-027, 133 N.M. 399, 62 P.3d 1281.

Where limitation period expires on Sunday, Monday trial timely. — Where the 180-day limitation period of 31-5-12 NMSA 1978 expires on a Sunday, a trial is timely if held the next day. *State v. Alderete*, 1980-NMCA-084, 95 N.M. 691, 625 P.2d 1208, cert. denied, 94 N.M. 674, 615 P.2d 991.

Enlargement of time to rule on motion for new trial. – Where the defendant filed a motion for a new trial at a hearing at which the district court granted a continuance to rule on defendant's sentencing for the purpose of receiving a forensic evaluation by defendant's expert, the district court enlarged the thirty day period to rule on the motion for a new trial as allowed by Rule 104 NMRA. *State v. Moreland*, 2007-NMCA-047, 141 N.M. 549, 157 P.3d 728, cert. granted, 2007-NMCERT-004.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 71 C.J.S. Pleading § 416.

5-105. Designation of judge.

A. **Assignment of cases.** The judge before whom the case is to be tried shall be designated at the time the information or indictment is filed, under local district court rule.

B. **Procedure for replacing a district judge who has been excused or recused.** In the event a district judge has been excused or recused, the clerk shall assign a district judge of another division at random, in the same fashion as cases are originally assigned or pursuant to local district court rule. If all district judges in the district have been excused or recused, the clerk of the district court shall notify the chief justice of the Supreme Court of New Mexico, who shall designate a judge, justice, or judge pro tempore to hear all further proceedings.

C. **Automatic recusal.** If a criminal proceeding is filed in any county of a judicial district against a judge or an employee of the district, a judge from another district shall be designated in accordance with procedures ordered by the chief justice.

D. **Designation of temporary judge.** If the state is seeking a search or arrest warrant and all of the judges of a judicial district are ineligible to hear the matter or have recused themselves, the clerk shall immediately certify the case to the Supreme Court for designation of a judge to hear all matters in the proceedings until such time as a judge may be agreed upon by the parties or designated in accordance with this rule.

E. **Excuse of judge appointed by chief justice.** Any judge designated by the chief justice may not be excused except under Article VI, Section 18 of the New Mexico Constitution.

[As amended, effective November 15, 2000; as amended by Supreme Court Order No. 17-8300-026, effective for all cases pending or filed on or after December 31, 2017.]

ANNOTATIONS

The 2017 amendment, approved by Supreme Court Order No. 17-8300-026, effective December 31, 2017, effective for all cases pending or filed on or after December 31, 2017, removed the provision allowing the parties to stipulate to a replacement judge after a district judge has been excused or recused, and removed the provision allowing the parties to file a stipulation designating a judge of a judicial district to preside over a criminal proceeding against a judge or an employee of the same district, and provided that in such cases a judge from another district shall be designated; in Paragraph B, after "has been excused or recused", deleted "counsel for all parties may agree to a district judge to hear all further proceedings and if that district judge so agrees, the clerk of the district court shall assign the case to such district judge. In the event counsel for all parties do not stipulate upon a district judge to try the case or the district judge upon whom they agree refuses to accept the case, within ten (10) days, or in the event that one party notifies the clerk of the district court in writing that they will be unable to agree on a replacement district judge", and after the second occurrence of "have been excused or recused", deleted "and counsel for all parties have not agreed within ten (10) days on a judge to hear the case"; and in Paragraph C, after "employee of the district", deleted "no judge of the district may hear the matter without written agreement of the parties. If within ten (10) days after the proceeding is filed, the parties have not filed a stipulation designating a judge to preside over the matter, the clerk shall request the Supreme Court to designate a judge" and added "a judge from another district shall be designated in accordance with procedures ordered by the chief justice".

Law reviews. — For annual survey of New Mexico criminal procedure, see 16 N.M.L. Rev. 25 (1986).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Construction and validity of state provisions governing designation of substitute, pro tempore, or special judge, 97 A.L.R.5th 537.

5-106. Peremptory challenge to a district judge; recusal; procedure for exercising.

A. **Definition of parties.** “Party,” as used in this rule, shall mean a defendant, the state, or an attorney representing the defendant or the state. A party may not excuse a judge after the party has requested that judge to perform any discretionary act.

B. **Extent of excuse or challenge.** No judge may be excused from conducting an arraignment or first appearance, setting initial conditions of release, reviewing a lower court’s order setting or revoking conditions of release, or presiding over a pretrial detention hearing or a preliminary examination in a case where a pretrial detention motion has been filed. No party shall excuse more than one judge.

C. **Mass reassignment.** A mass reassignment occurs when one hundred (100) or more pending cases are reassigned contemporaneously.

D. **Procedure for excusing a district judge.** The statutory right to excuse the judge before whom the case is pending must be exercised by a party filing a peremptory election to excuse with the clerk of the district court within ten (10) days after the later of

(1) arraignment or the filing of a waiver of arraignment;

(2) service by the clerk of notice of assignment or reassignment of the case to a judge;

(3) completion of publication of notice of reassignment in the case of a mass reassignment; or

(4) filing of a notice of appeal from a lower court.

E. **Notice of reassignment.** After the arraignment or the filing of a waiver of arraignment, if the case is reassigned to a different judge, the clerk shall give notice of reassignment to all parties. When a mass reassignment occurs, the clerk shall give notice of the reassignments to all parties by publishing notice for four (4) consecutive weeks on the State Bar website and in two (2) consecutive issues of the New Mexico Bar Bulletin. Service of notice by publication is complete on the date printed on the second issue of the Bar Bulletin.

F. **Service of excusal.** Any party electing to excuse a judge shall serve notice of that election on all parties.

G. **Misuse of peremptory excusal procedure.** Peremptory excusals are not to be exercised to hinder, delay, or obstruct the administration of justice. If it appears that an attorney or group of attorneys may be using peremptory excusals for improper purposes or with a frequency that impedes the administration of justice, the Chief Judge of the district shall send a written notice to the Chief Justice of the Supreme Court and shall send a copy of the written notice to the attorney or group of attorneys believed to be improperly using peremptory excusals. The Chief Justice may take appropriate action to address any misuse, including issuance of an order providing that the attorney or

attorneys or any party they represent may not file peremptory excusals for a specified period of time or until further order of the Chief Justice.

H. **Recusal.** No district judge shall sit in any action in which the judge's impartiality may reasonably be questioned under the provisions of the Constitution of New Mexico or the Code of Judicial Conduct, and the judge shall file a recusal in that action. On receipt of notification of recusal from a district judge, the clerk of the court shall give written notice to each party.

I. **Disability during trial.** If by reason of death, sickness, or other disability the judge before whom a jury trial has commenced is unable to proceed with the jury trial, any other judge regularly sitting in or assigned to the court, on certifying familiarity with the record of the jury trial, may proceed with and finish the jury trial or, if appropriate, may grant a mistrial. In a nonjury trial, on motion of the defendant, a mistrial shall be granted on disability of the trial judge.

J. **Disability after verdict or finding of guilt.** If by reason of death, sickness, or other disability the judge before whom the defendant has been tried is unable to perform the duties to be performed by the court after a verdict or finding of guilt, any other eligible judge may perform those duties on certifying familiarity with the record of the trial.

[As amended, effective August 1, 1989; September 1, 1990; June 1, 1994; as amended by Supreme Court Order No. 08-8300-039, effective December 15, 2008; as amended by Supreme Court Order No. 15-8300-019, effective for all cases pending or filed on or after December 31, 2015; 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. 19-8300-008, effective for all cases pending or filed on or after July 1, 2019; as amended by Supreme Court Order No. 20-8300-020, effective for all cases pending or filed on or after December 31, 2020; as amended by Supreme Court Order No. 22-8300-015, effective for all cases pending or filed on or after December 31, 2022.]

Committee commentary. — This rule governs the exercise of the statutory right to excuse the judge before whom the case is pending. *See* NMSA 1978, § 38-3-9 (1985). Paragraph B precludes a party from exercising this right in certain pretrial proceedings, including arraignment and pretrial release and detention hearings. Paragraph B does not prevent a judge from recusing under the provisions of the New Mexico Constitution or the Code of Judicial Conduct either on the court's own motion or on motion of a party. *See* N.M. Const. art. VI, § 18; Rule 21-211 NMRA.

Reassignment of a judge usually occurs in individual cases in which a party has excused the trial judge or the judge recuses himself or herself. When this happens, the clerk easily can and does provide individual notice of the reassignment to the parties by mail.

When a judge retires, dies, is disabled, or assumes responsibility for different types of cases (e.g., from a criminal to a civil docket), large numbers of cases are reassigned and parties who have not previously exercised a peremptory excusal may choose to excuse the successor judge. Providing individual notice by mail to every party in each of those cases is administratively difficult, expensive, and time consuming. Clerks sometimes provide notice of reassignment in an alternative manner—usually through publication in the Bar Bulletin, on the State Bar's website, or both.

The 2008 amendment formally incorporates into Rule 5-106 NMRA the use of notice by publication in that situation—now identified as a "mass reassignment." The amended rule requires that the specified notice be published on the State Bar's website for four (4) consecutive weeks and in two (2) consecutive issues of the New Mexico Bar Bulletin, and provides that a party who has not yet exercised a peremptory excusal may do so within ten (10) days after the date of the second Bar Bulletin.

When a judge's entire caseload is reassigned, the publication notice need not contain the caption of each affected case, but must contain the names of the initially-assigned judge and the successor judge.

There may be occasions when many, but not all, of a judge's cases are reassigned; for example, when an additional judge is appointed in a judicial district and a part of other judges' caseloads are assigned to the new judge. When this occurs, if the number of pending cases reassigned from any judge exceeds one hundred (100), the 2008 amendment authorizes notice by publication. To assure that the parties have notice of which cases were reassigned, the court should either make a list available containing the title of the action and file number of each case reassigned, or not reassigned, whichever is less. The court may publish that list in the Bar Bulletin, publish a notice in the Bar Bulletin that directs the reader to the court's website where the list will be posted, or post notice on the State Bar's website.

Substituting publication for individual notice increases the chance that a party will not receive actual notice of a reassignment. When actual notice is not achieved through publication, the trial court has ample authority to accept a late recusal. *See* Rule 5-104(B) NMRA (providing that the court may permit an act to be done after a deadline has passed for cause shown).

[Adopted by Supreme Court Order No. 08-8300-039, effective December 15, 2008; 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. 19-8300-008, effective for all cases pending or filed on or after July 1, 2019; as amended by Supreme Court Order No. 20-8300-020, effective for all cases pending or filed on or after December 31, 2020; as amended by Supreme Court Order No. 22-8300-015, effective for all cases pending or filed on or after December 31, 2022.]

ANNOTATIONS

The 2022 amendment, approved by Supreme Court Order No. 22-8300-015, effective December 31, 2022, prohibited the excusal of a judge from conducting a preliminary examination in a case where a pretrial detention motion has been filed, made certain technical amendments, and revised the committee commentary; in Paragraph B, added “pretrial” preceding the first occurrence of “detention”, after “detention hearing”, added “or a preliminary examination in a case where a pretrial detention motion has been filed”; in Paragraph E, after “consecutive”, added “issues of the”; and in Paragraph G, after “frequency”, deleted “as to impede” and added “that impedes”.

The 2020 amendment, approved by Supreme Court Order No. 20-8300-020, effective December 31, 2020, made nonsubstantive, stylistic amendments, and revised the committee commentary; and in Paragraph G, after “Peremptory excusals”, deleted “without cause are intended to allow litigants an expeditious method of avoiding assignment of a judge whom the party has a good faith basis for believing will be unfair to one side or the other, and they”.

The 2019 amendment, approved by Supreme Court Order No. 19-8300-008, effective July 1, 2019, revised the notice requirements for a mass reassignment, made technical changes, and revised the Committee commentary; in Paragraph E, after “reassignments to all parties by”, deleted “publication in the New Mexico Bar Bulletin for four (4) consecutive weeks” and added “publishing the notice for four (4) consecutive weeks on the State Bar web site and in two (2) consecutive New Mexico Bar Bulletins”, and after “printed on the”, deleted “fourth” and added “second”.

The 2017 amendment, approved by Supreme Court Order No. 17-8300-005, effective July 1, 2017, provided that a party is precluded from excusing a judge from certain pretrial proceedings, and revised the committee commentary; in Paragraph B, added “reviewing a lower court’s order setting or revoking conditions of release, or presiding over a detention hearing”; and in the committee commentary, added the first undesignated paragraph.

The 2015 amendment, approved by Supreme Court Order No. 15-8300-019, effective December 31, 2015, provided procedures and penalties to address the misuse of peremptory excusals; and added new Paragraph G and redesignated the succeeding paragraphs accordingly.

The 2008 amendment, approved by Supreme Court Order No. 08-8300-039, effective December 15, 2008, added a new Paragraph C and relettered former Paragraph C as Paragraph D; added Subparagraphs (3) and (4) of Paragraph D; relettered former Paragraph D as Paragraph E; in Paragraph E, added the second and third sentences; relettered the last sentence of former Paragraph D as Paragraph F and added the title; and relettered former Paragraphs E through G as Paragraphs G through I.

The 1994 amendment, effective June 1, 1994, rewrote Paragraph A, which formerly read "'Party' as used in this rule, shall mean: a defendant, and on behalf of the state the district attorney or the attorney general."

Denial of recusal not an abuse of discretion. — Where defendant was a child offender under the juvenile system; the court determined that defendant was not amenable to rehabilitation or treatment as a child and sentenced defendant as an adult after defendant pled guilty to second degree murder; prior to being appointed as district judge, the trial judge had been appointed as a contract public defender to represent the victim, who had been murdered by defendant, in a juvenile delinquency proceeding; the judge's former law partner actually appeared at all the hearings in the victim's case; and the judge did not personally represent the victim, engage in plea negotiations on the victim's behalf, discuss a plea with the victim or the victim's parents, appear before the court on behalf of the victim or the victim's parents, or have direct contact with the victim in the juvenile proceedings, the judge did not err in denying defendant's request for recusal. *State v. Trujillo*, 2009-NMCA-128, 147 N.M. 334, 222 P.3d 1040, cert. granted, 2009-NMCERT-011.

Effect of amendment of information. — Following a mistrial, the state's amendment of the criminal information to add a new charge has the effect of renewing the defendant's right to peremptorily excuse the presiding judge, which attaches upon the filing of the amended information. *State v. Devine*, 2007-NMCA-097, 142 N.M. 310, 164 P.3d 1009.

Exercise of discretion. — When a district court decides whether probable cause exists to believe that a defendant committed the crime charged, the court has exercised discretion. *State v. Devine*, 2007-NMCA-097, 142 N.M. 310, 164 P.3d 1009.

Failure to recuse. — District judge did not abuse his discretion in denying defendant's to recuse filed motion in defendant's second trial where the motion was based on statements made by the district judge at defendant's sentencing after the first trial, that the district judge had experience dealing with allegations of sexual abuse, that he had made an effort to develop a sense about the veracity of such allegations, that he thought the minor victim whom defendant was accused of sexually abusing was being truthful, and that he believed defendant had sexually abused the victim. *State v. Ruiz*, 2007-NMCA-014, 141 N.M. 53, 150 P.3d 1003, cert. denied, 2007-NMCERT-001.

Former rule created unreasonable burden on judicial system. — The ever-increasing number of disqualifications under former Rule 34.1, N.M.R. Crim. P. (replaced by rule adopted March 5, 1984) constituted an unreasonable burden on the judicial system, and as the rule permitted abuse and was inappropriate, it was retracted and the present rule promulgated. *State ex rel. Gesswein v. Galvan*, 1984-NMSC-025, 100 N.M. 769, 676 P.2d 1334.

Failure to recuse not abuse of discretion. — Where the judge had previously informed the parties of his mother's friendship with the victim, but defendant did not think that recusal of the trial judge was necessary until after an adverse ruling, the trial judge did not abuse his discretion by declining to recuse himself. *State v. Hernandez*, 1993-NMSC-007, 115 N.M. 6, 846 P.2d 312.

Peremptory excusal rejected. — Where defendant's notice of peremptory excusal was not filed until 10 months after notice of the judge's assignment, was mailed to defense counsel, and defendant had already exercised his right to excuse another judge, the excusal was properly rejected. *State v. Harris*, 1997-NMCA-119, 124 N.M. 293, 949 P.2d 1190, cert. denied, 124 N.M. 268, 949 P.2d 282.

Law reviews. — For article, "Survey of New Mexico Law, 1979-80: Criminal Law and Procedure," see 11 N.M.L. Rev. 85 (1981).

For article, "Separation of Powers and the Judicial Rule-Making Power in New Mexico: The Need for Prudential Restraints," see 15 N.M.L. Rev. 407 (1985).

For annual survey of New Mexico criminal procedure, see 16 N.M.L. Rev. 25 (1986).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judges § 40 et seq.

Disqualification of judge because of assault or threat against him by party or person associated with party, 25 A.L.R.4th 923.

Disqualification from criminal proceeding of trial judge who earlier presided over disposition of case of coparticipant, 72 A.L.R.4th 651.

23A C.J.S. Criminal Law §§ 1178, 1179.

5-107. Entry of appearance.

A. **Written order.** Whenever counsel undertakes to represent a defendant in any criminal action, he will file a written entry of appearance in the cause, unless he has been appointed by written order of the court. For the purpose of this rule, the filing of any pleading signed by counsel constitutes an entry of appearance.

B. **Continuation of representation.** An attorney who has entered an appearance or who has been appointed by the court shall continue such representation until relieved by the court.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21A Am. Jur. 2d Criminal Law § 1131.

5-108. Nonadmitted and nonresident counsel.

A. **Nonadmitted counsel.** Except as otherwise provided in Paragraph C of this rule, counsel not admitted to practice law in New Mexico, but who are licensed to practice law and in good standing in another state or territory, may upon compliance with Rule 24-106 NMRA, participate in proceedings before New Mexico courts only in association with counsel licensed to practice law and in good standing in New Mexico, who, unless

excused by the court, must be present in person in all proceedings before the court. New Mexico counsel must sign the first motion or pleading and New Mexico counsel's name and address must appear on all subsequent pleadings. New Mexico counsel shall be deemed to have signed every subsequent pleading and shall therefore be subject to the provisions of Rule 5-206 NMRA of the Rules of Criminal Procedure for the District Courts.

B. **Nonresident counsel licensed in New Mexico.** In order to promote the speedy and efficient administration of justice by assuring that a court has the assistance of attorneys who are available for court appointments, for local service, for docket calls and to prevent delays of motion hearings and matters requiring short notice, the court may require a nonresident counsel licensed to practice and in good standing in New Mexico to associate resident New Mexico counsel in connection with proceedings before the court.

C. **Discovery matters; counsel not licensed in New Mexico.** Counsel who are not New Mexico residents and who are not licensed to practice law in New Mexico, but who are licensed to practice law and in good standing in another state or territory may, without associating New Mexico counsel, participate in discovery proceedings which arise out of litigation pending in another state or territory. However, in a specific proceeding, the court may require association of New Mexico counsel.

[As amended by Supreme Court Order No. 13-8300-040, effective December 31, 2013.]

ANNOTATIONS

The 2013 amendment, approved by Supreme Court Order No. 13-8300-040, effective December 31, 2013, required non-admitted lawyers to comply with the rules governing the state bar; subjects New Mexico counsel to the provisions of Rule 5-206 NMRA; in Paragraph A, in the first sentence, after "state or territory, may", added "upon compliance with Rule 24-106 NMRA"; and in the third sentence, after "subject to the provisions of Rule", deleted "1-011" and added "5-206 NMRA" and after "Rules of", deleted "Civil" and added "Criminal".

Local counsel and nonadmitted counsel each held in contempt of court for not complying with requirement that local counsel be present in court in all proceedings, even though trial court did not require local counsel to appear. *State v. White*, 1984-NMCA-033, 101 N.M. 310, 681 P.2d 736.

Local counsel's failure to attend trial with nonadmitted counsel held not ineffective assistance. — There was no per se ineffective assistance of counsel where defendant admits no errors by counsel except that local counsel did not attend trial with nonadmitted counsel as required. *State v. White*, 1984-NMCA-033, 101 N.M. 310, 681 P.2d 736.

5-109. Court-appointed attorneys.

A. **Fee schedule.** In any criminal cases in which the court is required to appoint counsel to represent an indigent defendant, the court shall follow the fee schedule established by the public defender department for such cases, except that the court may award a greater fee in those cases where:

(1) the court finds that the complexity of the case warrants such an award; or

(2) exceptional circumstances otherwise exist.

B. **Award of attorney fees.** In setting the greater amount of attorney fees to be awarded under this rule, the court shall state in the record its reasons in support of the award of the attorney fees.

ANNOTATIONS

Reappointment of counsel. — When a defendant requests the court to reappoint counsel, the court should apply the following factors: (1) the defendant's prior history in the substitution of counsel and in the desire to change from self-representation to counsel-representation; (2) the reasons set forth for the request; (3) the length and stage of the proceedings; (4) disruption or delay which reasonably might be expected to ensue from the granting of the motion; and (5) the likelihood of the defendant's effectiveness in defending against the charges if required to continue to act as defendant's own attorney. *State v. Archuleta*, 2012-NMCA-007, 269 P.3d 924, cert. denied, 2011-NMCERT-012.

Rule inapplicable where attorney acted under contract with public defender department. — This rule does not apply where the attorney was not appointed by the court but represented the defendant expressly by contract with the public defender department. *State ex rel. Robins v. Hodges*, 1986-NMSC-082, 105 N.M. 48, 728 P.2d 458.

5-110. Clinical education.

A. **Purpose.** To permit a clinical program for the University of New Mexico School of Law.

B. **Procedure.** Any law student admitted to the clinical program at the University of New Mexico School of Law shall be authorized under the control and direction of the dean of the law school to advise persons and to negotiate and to appear before the courts and administrative agencies of this state, in civil and criminal matters, under the active supervision of a member of the state bar of New Mexico designated by the dean of the law school. Such supervision shall include assignment of all matters, review and examination of all documents and signing of all pleadings prepared by the student. The supervising lawyer need not be present while a student is advising a client or negotiating, but shall be present during court appearances. Each student in the program may appear in a given court with the written approval of the judge presiding over the

case and shall file in the court a copy of the order granting approval. The law school shall report annually to the supreme court.

C. **Eligible students.** Any full-time student in good standing in the University of New Mexico School of Law who has received a passing grade in law school courses aggregating thirty or more semester hours (or their equivalent), but who has not graduated, shall be eligible to participate in a clinical program if he meets the academic and moral standards established by the dean of the school.

5-110.1. Clinical education; out-of-state law school approved programs.

Law students may advise persons and appear before the district courts in criminal matters in accordance with Rules 1-094 and 1-094.1 of the Rules of Civil Procedure for the District Courts.

[Adopted, effective October 1, 1995.]

5-111. Record.

A. **Definition.** As used in the Rules of Criminal Procedure, "record" shall mean:

(1) stenographic notes which must be transcribed when a "record" is required to be filed;

(2) a statement of facts and proceedings stipulated to by the parties for purpose of review; or

(3) any mechanical, electrical or other recording, including a videotape recording of any proceeding, including grand jury proceedings, when such method of mechanical, electrical or other recording has been approved by the court administrator.

B. **Broadcast or reproduction.** Except for the disclosures provided for in Rule 5-506, no broadcast or reproduction of any mechanical, electrical or other recording shall be made for any person other than an official of the court.

Committee commentary. — The adoption of this rule provided the express authority for use of a tape recorded record. *See e.g.*, *State v. Lard*, 86 N.M. 71, 519 P.2d 307 (Ct. App. 1974). In *State ex rel. Moreno v. Floyd*, 85 N.M. 699, 516 P.2d 670 (1973), the supreme court approved a tape recording as the record of a preliminary hearing for use by the defendant. *See also*, Rule 6-110 NMRA [now withdrawn].

ANNOTATIONS

Rule pertains to district and magistrate courts. — This rule pertains equally to proceedings in district court and to preliminary examinations, pursuant to Rule 20 (*see*

now Rule 5-302 NMRA), in magistrate courts. *State ex rel. Moreno v. Floyd*, 1973-NMSC-117, 85 N.M. 699, 516 P.2d 670 (decided prior to adoption of N.M.R. Crim. P. (Magis. Cts.))

Taped statement preserved for review held part of record. — Appellate review would be easier if the trial court had filed, as part of the court file, a written statement of its reasons for alteration of a basic sentence, but a taped statement preserved for review was part of the appellate record because it was included in the transcript. *State v. Bernal*, 1987-NMCA-075, 106 N.M. 117, 739 P.2d 986.

Tape recording constitutes an adequate record of preliminary hearings in a magistrate court regardless of the fact that defendant's attorneys prefer a stenographic copy of these proceedings. *State ex rel. Moreno v. Floyd*, 1973-NMSC-117, 85 N.M. 699, 516 P.2d 670.

No right to transcript without reason shown. — Petitioner's claim that he was entitled to a transcript so that he might search for a ground of relief was without merit since he had no right to obtain a transcript without some showing as to a reason therefor. *Hines v. Baker*, 309 F. Supp. 1017 (D.N.M. 1968), *aff'd*, 422 F.2d 1002 (10th Cir. 1970).

5-112. Suspended.

[As amended by Supreme Court Order No. 15-8300-020, effective for all cases pending or filed on or after December 31, 2015; as amended by Supreme Court Order No. 16-8300-016, effective for all cases pending or filed on or after December 31, 2016; suspended by Supreme Court Order No. 21-8300-032, effective November 22, 2021, until further order of the court.]

ANNOTATIONS

Compiler's notes. — Pursuant to Supreme Court Order No. 21-8300-032, 5-112 NMRA, relating to criminal contempt, was suspended effective November 22, 2021, until further order of the court. For provisions of the former rule, *see* the 2020 NMRA on *NMOneSource.com*.

5-113. Harmless error; clerical mistakes.

A. **Harmless error.** Error in either the admission or the exclusion of evidence and error or defect in any ruling, order, act or omission by the court or by any of the parties is not grounds for granting a new trial or for setting aside a verdict, for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take any such action appears to the court inconsistent with substantial justice.

B. **Clerical mistakes.** Clerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission may be corrected by

the court at any time and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter, while the appeal is pending, may be so corrected with leave of the appellate court.

Committee commentary. — Paragraph A of this rule was derived from Rule 1-061. Application of this rule, where constitutional error is alleged, is governed by federal constitutional law. In *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705, rehearing denied, 386 U.S. 987, 87 S. Ct. 1283, 18 L. Ed. 2d 241 (1967), the court said that "the court must be able to declare a belief that [the error] was harmless beyond a reasonable doubt." In *Fahy v. Connecticut*, 375 U.S. 85, 84 S. Ct. 229, 11 L. Ed. 2d 171 (1963), the supreme court said that: "the question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction".

In *State v. Anaya*, 81 N.M. 52, 462 P.2d 637 (1969), the Chapman and Fahy tests were followed. The evidence in *State v. Anaya* pointed overwhelmingly to the defendant's guilt. There was "no reasonable possibility that the question and answer concerning a subsequent offense contributed to the defendant's conviction." *See also*, *State v. Pope*, 78 N.M. 282, 430 P.2d 779 (1967). In *State v. Mann*, 87 N.M. 427, 535 P.2d 70 (Ct. App. 1975), the court held that infringement of a right to confrontation could never be treated as harmless error.

This rule purports to cover error in the admission or exclusion of evidence. However, Paragraph A of Rule 11-103 also deals with error in rulings on evidence. Under Rule 5-613, the Rules of Evidence, insofar "as they are not in conflict with these rules", apply to and govern the trial of criminal cases. The commentaries to the Rules of Evidence indicate that Rule 11-103 does not purport to change the harmless error rule, citing, inter alia, Rule 1-061 and *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705, rehearing denied, 386 U.S. 987, 87 S. Ct. 1283, 18 L. Ed. 2d 241 (1967). *See* 56 F.R.D. 183, 195 (1973).

ANNOTATIONS

Cross references. — For defects, errors and amendment of information and indictment, *see* Rule 5-204 NMRA.

For effect of errors and irregularities in depositions, *see* Rule 5-503 NMRA.

Compiler's notes. — Paragraph A of this rule is similar to Rule 52(a) of the Federal Rules of Criminal Procedure.

Paragraph B of this rule is similar to Rule 36 of the Federal Rules of Criminal Procedure.

Hearsay statements made in a telephone call between witnesses. — Where the prosecutor distributed a transcript to the jury and played the recording of a telephone

call placed at the county jail by the witness to a friend of the defendant; the telephone call contained statements by the friend incriminating the defendant in the murder of the victim and purported to recount the defendant's confession to the friend; there was sufficient independent evidence to convict the defendant; the state placed marked emphasis on the statements of the friend; and the jury took the friend's statements into consideration, the admission of the friend's hearsay statements was not harmless. *State v. Macias*, 2009-NMSC-028, 146 N.M. 378, 210 P.3d 804.

Constitutional and non-constitutional harmless error. — Where the defendant has established a violation of the rights guaranteed by the United States Constitution or the New Mexico Constitution, a reviewing court should only conclude that an error is harmless when there is no reasonable possibility it affected the verdict. In contrast, where a defendant has established a violation of statutory law or court rules, a reviewing court should only conclude that a non-constitutional error is harmless when there is no reasonable probability the error affected the verdict. *State v. Barr*, 2009-NMSC-024, 146 N.M. 301, 210 P.3d 198.

Factors to be considered in analysis of constitutional and non-constitutional harmless error. — The factors a court should consider in determining whether there is a reasonable possibility or reasonable probability that an error, constitutional or non-constitutional, contributed to a verdict are whether there is: (1) substantial evidence to support the conviction without reference to the improperly admitted evidence; (2) such a disproportionate volume of permissible evidence that, in comparison, the amount of improper evidence will appear miniscule; and (3) no substantial conflicting evidence to discredit the state's testimony. *State v. Barr*, 2009-NMSC-024, 146 N.M. 301, 210 P.3d 198.

No non-constitutional harmless error. — Where the trial court improperly admitted a videotaped statement of a witness in the defendant's trial; the defendant's confession provided strong evidence against the defendant and was corroborated by the witness's testimony and the physical evidence; the improperly admitted evidence contained mostly irrelevant speculation which had no direct to the murder of the victim; and even though the defendant presented substantial evidence to challenge the extraneous discussion in the videotaped statement through witnesses who testified to the peaceful character of the defendant, there was no reasonable probability that the admission of the videotaped statement contributed to the defendant's conviction and the admission of the videotaped statement was harmless error. *State v. Barr*, 2009-NMSC-024, 146 N.M. 301, 210 P.3d 198.

Admission of testimony not error if there was no reasonable probability that the testimony affected the verdict. — In a trial for criminal sexual contact of a minor, where qualified expert in child sexual abuse testified regarding the propriety of a parent applying ointment to the genital area of a nine-year-old child, the trial court did not abuse its discretion in admitting the evidence, because even if the admission of the expert's testimony was error, the error was harmless because defendant was only convicted of an incident that did not involve ointment or the propriety of defendant

applying ointment to the genital area of his nine-year-old daughter; therefore even if the admission of the expert's testimony was error, there was not a reasonable probability that the error affected the verdict. *State v. Bailey*, 2015-NMCA-102, cert. granted, 2015-NMCERT-009.

Prosecutor's reference in opening statement to the defendant's refusal to submit to a polygraph test was an impermissible comment on silence and the error was not harmless beyond a reasonable doubt where the defendant's credibility was crucial since he testified at trial and denial of the charges was his only defense. *State v. Gutierrez*, 2007-NMSC-033, 142 N.M. 1, 162 P.3d 156.

Failure to adhere to court's pretrial ruling was not harmless and was sufficient grounds to support a mistrial. — Where defendant was charged with multiple crimes following a two-vehicle collision, including homicide by vehicle, great bodily harm by vehicle, driving under the influence of intoxicating liquor or drugs, and reckless driving, and where, prior to trial, the district court judge specifically excluded by motion in limine hearsay testimony that defendant had confessed to another officer about being behind the wheel at the time of the accident, and where, at trial, the officer failed to adhere to the court's admonishment, the district court abused its discretion in denying defendant's motion for a mistrial following the improper reference by the officer, because the improper testimony went to the crux of the defense that defendant was not the driver of the vehicle at the time of the accident, the improper testimony could not be cured by the district court's instruction to the jury to disregard the prejudicial testimony about the purported confession, and the purported confession error was not harmless. *State v. Hernandez*, 2017-NMCA-020, cert. denied.

There are two standards for determining "harmless error": (1) whether the issue was raised in the trial court and (2) whether the relief sought would be beneficial to defendant. *State v. Zamora*, 1978-NMCA-017, 91 N.M. 470, 575 P.2d 1355, cert. denied, 91 N.M. 491, 576 P.2d 297.

Error, to warrant reversal, must be prejudicial. *State v. Williams*, 1966-NMSC-145,76 N.M. 578, 417 P.2d 62 (decided under former law).

Where testimony of officers, fingerprint evidence and defendant's admission from the witness stand left no reasonable possibility that evidence improperly admitted, and then stricken by the trial court, contributed to the conviction, the improperly admitted evidence was harmless error. *State v. Thurman*, 1972-NMSC-040, 84 N.M. 5, 498 P.2d 697.

It is not the function of an appellate court to correct errors which have not affected the ultimate decision of the trial court. Defendant cannot be heard to complain of error which had not prejudiced him. *State v. Holland*, 1967-NMSC-186, 78 N.M. 324, 431 P.2d 57 (decided under former law).

A party cannot complain of errors committed by the trial court which under no view of the case could be prejudicial to such party. *State v. Darden*, 1974-NMCA-032, 86 N.M. 198, 521 P.2d 1039.

Error, to be reversible, must be prejudicial. *State v. Wright*, 1972-NMCA-073, 84 N.M. 3, 498 P.2d 695; *State v. Baca*, 1969-NMCA-070, 80 N.M. 488, 458 P.2d 92; *State v. Wesson*, 1972-NMCA-013, 83 N.M. 480, 493 P.2d 965.

Violation of defendant's constitutional rights is never harmless. *State v. Barela*, 1974-NMCA-016, 86 N.M. 104, 519 P.2d 1185.

Infringement of right of confrontation cannot be harmless error. — Unless there has been a waiver of the right of confrontation, or it has been shown that the witness is unavailable after due diligence has been used by the state to attempt to produce him at trial, admission of a witness' prior recorded testimony violates a defendant's right of confrontation. Infringement of that right cannot be harmless error. It is a right that is so basic to a fair trial that its infraction can never be treated as harmless error. *State v. Mann*, 1975-NMCA-045, 87 N.M. 427, 535 P.2d 70.

Two-way video testimony violated defendant’s confrontation rights and was not harmless error. — In defendant’s first-degree murder trial, where a police forensic scientist, living outside of New Mexico, testified via Skype, there was nothing in the record to demonstrate that the use of two-way video was necessary to further an important public policy, where the district court did not conduct an evidentiary hearing or enter any findings on the issue; the admission of remote testimony violated defendant’s sixth amendment right to confrontation. Moreover, the constitutional error was not harmless because there was no reasonable probability that the testimony of the absent forensic analyst did not influence the verdict, where the expert witness was the only analyst who had actually tested the DNA samples, and she testified to the results of the measurements she performed, and the DNA profiles were offered as the sole evidence that implicated defendant in the crime. *State v. Thomas*, 2016-NMSC-024.

When clear denial of statutorily created procedural right has been established, the state has the burden of showing beyond a reasonable doubt that the error was harmless. *State v. Spearman*, 1972-NMCA-150, 84 N.M. 366, 503 P.2d 649.

Doctrine of fundamental error is to be applied sparingly and is not to be used to excuse failure to make proper objection in the trial court. *State v. Browder*, 1971-NMCA-150, 83 N.M. 238, 490 P.2d 680 (decided under former law).

The doctrine of fundamental error is resorted to in criminal cases only if the innocence of the defendant appears indisputable, or if the question of his guilt is so doubtful that it would shock the conscience to permit his conviction to stand. *State v. Aguirre*, 1972-NMSC-081, 84 N.M. 376, 503 P.2d 1154.

The doctrine of fundamental error is applicable only if the innocence of the defendant appears indisputable or if the question of his guilt is so doubtful that it would shock the conscience to permit his conviction to stand. *State v. Jones*, 1975-NMCA-078, 88 N.M. 110, 537 P.2d 1006, cert. denied, 88 N.M. 318, 540 P.2d 248.

Doctrine of cumulative error is recognized in New Mexico. *State v. Parker*, 1973-NMCA-055, 85 N.M. 80, 509 P.2d 272.

The doctrine of cumulative error is recognized in New Mexico and may be raised as an issue on a direct appeal. However, the doctrine is not applicable if the claimed errors were not committed by the trial court and the entire record demonstrates that the defendant did receive a fair trial. *State v. Seaton*, 1974-NMSC-067, 86 N.M. 498, 525 P.2d 858.

Cumulative error found. — In trial for aggravated assault on a police officer, where prosecutor introduced into evidence a butcher knife that could not be connected with defendants, made reference to the stabbing of a United States senator in Washington, D.C., and expressed his personal opinion of the defendants' guilt, cumulative impact of three items of misconduct was so prejudicial as to deprive defendants of a fair trial and called for reversal of conviction even where one defendant objected to only two of the items and the other defendant objected to none. *State v. Vallejos*, 1974-NMCA-009, 86 N.M. 39, 519 P.2d 135.

Cumulative error deprives a defendant of a fair trial. — In a trial for criminal sexual penetration of a minor, where the prosecutor failed to disclose evidence favorable to the defense until just before trial started, where the district court permitted the trial to go forward without allowing defendant any additional time to conduct a meaningful review of untimely disclosed evidence, where defendant was forced to call a witness without the benefit of a prior interview, where defendant had no opportunity to effectively use the untimely disclosed evidence to his advantage, and where the jury was presented with six identical counts per child, with no way to distinguish between each offense or act, the numerous errors, considered together, rose to the level of prejudice so great that defendant was deprived of a fair trial. *State v. Huerta-Castro*, 2017-NMCA-026.

Cumulative error by trial court and defense counsel denied defendant a fair trial. — In defendant’s trial for criminal sexual penetration of a minor, criminal sexual contact of a minor, and bribery of a witness, where the trial court erroneously admitted an apparent admission of guilt by defendant, and where defendant’s trial counsel failed to investigate the sexual molestation charges against the victim’s stepfather, failed to discover the victim’s recantation of her allegations against her stepfather, failed to move to strike or otherwise remedy the characterization of his client as a sexual deviant, and failed to review and take steps to properly introduce a Children, Youth and Families Department report that called into question the victim’s credibility, cumulative error denied defendant a fair trial. *State v. Miera*, 2018-NMCA-020.

Improperly admitted evidence must not contribute to conviction. — In order for an appellate court to say that the error was harmless, they must also be able to say that the other evidence was so overwhelming that the improperly admitted evidence did not contribute to the conviction. *State v. Self*, 1975-NMCA-062, 88 N.M. 37, 536 P.2d 1093.

Peephole evidence very likely substantially contributed to the jury's guilty verdicts and is not harmless error under Paragraph A of this rule. *State v. Kerby*, 2005-NMCA-106, 138 N.M. 232, 118 P.3d 740, cert. granted, 2005-NMCERT-008.

Comment on defendant's failure to testify. — Closing remarks by prosecutor as to "uncontroverted testimony" by state witnesses did not address itself to the defendant's failure to testify so as to constitute fundamental error. *State v. Aguirre*, 1972-NMSC-081, 84 N.M. 376, 503 P.2d 1154.

Where prosecution improperly commented on accused's failure to testify in his own behalf, and where it could not be contended that the evidence of guilt was overwhelming nor that the remark of the prosecutor was an inconsequential factor in the outcome of the case, the harmless error rule was inapplicable. *State v. Ford*, 1969-NMCA-092, 80 N.M. 649, 459 P.2d 353 (decided under former law).

Testimony regarding the behavior of sexually abused children. — Testimony by a S.A.F.E. House interviewer, improperly admitted as lay witness testimony, that the majority of children she has interviewed delayed in disclosing sexual abuse was not harmless because there was a reasonable probability that the error affected the jury's verdict by supporting the victim's credibility. *State v. Duran*, 2015-NMCA-015.

Improperly admitted expert opinion testimony resulted in plain error that was not harmless. — Where defendant was charged with child abuse, kidnapping, contributing to the delinquency of a minor, battery against a household member, two counts of bribery of a witness, four counts of conspiracy, and two counts of criminal sexual penetration of a minor, and where, at trial, the State's expert witness, who testified as an expert family nurse practitioner with a specialty in child sexual abuse, testified that "the things that Victim said had happened to her had, in fact, happened to her" and that Victim's physical examination, which revealed no physical injuries to Victim's genital area, was consistent with Victim's description of the incident, it was plain error for the expert to comment both directly and indirectly upon the victim's truthfulness, identify defendant as the victim's molester based solely on the victim's statement of events, and to repeat in detail the victim's statements regarding the sexual abuse; the admission of the expert's testimony vouched too much for the credibility of the victim and encroached too far upon the province of the jury. *State v. Garcia*, 2019-NMCA-056, cert. denied.

The improper admission of a child's incriminating statements in DWI investigation deemed harmless in light of properly admitted evidence. — In delinquency proceedings, where the district court excluded sixteen-year-old child's statements that he drank three beers approximately fifteen to thirty minutes prior to his encounter with police officers, and where the district court then allowed the prosecutor

to elicit testimony from the arresting officer regarding those same statements, the admission of the child's statements was improper because they were elicited before the child was advised of his statutory right to remain silent in violation of Section 32A-2-14(D) NMSA 1978. The improperly admitted statements were harmless, however, because when viewed in light of the properly admitted evidence, that the officer, upon approaching child's vehicle, detected the odor of alcohol, that child appeared to be intoxicated, smelled of alcohol, had bloodshot and watery eyes and slurred speech, performed poorly on field sobriety tests, stated that he was "pretty buzzed", and that the results of child's breath alcohol tests established child's alcohol concentration level of 0.14 and 0.15, there was no reasonable probability that the admission of the officer's testimony regarding the statements child made prior to being advised of his right to remain silent affected the verdict. *State v. Wyatt B.*, 2015-NMCA-110, cert. denied, 2015-NMCERT-010.

Failure to grant juvenile defendant's motion to suppress statements made without counsel present was harmless. — In a first-degree murder trial, it was error for the district court to deny the juvenile defendant's motion to suppress statements he made in a police interview in the absence of his appointed counsel, because once the record had established that the Sixth Amendment right to counsel had attached, the juvenile's right to counsel could not be waived outside the presence of counsel, but the error was harmless because the statement sought to be suppressed introduced facts favorable to the defendant and there was no reasonable probability the admission of the statements contributed to defendant's convictions. *State v. Rivas,* 2017-NMSC-022.

For a district attorney to be both witness and prosecutor is reversible error. When a district attorney finds it necessary to testify on behalf of the prosecution, he should withdraw and leave the trial of the case to other counsel. *State v. McCuistion*, 1975-NMCA-067, 88 N.M. 94, 537 P.2d 702, cert. denied, 88 N.M. 318, 540 P.2d 248.

Admission of coconspirator's testimony may constitute a technical violation of the accused's right to confront and cross-examine the witnesses against him, but such admission does not require a reversal of conviction if it constituted error harmless beyond a reasonable doubt. Admission of such statements was harmless beyond a reasonable doubt where the properly admitted evidence of guilt was overwhelming, and the prejudicial effect of the codefendants' statements was insignificant by comparison. *State v. Rondeau*, 1976-NMSC-044, 89 N.M. 408, 553 P.2d 688.

Admission of codefendant's plea agreement as substantive evidence against defendant was not harmless error. — Where defendant was charged with receiving or transferring a stolen vehicle, conspiracy to receive or transfer a stolen vehicle, possession of burglary tools, and two counts of harboring a felon, and where the district court admitted, without any limiting instruction, a codefendant's plea and disposition agreement in order to prove elements of the crime against defendant, including knowledge that the codefendant had committed felonies and that defendant had reason to believe that the automobile in question was stolen, the admission of the plea agreement was not harmless, because a codefendant's guilty plea may not be used as

substantive evidence to prove a defendant's guilt, and it cannot be said that there was no reasonable possibility that the substantive use of the codefendant's guilty plea affected the verdict. *State v. Flores*, 2018-NMCA-075.

Admission of evidence of the defendant's other than honorable discharge from the military service was harmless error where other strong and competent admissible evidence supported the jury verdict. *State v. Ho'o*, 1982-NMCA-158, 99 N.M. 140, 654 P.2d 1040.

Improper admission of testimony related to the operation of cell phone towers deemed harmless in light of properly admitted evidence. — In a first-degree murder trial, where the trial court erred in allowing a lay witness to testify regarding how cell phone towers operate, which required a duly qualified expert to explain the technical nature of the many variables that influence how cell towers connect with cell phones, the error was harmless, because other testimony, to which there was no objection, summarized the information contained within the call detail report record and the cell tower report produced by the lay witness, and therefore defendant failed to establish that there was a reasonable probability that the jury would have had a reasonable doubt concerning his guilt as a result. *State v. Carrillo,* 2017-NMSC-023.

Admission of gun evidence in drug trafficking case was harmless error. — Where defendant was charged with trafficking a controlled substance, tampering with evidence, resisting, evading, or obstructing an officer, and possession of drug paraphernalia after law enforcement officers conducted a traffic stop, during which defendant was found with a large amount of money on his lap and sixty-three small baggies of crack cocaine, and subsequently searched defendant's home, finding a .380 caliber semi-automatic pistol, several small zip-lock baggies, several digital scales, and a brown bag with small zip-lock baggies inside, and where, at trial, defendant objected to the admission of evidence that a gun was found at his residence, claiming that he was not armed at the time of his arrest and that the gun evidence created the impression that he was dangerous and that, in turn, encouraged the jury to convict him of trafficking a controlled substance rather than simple possession, the admission of the gun evidence, assuming error, was harmless. It was doubtful that the admission of the gun evidence had any probable impact on the jury's deliberations regarding trafficking versus possession, considering the evidence that defendant was apprehended with sixty-three baggies of crack cocaine, individually packaged, indicating that the drugs were intended for sale to individuals, in addition to the discovery of digital scales and empty small baggies at defendant's residence. *State v. Jackson*, 2021-NMCA-059, *cert. denied*.

Statements based on evidence and reasonable inferences. — Statements by counsel in closing arguments having their basis in the evidence, together with reasonable inferences to be drawn therefrom, are permissible and do not warrant reversal. *State v. Santillanes*, 1970-NMCA-003, 81 N.M. 185, 464 P.2d 915 (decided under former law).

Claim of ineffective assistance of counsel. — A conviction is not to be reversed on a claim of ineffective assistance of counsel unless the proceedings leading to his conviction amount to a sham, a farce or a mockery of justice. *State v. Trejo*, 1972-NMCA-019, 83 N.M. 511, 494 P.2d 173.

The failure of counsel to object to the words, "my wife said she heard glass," did not deprive defendant of the effective assistance of counsel. *State v. Baca*, 1969-NMCA-070, 80 N.M. 488, 458 P.2d 92 (decided under former law).

Jury seeing defendant in handcuffs. — Where there was no showing that any juror saw defendant handcuffed in courtroom, defendant was not prejudiced, or denied a fair trial or due process. *State v. Foster*, 1971-NMCA-134, 83 N.M. 128, 489 P.2d 408 (decided under former law).

Absent proof or contention that defendant had been in handcuffs in the courtroom during jury selection or trial, without reasonable justification, defendant's objection constitutes no reversible error. *State v. Newman*, 1971-NMCA-137, 83 N.M. 165, 489 P.2d 673 (decided under former law).

Comments by court held not to show bias against party. — Comments by the trial court to defense counsel that "you shouldn't be calling people like that as a witness", referring to an individual who had not been called by the defense, and that "if you don't want your witnesses cross-examined, don't call them", although indicative of impatience, did not display bias against or in favor of a party, nor did they amount to an undue interference by the trial court or show such a severe attitude that proper presentation of the cases was prevented, and consequently, the remarks did not deprive defendant of a fair trial. *State v. Herrera*, 1977-NMCA-028, 90 N.M. 306, 563 P.2d 100, cert. denied, 90 N.M. 636, 567 P.2d 485.

Communication between jury and trial judge. — The presumption of prejudicial error does not automatically attach in all cases involving attempted communication between jury and trial judge. There must be at least some indication, however slight, in the record that the event complained of gives rise to the likelihood of prejudice. *State v. Trujillo*, 1973-NMCA-012, 84 N.M. 593, 506 P.2d 337.

It is highly improper for the court to have any communication with the jury, except in open court and in the presence of the accused and his counsel. Although the bare fact of such a communication does not, in all cases, necessitate a new trial, it must affirmatively appear that no prejudice resulted to the defendants and the burden is on the state to establish this as a fact. *State v. Brugger*, 1972-NMCA-102, 84 N.M. 135, 500 P.2d 420.

Questions as to race of friend of defendant. — Where defendant convicted of distribution of a controlled substance was a Negro, and the transactions complained of occurred between defendant and an undercover agent at the home of a white female friend of defendant, prosecutor's questions which asked that the woman be identified as

"white or black" did not, as a matter of law, constitute fundamental error. *State v. Parker*, 1973-NMCA-055, 85 N.M. 80, 509 P.2d 272.

Racial composition of jury. — One is not entitled to relief simply because there is no member of his race on the jury unless he shows that the absence results from purposeful discrimination. *State v. Newman*, 1971-NMCA-137, 83 N.M. 165, 489 P.2d 673 (decided under former law).

Waiver by defendant of error of denial of motion for directed verdict. — When the defendant in a murder trial, having moved for a directed verdict at the close of the state's case in chief on grounds of insufficient evidence, took the stand after the denial of the motion, admitted that he fired the shot and asserted the defense of self-defense, he waived the error, if any, in the denial of his motion. *State v. Quintana*, 1974-NMCA-095, 86 N.M. 666, 526 P.2d 808, cert. denied, 86 N.M. 656, 526 P.2d 798.

Waiver of error of nonresponsive answer by witness. — Where a witness for the state gave a potentially prejudicial and nonresponsive answer on direct examination and was thereafter cross-examined and examined on redirect, and only after the examination of the witness was concluded did defendant move for a mistrial on the basis of the nonresponsive answer, then by lack of timely objection defendant waived the claimed error. *State v. Milton*, 1974-NMCA-094, 86 N.M. 639, 526 P.2d 436.

Questions regarding prior convictions. — Where the very essence of defendant's defense hinged upon his credibility, questioning the defendant about his prior misdemeanor convictions for possession of marijuana, which easily conjures notions and prejudices in the mind of a juror, could not be rectified by an admonition to disregard such testimony and was reversible error. *Albertson v. State*, 1976-NMSC-056, 89 N.M. 499, 554 P.2d 661.

The damage implicit in asking defendant's mother whether she knew of defendant's past convictions of crimes was in no way repaired by virtue of the fact that the objection was sustained. Neither was it overcome by the admonitions given the jury. Therefore, the asking of such a question constituted reversible error, and a mistrial should have been declared. *State v. Rowell*, 1966-NMSC-231, 77 N.M. 124, 419 P.2d 966.

Question suggesting conviction of rape held not prejudicial. — Where it was made clear to the jury by two answers of appellant, and by the instruction of the court, that appellant was not convicted of statutory rape, as suggested by the question to which objection was made, if any error was committed by asking such question, such error was not prejudicial to appellant under the facts. *State v. Williams*, 1966-NMSC-145, 76 N.M. 578, 417 P.2d 62 (decided under former law).

Allowing jury to hear tape after case submitted to jury. — Where trial court allowed the jury to listen again to a tape recording allegedly containing defendant's voice after the case had been submitted to the jury for decision, there was a presumption of prejudicial error and the burden was upon the state to overcome the presumption by

showing that the jury was not prejudiced by the playing of the tape. *State v. Ross*, 1973-NMCA-072, 85 N.M. 176, 510 P.2d 109.

Refusing to hear evidence about fairness of lineup procedure. — Trial court's error in refusing to hear defendant's evidence concerning fairness of lineup procedure was not harmless where evidence as to the lineup identification was the only evidence which directly identified the defendant. *State v. Torres*, 1970-NMCA-017, 81 N.M. 521, 469 P.2d 166, cert. denied, 81 N.M. 506, 469 P.2d 151 (decided under former law).

Refusing to allow expert to testify regarding validity of lay opinion. — Though the trial judge should probably have allowed defendant's expert to testify regarding the validity of lay opinion on defendant's mental condition, defendant was denied no substantial right, nor was he substantially harmed such that he was denied a fair trial, furthermore, the record clearly showed that the expert witness had an opportunity after the disallowed question to state the difficulty a lay person would have in forming a valid opinion as to defendant's mental condition. *State v. Lujan*, 1975-NMSC-017, 87 N.M. 400, 534 P.2d 1112, cert. denied, 423 U.S. 1025, 96 S. Ct. 469, 46 L. Ed. 2d 400 (1975).

Where court was unable to find in newspaper article anything prejudicial to defendant or which could have aroused public excitement or feeling against him, and where it was neither suggested nor argued that any of the jurors who tried the case had read the article, defendant could not have been prejudiced by it. *State v. Lindsey*, 1969-NMCA-121, 81 N.M. 173, 464 P.2d 903, cert. denied, 81 N.M. 140, 464 P.2d 559, 398 U.S. 904, 90 S. Ct. 1692, 26 L. Ed. 2d 62 (1970) (decided under former law).

Delay of 40 days between commission of offense and arrest of defendant was not in itself suggestive of prejudice. *State v. Polsky*, 1971-NMCA-011, 82 N.M. 393, 482 P.2d 257, cert. denied, 82 N.M. 377, 482 P.2d 241, 404 U.S. 1015, 92 S. Ct. 688, 30 L. Ed. 2d 662 (1972).

Failure to attempt to suppress evidence arising from alleged illegal arrest. — Where defendant asserted his arrest had been illegal and the subsequent finding of heroin "arose" from the claimed illegal arrest, so that he was deprived of his fundamental rights by the admission into evidence of heroin, but defendant did not attempt to suppress this evidence prior to trial nor object to testimony relative thereto at trial, then despite defendant's claim that under the "harmless error" rule no error is harmless if it is inconsistent with substantial justice, and his reliance on the "plain error" rule, the court of appeals could not hold there was an illegal arrest as a matter of law. *State v. Bauske*, 1974-NMCA-078, 86 N.M. 484, 525 P.2d 411.

Failure of state to show that witness unavailable before admitting prior testimony. — Although admission of a material witness's preliminary hearing testimony was improper because the state failed to show that the witness was unavailable, it was not prejudicial since testimony of several other witnesses established the essential

elements of the crime, and a trial court may in its discretion permit cumulative testimony. *State v. Mann*, 1975-NMCA-045, 87 N.M. 427, 535 P.2d 70.

Inference of defendant's guilt from refusal of defendant's witness to testify. — Once the state has obtained the benefit of the inference of defendant's guilt by a witness and associate of defendant invoking his fifth amendment right not to testify, which is not subject to cross-examination, then the state cannot have the benefit of a presumption that this inference was not prejudicial and shift the burden to defendant to show there was prejudice. *State v. Vega*, 1973-NMCA-085, 85 N.M. 269, 511 P.2d 755.

Requiring oath as "fostering religion". — Defendant's contention that by requiring an oath by witnesses and jurors, the state "openly fostered religion", when made without any showing that the defendant was affected thereby, is at best a specie of harmless error. *State v. Deats*, 1971-NMCA-089, 82 N.M. 711, 487 P.2d 139 (decided under former law).

Inconsistent verdicts are not necessarily irrational. — Defendant's conviction of rape and acquittal of sodomy was not an irrational result amounting to fundamental error, since even assuming the verdicts were inconsistent, reviewing court can only speculate as to why the jury reached that result. That the verdicts may not be in harmony does not mean they are irrational. *State v. Padilla*, 1974-NMCA-029, 86 N.M. 282, 523 P.2d 17, cert. denied, 86 N.M. 281, 523 P.2d 16.

Talking to state's witness during recess in defendant's cross-examination. — Absent a showing of prejudice, the denial of a motion for a mistrial because the district attorney talked to a state's witness outside the defendant's presence and during a recess in the defendant's cross-examination of such witness is not reversible error. *State v. Mosley*, 1965-NMSC-081, 75 N.M. 348, 404 P.2d 304 (decided under former law).

Requiring original court-appointed counsel to continue. — Where defendant claimed it was error for trial court to require original counsel to continue in the case, with no contention that he was prejudiced by the representation of original counsel, the claim was no more than a claim that defendant had a right to choose his court-appointed counsel, and he had no such right. *State v. Williams*, 1971-NMCA-143, 83 N.M. 185, 489 P.2d 1183, cert. denied, 83 N.M. 258, 490 P.2d 975 (decided under former law).

Objection to hearsay evidence promptly sustained. — The prompt sustaining of defendant's objection and the admonition to disregard the answer cured any prejudicial effect from testimony inadmissible because hearsay concerning the defendant's hitting of a child, and the prosecutor's attempt to evade the trial court's exclusionary ruling did not deprive defendant of a fair trial because objection to the question was promptly sustained and the question was never answered. *State v. King*, 1977-NMCA-042, 90 N.M. 377, 563 P.2d 1170, *overruled on other grounds by State v. Reynolds*, 1982-NMSC-091, 98 N.M. 527, 650 P.2d 811.

Failure to prove surplusage in indictment. — Where the essential elements of the crime of burglary of an automobile were established, the model and license of the vehicle were surplusage in the indictment and need not be proved, thus failure to do so did not constitute reversible error. *State v. Newman*, 1971-NMCA-137, 83 N.M. 165, 489 P.2d 673 (decided under former law).

Refusal to strike testimony where witness does not remember making statement. — It was not abuse of discretion by trial court to refuse to strike expert testimony from record where witness did not deny that he gave testimony appearing in record, but claimed only to not remember making statement. *State v. Chavez*, 1972-NMCA-127, 84 N.M. 247, 501 P.2d 691.

Failure to grant continuance when witness's name given to defendant day before trial. — Defendant was entitled as a matter of law to a continuance to obtain a deposition where state, after having provided defendant with a supposedly complete list of witnesses to appear at trial, sought, over defendant's objections, to add an important witness whose name the state had disclosed to the defendant's attorney by phone the day before. Since the witness's testimony was critical and could not have been reasonably anticipated, failure of trial court to grant such continuance constituted an abuse of discretion and was so prejudicial of the substantial rights of the defendant as to necessitate reversal. *State v. Billington*, 1974-NMCA-010, 86 N.M. 44, 519 P.2d 140.

Granting of separate trials to jointly-charged defendants is a matter resting within the discretion of the trial judge, and this right to a separate trial is not to be equated with the concept of fundamental error. This concept is bottomed upon the innocence of the accused, or the corruption of justice. It is resorted to in a criminal case only if the innocence of defendant appears indisputable, or the question of his guilt is so doubtful that it would shock the conscience to permit his conviction to stand. *State v. Carrillo*, 1970-NMCA-127, 82 N.M. 257, 479 P.2d 537.

Where questioned evidence establishes matters not in dispute. — Where the only probative effect the admission into evidence of prosecutrix's glasses could have had was to establish their existence, and to establish that prosecutrix had been in the area where they were found, and neither the existence of the glasses nor the fact that prosecutrix had been at the place where they were found is in dispute, their admission could not possibly have prejudiced defendant. *State v. Carrillo*, 1970-NMCA-127, 82 N.M. 257, 479 P.2d 537.

Inference from lineup identification testimony held not prejudicial. — Where defendant was positively identified by other testimony to which no objection was made, any inference from stricken lineup testimony could not be considered to be so prejudicial that the trial court was required to grant a mistrial when defendant never asked for a mistrial. *State v. Hunt*, 1972-NMCA-026, 83 N.M. 546, 494 P.2d 624.

Not keeping jury together. — Where there is absolutely no showing of any prejudice that the jury was not kept together constitutes no error. *State v. Rose*, 1968-NMSC-091,

79 N.M. 277, 442 P.2d 589, cert. denied, 393 U.S. 1028, 89 S. Ct. 626, 21 L. Ed. 2d 571 (1969) (decided under former law).

Inadvertent reference to other charges pending against defendant. — Where the inadvertent conduct of the trial court in referring to other charges pending against defendant was of such minor significance that the appellate court was unable to ascribe to it any improper suggestion by the court or improper effect upon the jury, there was no prejudicial error. *State v. Foster*, 1971-NMCA-134, 83 N.M. 128, 489 P.2d 408 (decided under former law).

Where error in judgment is result of inadvertence, it is subject to amendment to conform with the verdict. *State v. Soliz*, 1968-NMSC-101, 79 N.M. 263, 442 P.2d 575 (decided under former law).

Court addressing witness by first name. — Fact that the court, in asking the first question, addressed the expert witness by his first name was an impropriety on the part of the court, but it was in no way questioned at the time, and was of such minor significance that it could not have been prejudicial. *State v. Favela*, 1968-NMCA-065, 79 N.M. 490, 444 P.2d 1001 (decided under former law).

Failure to instruct jury on essential elements of crime charged. — A jury must be instructed on the essential elements of the crime charged. *State v. Kendall*, 1977-NMCA-002, 90 N.M. 236, 561 P.2d 935, modified, 1977-NMSC-015, 90 N.M. 191, 561 P.2d 464.

Supplying impeachment instruction that had been omitted. — Where the court acted immediately to supply the impeachment instruction as soon as its omission became known and appellant availed himself fully of the opportunity to argue the point prior to the state's closing its argument, appellant has not met the burden imposed upon him and the error was harmless. *State v. Lindwood*, 1968-NMCA-063, 79 N.M. 439, 444 P.2d 766 (decided under former law).

Where evidence does not support numerous instructions given jury. — Defendant convicted of first-degree murder for killing the victim by striking her with a cinder block after allegedly raping her was entitled to reversal of conviction, even in absence of objection by defendant at trial, where evidence supported judge's instruction on willful, deliberate or premeditated killing, but did not support instructions on theories of felony murder; murder by act dangerous to others, indicating depraved mind; or murder from deliberate and premeditated design unlawfully and maliciously to effect death of any human being (transferred intent). Such error was fundamental, since an intolerable amount of confusion was introduced into the case, and defendant could have been convicted without proof of all necessary elements. *State v. DeSantos*, 1976-NMSC-034, 89 N.M. 458, 553 P.2d 1265.

Laying of no foundation for testimony found harmless. — Even if no foundation had been laid for the witness to characterize the substance sold as marijuana, the error in

allowing testimony was harmless because that fact had been stipulated by expert witness. *State v. Latham*, 1972-NMCA-025, 83 N.M. 530, 494 P.2d 192.

Waiver of defect in instructions by failure to object. — Although appellant moved at the close of the state's case as well as at the close of all testimony, and by motion for a new trial after verdict, to dismiss the charges because of a failure of proof to support a conviction of murder either in the first or second degree or of manslaughter, where no objection to the jury being instructed on manslaughter along with the two degrees of murder was stated in the record, this constitutes a waiver of errors or defects in the instructions. *State v. Lopez*, 1968-NMSC-092, 79 N.M. 282, 442 P.2d 594 (decided under former law).

Mistrial motion used to specify fundamental trial error. — Use of the motion for a mistrial is not appropriately addressed to mere erroneous rulings of law, but generally is used to specify such fundamental error in a trial as to vitiate the result. *State v. Day*, 1980-NMSC-032, 94 N.M. 753, 617 P.2d 142, cert. denied, 449 U.S. 860, 101 S. Ct. 163, 66 L. Ed. 2d 77 (1980).

Motion for mistrial is addressed to trial court's discretion and is reviewable for an abuse of discretion. *State v. King*, 1977-NMCA-042, 90 N.M. 377, 563 P.2d 1170.

Granting of continuance is within discretion of court, and absent a showing of abuse of discretion the trial court's decision will stand. *State v. Blea*, 1975-NMCA-129, 88 N.M. 538, 543 P.2d 831, cert. denied, 89 N.M. 5, 546 P.2d 70.

Admission of evidence is matter within discretion of court. — The admission or exclusion of evidence in the trial of a criminal case is a matter within the sound discretion of the trial court and will not be disturbed on appeal unless there has been a clear abuse. *State v. Ramirez*, 1976-NMCA-101, 89 N.M. 635, 556 P.2d 43, *overruled on other grounds by City of Albuquerque v. Haywood*, 1998-NMCA-029, 124 N.M. 661, 954 P.2d 93 (Ct. App. 1997).

Clerical error not precluding amendment of information. — Where, because of a clerical error, the written bind-over order omitted two crimes with which the defendant had been charged, and the magistrate had in fact orally announced that he was binding over the defendant on those counts, the written bind-over order was subsequently effectively amended to conform to the oral order, and the original information could be amended to conform to the bind-over order. *State v. Coates*, 1985-NMSC-091, 103 N.M. 353, 707 P.2d 1163.

Clerical error in judgment and sentence that could be corrected. — Where defendant pled no contest to two separate crimes, one of which would result in a nine-year sentence and the other of which would result in a three-year sentence with two years unconditionally suspended, and where the plea agreement recited that the sentence for both convictions would run consecutively for a total of ten years in the department of corrections, and where, at the plea hearing, the district court reviewed the

terms of the plea agreement with defendant on the record, acknowledged that the agreement called for a ten-year period of incarceration, and accepted defendant's plea, but where the written judgment and sentence that was then entered recited that the sentences for the two crimes would run concurrently, with the result that defendant effectively was sentenced to nine years of incarceration, the district court was within its authority to correct the sentence two years after its original entry, because based on the record below, it was clear that the judgment and sentence contained a clerical error, and Rule 5-113(B) NMRA authorizes a district court at any time to correct clerical mistakes in judgments, orders or other parts of the record. *State v. Stejskal*, 2018-NMCA-045.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Counsel's reference, in presence of sequestered witness in state criminal trial, to testimony of another witness as ground for mistrial or reversal, 24 A.L.R.4th 488.

Failure to object to improper questions or comments as to defendant's pretrial silence or failure to testify as constituting waiver of right to complain of error - modern cases, 32 A.L.R.4th 774.

Prosecutor's appeal in criminal case to racial, national, or religious prejudice as ground for mistrial, new trial, reversal, or vacation of sentence - modern cases, 70 A.L.R.4th 664.

What constitutes harmless or plain error under Rule 52 of the Federal Rules of Criminal Procedure - Supreme Court cases, 157 A.L.R. Fed. 521.

5-114. Decorum of grand jury proceedings.

In addition to the persons authorized by law to be present during testimony before the grand jury, upon motion of the state or request of the grand jury, the district court may designate one or more bailiffs or security officers to be present during testimony before the grand jury, upon a showing that it is reasonably necessary to preserve the decorum of the proceedings or the safety of the participants in the grand jury proceedings. All deliberations of the grand jury will be conducted in a private room outside the hearing or presence of any person other than grand jury members.

Committee commentary. — This rule was adopted by the supreme court to provide a procedure for the designation of a bailiff or other security officer to be present during testimony of witnesses.

Subsequent to the adoption of this rule, the legislature amended Section 31-6-4 NMSA 1978 to provide during the taking of testimony before the grand jury for the presence of security officers. Section 31-6-7 NMSA 1978 provides that "the district court shall assign court reporters, bailiffs, interpreters, clerks or other persons as required to aid the grand jury in carrying out its duties". *See Davis v. Traub*, 90 N.M. 498, 565 P.2d 1015 (1977), where prior to the adoption of this rule and the amendment of Section 31-6-4 NMSA

1978, the New Mexico Supreme Court held under former Sections 31-6-4 and 31-6-7 NMSA 1978 that only members of the legal staff of the attorney general and district attorney were authorized to be present during the taking of testimony of the grand jury. Under this rule a bailiff or security officer may be designated to be present at the grand jury only during the taking of testimony, upon a showing that a witness may disrupt the decorum of the proceedings or otherwise create a risk to the safety of the grand jurors. Section 31-6-4 NMSA 1978 (as amended by Laws 1981, Chapter 262, Section 2) provides that such security personnel may be present only by leave of the court and only if they are not potential witnesses or interested parties.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — Presence of persons not authorized by Rule 6(d) of Federal Rules of Criminal Procedure during session of grand jury as warranting dismissal of indictment, 68 A.L.R. Fed. 798.

5-115. Conduct of court proceedings.

A. **Judicial proceedings.** Judicial proceedings should be conducted with fitting dignity and decorum, in a manner conducive to undisturbed deliberation, indicative of their importance to the people and to the litigants, and in an atmosphere that bespeaks the responsibilities of those who are charged with the administration of justice.

B. **Nonjudicial proceedings.** Proceedings, other than judicial proceedings, designed and carried out primarily as ceremonies, and conducted with dignity by judges in open court, may properly be photographed in, or broadcast from, the courtroom with the permission and under the supervision of the court.

C. **Appearance of the defendant and witnesses before the court.** A defendant shall not be required to appear before the jury in distinctive clothing that would give the appearance that the defendant is incarcerated. Except by order of the court, the defendant may not appear before the jury in any visible restraint devices, including handcuffs, chains, or stun belts, a visible bullet proof vest, or any other item which, if visible to the jury, would prejudice the defendant in the eyes of the jury. When the defendant appears in court for a jury trial in any restraint device, the court shall state on the record, outside the presence of the jury, the kind of restraint device used and the reasons why the defendant is being restrained. Before requiring a witness to appear before the jury in prison clothing or any visible restraint the court shall balance the need for courtroom security and the likelihood of prejudice to the defendant in the eyes of the jury.

[As amended by Supreme Court Order No. 05-8300-017, effective October 11, 2005; as amended by Supreme Court Order No. 13-8300-018, effective for all cases pending or filed on or after December 31, 2013.]

Committee commentary. — The Committee added Paragraph C to ensure that defendants are not prejudiced because of being unduly restrained before the court. When the court is required under Paragraph C to state on the record the kind of restraint device used and the reasons why the defendant is being restrained, the record should be made outside the presence of the jury whether the restraint device is visible to the jury or not.

[As amended by Supreme Court Order No. 13-8300-018, effective for all cases pending or filed on or after December 31, 2013.]

ANNOTATIONS

The 2013 amendment, approved by Supreme Court Order No. 13-8300-018, effective December 31, 2013, required the district court to create a record regarding any restraint device when defendant appears in court for a jury trial in a restraint and to balance courtroom security and the likelihood of prejudice to defendant before requiring a witness to appear before a jury in prison clothing or a restraint; and in Paragraph C, in the title, after “defendant”, added “and witnesses”, and added the third and fourth sentences.

The 2005 amendment, effective October 11, 2005, added Paragraph C relating to restraint devices.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Propriety and prejudicial effect of gagging, shackling or otherwise physically restraining accused during course of state criminal trial, 90 A.L.R.3d 17.

Exclusion of public from state criminal trial in order to preserve confidentiality of undercover witness, 54 A.L.R.4th 1156.

Exclusion of public from state criminal trial in order to prevent disturbance by spectators or defendant, 55 A.L.R.4th 1170.

Exclusion of public from state criminal trial in order to avoid intimidation of witness, 55 A.L.R.4th 1196.

23A C.J.S. Criminal Law § 1145 et seq.

5-116. Witness use immunity.

A. **Issuance of order.** If a person has been or may be called to testify or to produce a record, document, or other object in an official proceeding conducted under the authority of a court or grand jury, the district court for the judicial district in which the official proceeding is or may be held may issue a written order requiring the person to testify or to produce the record, document or other object notwithstanding the person’s privilege against self-incrimination. The court may issue an order under this rule upon

the written application of the prosecuting attorney, the accused, or upon the court's own motion. The written application shall be provided to all parties.

B. **Application.** The court may grant the application and issue a written order pursuant to this rule if it finds the following:

(1) the testimony, or the record, document or other object may be necessary to the public interest; and

(2) the person has refused or is likely to refuse to testify or to produce the record, document or other subject on the basis of the person's privilege against self-incrimination.

C. **Effect of order.** The use of any testimony or other evidence given pursuant to an order issued under this rule is subject to the provisions of Rule 11-413 NMRA.

[As amended by Supreme Court Order No. 10-8300-028, effective December 3, 2010; as amended by Supreme Court Order No. 14-8300-017, effective for all cases pending or filed on or after December 31, 2014.]

Committee commentary. — This rule, together with Rule 11-412 NMRA, creates a procedure for supplanting the privilege against self-incrimination by a grant of use immunity from the court.

There are two types of witness immunity, the so-called "use and derivative use" immunity rule and the so-called "transactional immunity" rule. Use and derivative use immunity was held to be co-extensive with the scope of the Fifth Amendment privilege against self-incrimination in *Kastigar v. United States*, 406 U.S. 441 (1972). *See also Zicarelli v. New Jersey State Comm'n*, 406 U.S. 472 (1972). The so-called "transactional immunity" rule affords the witness considerably broader protection than does the Fifth Amendment privilege. *Kastigar*, 406 U.S. at 453; *see also Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964); *see generally*, Note, 82 Yale L.J. 171 (1972); Note, 58 Va. L. Rev. 1099 (1972); Note, 32 Md. L. Rev. 289 (1972).

Although prior to the 1980 amendments, this rule did not specifically require a party to make a written application for the court to issue a written order granting immunity, the New Mexico Supreme Court held that the application and order must be written. *See Campos v. State*, 91 N.M. 745, 580 P.2d 966 (1978). This rule was amended in 1979 to require a written application in accordance with the *Campos* decision. Prior to the New Mexico Supreme Court's decision in *State v. Belanger*, 2009-NMSC-025, the court could only issue an order granting use immunity upon application of the prosecuting attorney. However, *Belanger* removed that restriction, and this rule has been revised to allow the court to issue an order granting use immunity upon application of the prosecuting attorney, the accused, or upon the court's own motion.

If the court is considering whether to grant a defense witness use immunity over the opposition of the prosecution, *Belanger* provides the following guidance to district courts:

district courts should perform a balancing test which places the initial burden on the accused. The defendant must show that the proffered testimony is admissible, relevant and material to the defense and that without it, his or her ability to fairly present a defense will suffer to a significant degree. If the defendant meets this initial burden, the district court must then balance the defendant's need for the testimony against the government's interest in opposing immunity. A court cannot determine whether a judicial grant of use immunity is necessary "without assessing the implications upon the Executive Branch." *Turkish*, 623 F.2d at 776. In opposing immunity, the State must demonstrate a persuasive reason that immunity would harm a significant governmental interest. If the State fails to meet this burden, and the defendant has already met his burden, the court may then exercise its informed discretion to grant use immunity which our appellate courts would review for abuse of discretion.

Belanger, 2009-NMSC-025, ¶ 38.

[As amended by Supreme Court Order No. 10-8300-028, effective December 3, 2010.]

ANNOTATIONS

The 2014 amendment, approved by Supreme Court Order No. 14-8300-017, effective December 31, 2014, changed the reference in Paragraph C from "11-412" to "11-413".

The 2010 amendment, approved by Supreme Court Order No. 10-8300-028, effective December 3, 2010, in the title of the rule, added "use"; in Paragraph A, in the first sentence, after "official proceeding is or may be held may", deleted "upon the written application of the prosecuting attorney", and added the last sentence; in Paragraph B, in the introductory sentence, after "if it finds", added "the following"; and added Paragraph C.

Cross references. — For statute on witness immunity, *see* Section 31-6-15 NMSA 1978.

For rule on use of evidence obtained under immunity order, *see* Rule 11-412 NMRA.

Witness use immunity and transactional immunity distinguished. — Transactional immunity involves a promise by prosecutors that a witness will not be prosecuted for crimes related to the events about which the witness testifies. Transaction immunity affords the witness immunity related to the entire transaction, not just the witness's testimony. Transactional immunity is a legislative prerogative defined by statute. Under a grant of use immunity, the prosecution promises only to refrain from using the testimony in any future prosecution, as well as any evidence derived from the protected testimony. Under use immunity, the prosecution may proceed with charges against the

witness so long as it does not use or rely on the witness's testimony or its fruits. The grant of use immunity is a power that the Supreme Court defines in the exercise of its inherent judicial authority. *State v. Belanger*, 2009-NMSC-025, 146 N.M. 357, 210 P.3d 783, *rev'g* 2007-NMCA-143, 142 N.M. 751, 170 P.3d 530 and *overruling State v. Cheadle*, 1983-NMSC-093, 101 N.M. 282, 681 P.2d 708; *State v. Baca*, 1997-NMSC-045, 124 N.M. 55, 946 P.2d 1066; and *State v. Sanchez*, 1982-NMCA-105, 98 N.M. 428, 649 P.2d 496.

Authority to grant witness use immunity. — New Mexico courts have the authority to grant a witness use immunity under certain limited circumstances. *State v. Belanger*, 2009-NMSC-025, 146 N.M. 357, 210 P.3d 783, *rev'g* 2007-NMCA-143, 142 N.M. 751, 170 P.3d 530 and *overruling State v. Cheadle*, 1983-NMSC-093, 101 N.M. 282, 681 P.2d 708; *State v. Baca*, 1997-NMSC-045, 124 N.M. 55, 946 P.2d 1066; *State v. Sanchez*, 1982-NMCA-105, 98 N.M. 428, 649 P.2d 496.

Rule modified by the Supreme Court. — Paragraph A of Rule 5-116 NMRA is amended to delete the words "upon the written application of the prosecuting attorney". The amendment applies prospectively and to all pending cases that have not yet gone to trial as of May 12, 2009. *State v. Belanger*, 2009-NMSC-025, 146 N.M. 357, 210 P.3d 783, *rev'g* 2007-NMCA-143, 142 N.M. 751, 170 P.3d 530 and *overruling State v. Cheadle*, 1983-NMSC-093, 101 N.M. 282, 681 P.2d 708; *State v. Baca*, 1997-NMSC-045, 124 N.M. 55, 946 P.2d 1066; *State v. Sanchez*, 1982-NMCA-105, 98 N.M. 428, 649 P.2d 496.

Guidelines for granting witness use immunity. — Before granting use immunity to a defense witness over the opposition of the prosecution, the district court should perform a balancing test which places the initial burden on the defendant. The defendant must show that the proffered testimony is admissible, relevant and material to the defense and that without it, his or her ability to fairly present a defense will suffer to a significant degree. If the defendant meets this initial burden, the district court must then balance the defendant's need for the testimony against the government's interest in opposing immunity. In opposing immunity, the state must demonstrate a persuasive reason that immunity would harm a significant government interest. If the state fails to meet this burden, and the defendant has already met his or her burden, the court may then exercise its informed discretion to grant use immunity which appellate courts would review for abuse of discretion. *State v. Belanger*, 2009-NMSC-025, 146 N.M. 357, 210 P.3d 783, *rev'g* 2007-NMCA-143, 142 N.M. 751, 170 P.3d 530 and *overruling State v. Cheadle*, 1983-NMSC-093, 101 N.M. 282, 681 P.2d 708; *State v. Baca*, 1997-NMSC-045, 124 N.M. 55, 946 P.2d 1066; *State v. Sanchez*, 1982-NMCA-105, 98 N.M. 428, 649 P.2d 496.

Failure to meet defendant's burden of proof. — Where defendant and defendant's co-defendant shot and killed the victim; defendant called the co-defendant as a witness; the co-defendant told the district court that the co-defendant would assert the right against self-incrimination, but that the co-defendant would testify if the co-defendant was granted use immunity; defendant argued that because the co-defendant was an

eyewitness, the co-defendant was important to defendant's defense; and defendant never made a proffer of the testimony the co-defendant would give or addressed how defendant's defense would be prejudiced without the co-defendant's testimony, the district court did not abuse its discretion in denying the co-defendant use immunity. *State v. Ortega*, 2014-NMSC-017.

Prosecution's grounds for refusing witness use immunity not valid. — Where the defendant was charged with criminal sexual penetration of a minor; there were no witnesses to the alleged incident and no physical evidence implicating the defendant; the defendant wanted to call a witness against whom the victim had leveled similar sexually related charges just weeks before the incident involving the defendant; the state dismissed the charges against the witness and had no intention of bringing new charges against the witness; the state refused to request use immunity for the witness on the grounds that the witness had no valid Fifth Amendment right because the case against the witness had been dismissed and that the grant of use immunity would encourage others to seek immunity, the state's explanation for refusing to grant use immunity was not justified and the witness's testimony might have been material to the defendant's theory of the case. *State v. Belanger*, 2009-NMSC-025, 146 N.M. 357, 210 P.3d 783, *rev'g* 2007-NMCA-143, 142 N.M. 751, 170 P.3d 530 and *overruling State v. Cheadle*, 1983-NMSC-093, 101 N.M. 282, 681 P.2d 708; *State v. Baca*, 1997-NMSC-045, 124 N.M. 55, 946 P.2d 1066; *State v. Sanchez*, 1982-NMCA-105, 98 N.M. 428, 649 P.2d 496.

Compliance with the procedural requirements of this rule is mandatory. *State v. Sanchez*, 1982-NMCA-105, 98 N.M. 428, 649 P.2d 496.

A defendant has no sixth amendment right to demand that any witness he chooses be immunized, and the prosecution's refusal to grant immunity to a defense witness who would allegedly offer exculpatory testimony to a defendant did not amount to a denial of due process or a violation of sixth amendment rights. *State v. Sanchez*, 1982-NMCA-105, 98 N.M. 428, 649 P.2d 496; *State v. Baca*, 1997-NMSC-045, 124 N.M. 55, 946 P.2d 1066.

Generally as to privilege against self-incrimination. — Unless protected by an authorized immunity order, no witness can be required to give testimony which either directly or indirectly tends to incriminate him or to form a link in a chain of circumstances that might result in punishment for crime. *Campos v. State*, 1978-NMSC-050, 91 N.M. 745, 580 P.2d 966.

Self-incriminating testimony from defendant compelled to testify cannot be admitted in later proceedings. — A defendant who is compelled to testify about criminal activities or prior convictions that might otherwise be self-incriminating in a later proceeding may not have such evidence admitted against him in those later proceedings. The protection of the defendant's fifth amendment rights in this manner fully compensates for any failure by the state or the trial court to comply with this rule. *State v. Urioste*, 1980-NMCA-104, 95 N.M. 712, 625 P.2d 1229.

Absent constitutional or statutory enablement, neither district attorney nor district court may grant immunity from a prosecution to which incriminating answers might expose a witness. *Campos v. State*, 1978-NMSC-050, 91 N.M. 745, 580 P.2d 966.

Purpose of rule. — This rule was promulgated and approved by the supreme court to provide a method by which a grant of immunity could be secured and the constitutional prescription against self-incrimination protected. *Campos v. State*, 1978-NMSC-050, 91 N.M. 745, 580 P.2d 966 (decided prior to 1980 amendment).

This rule and Rule 11-412, which grant the judicial branch the authority to immunize a witness, strike a permissible balance between the state's interest in prosecuting crime and private rights under the Fifth Amendment. *State v. Brown*, 1998-NMSC-037, 126 N.M. 338, 969 P.2d 313.

Validity of rule. — This rule is valid. *State v. Gabaldon*, 1978-NMCA-101, 92 N.M. 230, 585 P.2d 1352, cert. denied, 92 N.M. 260, 586 P.2d 1089.

Although the validity of Subdivision (a) (*see now* Paragraph A) is questionable because immunity from prosecution is qualitatively different from the privilege not to testify and the granting of immunity is a legislative function, nevertheless the court of appeals has no authority to set aside a rule adopted by the New Mexico Supreme Court. *State v. Thoreen*, 1978-NMCA-024, 91 N.M. 624, 578 P.2d 325, cert. denied, 91 N.M. 610, 577 P.2d 1256 (decided prior to 1980 amendment).

Requisites of application and order. — This rule requires an application (held to mean "written application") by the district attorney and an order (held to mean "written order") by the trial court ordering the person to testify; the order must also contain the specific condition that the state shall forego the prosecution of the person for criminal conduct about which he is questioned and testifies. *Campos v. State*, 1978-NMSC-050, 91 N.M. 745, 580 P.2d 966 (decided prior to 1980 amendment).

No authority to demand immunity for witness by the defense in New Mexico. *State v. Cheadle*, 1983-NMSC-093, 101 N.M. 282, 681 P.2d 708, cert. denied, 466 U.S. 945, 104 S. Ct. 1930, 80 L. Ed. 2d 475 (1984).

Use immunity under New Mexico law is available only at request of the state and there is no statutory or judicial provision for a defendant's invocation of use immunity for a witness; defendant suffered no prejudice necessary to find ineffective assistance of counsel as result of failure of his attorney to find use immunity statute where defendant did not demonstrate that prosecution would have granted witness immunity, thereby permitting witness to testify even if defense attorney had discovered the statute. *McGee v. Crist*, 739 F.2d 505 (10th Cir. 1984).

Limitations to derivative use immunity. — Section 31-6-15 NMSA 1978, and its implementing rules, Rule 11-412 NMRA and this rule, allow the government to compel a

witness to testify and then prosecute the witness for the crimes mentioned in the compelled testimony, as long as neither the testimony itself nor any information directly or indirectly derived from the testimony is used in the prosecution. However, it is not enough for the prosecutor to simply assert that all evidence to be used at trial was obtained prior to the defendant's immunized testimony; instead the state should have included testimony from key witnesses, along with testimony from the prosecutor and the investigators, that the witnesses had not had access or otherwise been exposed to the defendant's immunized testimony. *State v. Vallejos*, 1994-NMSC-107, 118 N.M. 572, 883 P.2d 1269.

No due process violation where defendant ignored opportunity to explain request. — Where the trial court suggested an in camera hearing and the prosecutor suggested an in camera hearing with the prosecutor excluded, but the defendant did not respond to these suggestions and did not take advantage of the opportunity to explain to the court how a potential witness' testimony might be exculpatory and grant of immunity thus might be in the public interest, the defendant was in no position to complain that due process was violated. *State v. Thoreen*, 1978-NMCA-024, 91 N.M. 624, 578 P.2d 325, cert. denied, 91 N.M. 610, 577 P.2d 1256 (decided prior to 1980 amendment).

Defective grant of immunity. — Defendant failed to show any prejudice resulting from witness's exculpatory testimony given under a defective grant of immunity. *State v. Summerall*, 1986-NMSC-080, 105 N.M. 82, 728 P.2d 833.

Rule does not preclude enforcement of other agreements. — Although this rule applies only to immunity from prosecution, this does not mean that other agreements are not to be enforced. Agreements for reduced charges have been enforced within the dictates of due process; that is, on constitutional grounds. *State v. Gabaldon*, 1978-NMCA-101, 92 N.M. 230, 585 P.2d 1352, cert. denied, 92 N.M. 260, 586 P.2d 1089.

Agreement for reduced sentence if conviction occurs is enforceable agreement on due process grounds and is a type of agreement not covered and not prohibited by this rule. *State v. Gabaldon*, 1978-NMCA-101, 92 N.M. 230, 585 P.2d 1352, cert. denied, 92 N.M. 260, 586 P.2d 1089.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 157 to 167.

Right of immune jury witness to obtain access to government affidavits and other supporting materials in order to challenge legality of court-ordered wiretap or electronic surveillance which provided basis for questions asked in grand jury proceedings, 60 A.L.R. Fed. 706.

22 C.J.S. Criminal Law § 78 et seq.

5-117. Record; exhibits.

A. **Record of proceedings.** A verbatim record shall be made of all court proceedings, including, but not limited to:

(1) the trial;

(2) arraignment;

(3) release proceedings;

(4) motion hearings;

(5) plea agreement proceedings;

(6) sentencing and habitual offender proceedings;

(7) habeas corpus proceedings; and

(8) extradition proceedings.

B. **Receipt.** The court reporter or tape monitor shall deliver to the clerk of the court a copy of the record of proceedings, all tendered exhibits and a receipt listing the exhibits. Upon receipt of the record and exhibits, the clerk shall sign the receipt and file a copy in the court file.

C. **Return.** Unless otherwise ordered by the court, after notice to the parties or their attorneys in the manner set forth in this rule, all exhibits delivered to the clerk may be returned to the attorney or party tendering the exhibit as evidence.

D. **Notice of disposition of exhibits.** Prior to returning the exhibits to the attorney or party tendering the exhibit as evidence, the clerk shall give written notice to all parties or their attorneys that, unless otherwise ordered by the court, the exhibits in custody of the clerk will be returned to the attorney or party tendering the exhibit or otherwise disposed of after the expiration of sixty (60) days from the date of mailing of such notice. The clerk shall give the written notice required by this paragraph:

(1) within ninety (90) days after final disposition of the case, or

(2) if there is an appeal and a new trial has not been ordered, within thirty (30) days after the filing of the mandate in the district court.

The clerk shall file a notice of the final disposition of the evidence.

E. **Preservation of exhibits.** Upon motion, the court may order any exhibit preserved by the court or disposed of in the manner ordered by the court.

F. **Preservation of biological and physical evidence.** The court shall preserve all evidence that is secured in relation to an investigation or prosecution of a crime and that could be subjected to DNA testing, for not less than the period of time that a person remains subject to incarceration or supervision in connection with the investigation or prosecution.

G. **Disposal of biological and physical evidence.** The court may dispose of evidence before the expiration of the time period set forth in Paragraph F of this rule if:

(1) no other law, regulation or court order requires that the evidence be preserved;

(2) the evidence must be returned to its rightful owner;

(3) preservation of the evidence is impractical due to the size, bulk, or physical characteristics of the evidence; and

(4) the state takes reasonable measures to remove and preserve portions of the evidence sufficient to permit future DNA testing.

H. **Compliance.** The court may comply with the requirements of Paragraphs F and G of this rule, by returning the evidence described in those paragraphs to the appropriate representative of the State.

[Adopted, effective August 1, 1989; as amended, effective November 15, 2000; as amended by Supreme Court Order No. 15-8300-010, effective for all cases pending or filed on or after December 31, 2015.]

Committee commentary. — *See* NMSA 1978, Section 31-1A-2.

[Adopted by Supreme Court Order No. 15-8300-010, effective for all cases pending or filed on or after December 31, 2015.]

ANNOTATIONS

The 2015 amendment, approved by Supreme Court Order No. 15-8300-010, effective December 31, 2015, required the clerk to file a notice of final disposition of exhibits, provided for the preservation and disposal of biological and physical evidence, and added the committee commentary; in Paragraph D, added the last sentence; and added new Paragraphs F, G and H.

5-118. Form of papers.

Except exhibits and papers filed by electronic transmission pursuant to Rule 5-103.2 of these rules, all pleadings and papers filed in the district court shall be clearly legible, shall be on good quality white paper eight and one-half by eleven (8½ x 11) inches in

size, with a left margin of (1) inch, a right margin of one (1) inch, and top and bottom margins of one and one-half (1½) inches; with consecutive page numbers at the bottom; and stapled at the upper left hand corner; and, except for a cover page, shall be typed or printed using pica (10 pitch) type style or a twelve (12) point typeface. A space of at least two and one-half (2½) by two and one-half (2½) inches for the clerk's recording stamp shall be left in the upper right-hand corner of the first page of each pleading. The contents, except quotations and footnotes, shall be double spaced. Exhibits which are copies of original documents may be reproduced from originals by any duplicating or copying process which produces a clear black image on white paper. The size of any exhibits shall be their original size or any smaller size not less than eight and one-half by eleven (8½ x 11) inches.

[Approved, effective January 1, 1994; as amended effective, December 1, 1998.]

ANNOTATIONS

The 1998 amendment, effective December 1, 1998, rewrote the first sentence to conform to Rule 1-100 NMRA as amended effective January 1, 1998 and inserted "and footnotes" in the third sentence.

5-119. Witnesses.

Rule 5-511 NMRA shall apply to and govern the compelling of attendance of witnesses in criminal cases. Out-of-state witnesses may be subpoenaed in the manner provided by the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings, Sections 31-8-1 to 31-8-6 NMSA 1978. Grand jury subpoenas may be issued pursuant to Sections 31-6-12 and 31-6-13 NMSA 1978.

[Rule 48; Rule 5-613 SCRA; as recompiled and amended, effective December 1, 1998; August 28, 2001.]

ANNOTATIONS

The 2001 amendment, effective August 28, 2001 substituted "Rule 5-511 NMRA" for "The Rules of Civil Procedure for the District Courts, so far as they are applicable and not in conflict with these rules" at the beginning of the rule and withdrew the committee commentary.

The 1998 amendment, effective December 1, 1998, substituted "Subpoena" for "Conduct of trial" in the catchline; deleted the former Paragraph A designation and the heading, which read: "Attendance of witnesses"; added the last two sentences in Paragraph A; and deleted former Paragraphs B and C, relating to oath of witnesses and evidence, respectively.

Cross references. — For subpoenas in civil proceedings, *see* Rule 1-045 NMRA.

Trial court properly quashed subpoena issued one day before trial. *Udall ex rel. State v. Montoya*, 1998-NMCA-149, 126 N.M. 273, 968 P.2d 784, cert. denied, 126 N.M. 532, 972 P.2d 351.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Right of indigent defendant under Rule 17(b) of the Federal Rules of Criminal Procedure to appearance of witnesses necessary to adequate defense, 42 A.L.R. Fed. 233.

Requirements, under Rule 45(c) of Federal Rules of Civil Procedure and Rule 17(d) of Federal Rules of Criminal Procedure, relating to service of subpoena and tender of witness fees and mileage allowance, 77 A.L.R. Fed. 863.

5-120. Motions.

A. **Motions and other papers.** An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

B. **Requirement of written motion.** All motions, except motions made during trial, or as may be permitted by the court, shall be in writing and shall state with particularity the grounds and the relief sought.

C. **Unopposed motions.** The moving party shall determine whether or not a motion will be opposed. If the motion will not be opposed, an order initialed by opposing counsel shall accompany the motion.

D. **Opposed motions.** The motion shall recite that concurrence of opposing counsel was requested or shall specify why no such request was made. The movant shall not assume that the nature of the motion obviates the need for concurrence from opposing counsel unless the motion is a:

(1) motion to dismiss;

(2) motions regarding bonds and conditions of release;

(3) motion for new trial;

(4) motion for judgment notwithstanding the verdict;

(5) motion to suppress evidence; or

(6) motion to modify a sentence pursuant to Rule 5-801.

Notwithstanding the provisions of any other rule, counsel may file with any opposed motion a brief or supporting points with citations or authorities. Affidavits, statements, depositions or other documentary evidence in support of the motion may be filed with the motion.

E. **Response.** Unless otherwise specifically provided in these rules, a written response shall be filed within fifteen (15) days after service of the motion. Affidavits, statements, depositions or other documentary evidence in support of the response may be filed with the response. A motion to reduce bond or modify conditions of release shall not require a written response prior to hearing.

F. **Reply brief.** Any reply brief shall be filed within fifteen (15) days after service of any written response.

[Approved, effective May 3, 1999.]

ANNOTATIONS

Cross references. — For motions to suppress, *see* Rule 5-212 NMRA.

For pre-trial motions, *see* Rule 5-601 NMRA.

For motion for new trial, *see* Rule 5-614 NMRA.

5-121. Orders; preparation and entry.

A. **Preparation of orders.** Upon announcement of the court's decision in any matter the court shall:

(1) allow counsel a reasonable time, fixed by the court, within which to submit the requested form of order or judgment;

(2) designate the counsel who shall be responsible for preparation of the order or judgment and fix the time within which it is to be submitted; or

(3) prepare its own form of order or judgment.

B. **Trial without a jury.** In a case tried without a jury the court shall make a general finding and may in addition, on request made before the general finding, find the facts specially. Such findings may be oral. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact appear therein.

C. **Time limit.** Notwithstanding Section 39-1-1 NMSA 1978, if no satisfactory form of order or judgment has been submitted within the time fixed by the court, the court shall take such steps as it may deem proper to have an appropriate form of order or judgment entered promptly.

D. **Examination by counsel.** In all events, before the court signs any order or judgment, counsel shall be afforded a reasonable opportunity to examine the same and make suggestions or objections.

E. **Entry by court.** The court must enter the judgment and order within a reasonable time after submission.

F. **Filing.** Upon the signing of any order or judgment it shall be filed promptly in the clerk's office and such filing constitutes entry thereof.

[Adopted, effective December 1, 1998; as amended by Supreme Court Order No. 09-8300-006, effective May 6, 2009.]

Committee commentary for 2009 amendments. — The 2009 amendment to Paragraph E of this rule supersedes the portion of Section 39-1-1 NMSA 1978 providing that many post-judgment motions are deemed automatically denied if not granted within thirty (30) days of filing. The 2009 amendment to Rule 5-121 NMRA and the corresponding amendments to Paragraph C of Rule 5-614, Paragraph B of Rule 5-801 and Paragraph H of Rule 5-802 NMRA are intended to make clear that the automatic denial provision in Section 39-1-1 NMSA 1978 has no application in cases subject to the Rules of Criminal Procedure for the District Courts. *See* 2006 committee commentary to Rule 1-054.1 NMRA discussing the similar elimination of deemed denied provisions from the Rules of Civil Procedure for the District Courts. As a result of these changes, all post-conviction motions are subject to the same requirement that the court shall enter judgments or orders promptly in accordance with Paragraph E of this rule.

[As amended by Supreme Court Order No. 09-8300-006, effective May 6, 2009.]

ANNOTATIONS

The 2009 amendment, approved by Supreme Court Order No. 09-8300-006, effective May 6, 2009, in Paragraph C, at the beginning of the sentence, added "Notwithstanding Section 39-1-1 NMSA 1978".

5-122. Court Interpreters.

A. **Scope and definitions.** This rule applies to all criminal proceedings filed in the district court. The following definitions apply to this rule:

(1) "case participant" means a party, witness, or other person required or permitted to participate in a proceeding governed by these rules;

(2) "interpretation" means the transmission of a spoken or signed message from one language to another;

(3) "transcription" means the interpretation of an audio, video, or audio-video recording, which includes but is not limited to 911 calls, wire taps, and voice mail messages, that is memorialized in a written transcript for use in a court proceeding;

(4) "translation" means the transmission of a written message from one language to another;

(5) "court interpreter" means a person who provides interpretation or translation services for a case participant;

(6) "certified court interpreter" means a court interpreter who is certified by and listed on the New Mexico Directory of Certified Court Interpreters maintained by the Administrative Office of the Courts or who is acknowledged in writing by the Administrative Office of the Courts as a court interpreter certified by another jurisdiction that is a member of the Consortium for Language Access in the Courts;

(7) "justice system interpreter" means a court interpreter who is listed on the Registry of Justice System Interpreters maintained by the Administrative Office of the Courts;

(8) "language access specialist" means a bilingual employee of the New Mexico Judiciary who is recognized in writing by the Administrative Office of the Courts as having successfully completed the New Mexico Center for Language Access Language Access Specialist Certification program and is in compliance with the related continuing education requirements;

(9) "non-certified court interpreter" means a justice system interpreter, language access specialist, or other court interpreter who is not certified by and listed on the New Mexico Directory of Certified Court Interpreters maintained by the Administrative Office of the Courts;

(10) "sight translation" means the spoken or signed translation of a written document; and

(11) "written translation" means the translation of a written document from one language into a written document in another language.

B. **Identifying a need for interpretation.**

(1) The need for a court interpreter exists whenever a case participant is unable to hear, speak, or otherwise communicate in the English language to the extent reasonably necessary to fully participate in the proceeding. The need for a court interpreter may be identified by the court or by a case participant. A court interpreter shall be appointed if one is requested.

(2) The court is responsible for making arrangements for a court interpreter for a juror who needs one.

(3) A party is responsible for notifying the court of the need for a court interpreter as follows:

(a) if the defendant needs a court interpreter, defense counsel shall notify the court at arraignment or within ten (10) days after waiver of arraignment; and

(b) if a court interpreter is needed for a party's witness, the party shall notify the court in writing substantially in a form approved by the Supreme Court upon service of a notice of hearing and shall indicate whether the party anticipates the proceeding will last more than two (2) hours.

(4) If a party fails to timely notify the court of a need for a court interpreter, the court may assess costs against that party for any delay caused by the need to obtain a court interpreter unless that party establishes good cause for the delay.

(5) Notwithstanding any failure of a party, juror, or other case participant to notify the court of a need for a court interpreter, the court shall appoint a court interpreter for a case participant whenever it becomes apparent from the court's own observations or from disclosures by any other person that a case participant is unable to hear, speak, or otherwise communicate in the English language to the extent reasonably necessary to fully participate in the proceeding.

C. **Appointment of court interpreters.**

(1) When a need for a court interpreter is identified under Paragraph B of this rule, the court shall appoint a certified court interpreter except as otherwise provided in this paragraph.

(2) For cases exclusively involving charges under the Motor Vehicle Code except for driving while under the influence of intoxicating liquor or drugs, reckless driving, or driving while license suspended or revoked, the court may appoint a language access specialist without complying with Subparagraph (5) of this paragraph.

(3) Upon approval of the court, the parties may stipulate to the use of a non-certified court interpreter for non-plea and non-evidentiary hearings without complying with the waiver requirements in Paragraph D of this rule.

(4) To avoid the appearance of collusion, favoritism, or exclusion of English speakers from the process, the judge shall not act as a court interpreter for the proceeding or regularly speak in a language other than English during the proceeding. A party's attorney shall not act as a court interpreter for the proceeding, except that a party and the party's attorney may engage in confidential attorney-client communications in a language other than English.

(5) If the court has made diligent, good faith efforts to obtain a certified court interpreter and one is not reasonably available, after consulting with the Administrative Office of the Courts, the court may appoint a justice system interpreter subject to the restrictions in Sub-subparagraphs (d) and (e) of this subparagraph. If the court has made diligent, good faith efforts to obtain a justice system interpreter and one is not reasonably available, after consulting with the Administrative Office of the Courts, the court may appoint a language access specialist or less qualified non-certified court interpreter only after the following requirements are met:

(a) the court provides notice to the parties substantially in a form approved by the Supreme Court that the court has contacted the Administrative Office of the Courts for assistance in locating a certified court interpreter or justice system interpreter but none is reasonably available and has concluded after evaluating the totality of the circumstances including the nature of the court proceeding and the potential penalty or consequences flowing from the proceeding that an accurate and complete interpretation of the proceeding can be accomplished with a less qualified non-certified court interpreter;

(b) the court finds on the record that the proposed court interpreter has adequate language skills, knowledge of interpretation techniques, and familiarity with interpretation in a court setting to provide an accurate and complete interpretation for the proceeding;

(c) the court finds on the record that the proposed court interpreter has read, understands, and agrees to abide by the New Mexico Court Interpreters Code of Professional Responsibility set forth in Rule 23-111 NMRA;

(d) with regard to a non-certified signed interpreter, in no event shall the court appoint a non-certified signed language interpreter who does not, at a minimum, possess both a community license from the New Mexico Regulations and Licensing Department and a generalist interpreting certification from the Registry of Interpreters for the Deaf; and

(e) a non-certified court interpreter shall not be used for a juror.

D. **Waiver of the right to a court interpreter.** Any case participant identified as needing a court interpreter under Paragraph B of this rule may at any point in the case waive the services of a court interpreter with approval of the court only if the court explains in open court through a court interpreter the nature and effect of the waiver and finds on the record that the waiver is knowingly, voluntarily, and intelligently made. If the case participant is the defendant in the criminal proceeding, the waiver shall be in writing and the court shall further determine that the defendant has consulted with counsel regarding the decision to waive the right to a court interpreter. The waiver may be limited to particular proceedings in the case or for the entire case. With the approval of the court, the case participant may retract the waiver and request a court interpreter at any point in the proceedings.

E. **Procedures for using court interpreters.** The following procedures shall apply to the use of court interpreters:

(1) **Qualifying the court interpreter.** Before appointing a court interpreter to provide interpretation services to a case participant, the court shall qualify the court interpreter in accordance with Rule 11-604 NMRA of the Rules of Evidence. The court may use the questions in Form 9-109 NMRA to assess the qualifications of the proposed court interpreter. A certified court interpreter is presumed competent, but the presumption is rebuttable. Before qualifying a justice system interpreter or other less qualified non-certified court interpreter, the court shall inquire on the record into the following matters:

(a) whether the proposed court interpreter has assessed the language skills and needs of the case participant in need of interpretation services; and

(b) whether the proposed court interpreter has any potential conflicts of interest.

(2) **Instructions regarding the role of the court interpreter during trial.** Before the court interpreter begins interpreting for a party during trial, the court shall instruct the parties and others present in the courtroom regarding the role of the court interpreter. If the court interpreter will provide interpretation services for a juror, the court also shall instruct the jury prior to deliberations in accordance with UJI 14-6022 NMRA.

(3) **Oath of the court interpreter.** Before a court interpreter begins interpreting, the court shall administer an oath to the court interpreter as required by Section 38-10-8 NMSA 1978. If a court interpreter will provide interpretation services for a juror, the court also shall administer an oath to the court interpreter prior to deliberations in accordance with UJI 14-6021 NMRA. All oaths required under this subparagraph shall be given on the record in open court.

(4) **Objections to the qualifications or performance of a court interpreter.** A party shall raise any objections to the qualifications of a court interpreter when the court is qualifying a court interpreter as required by Subparagraph (1) of this paragraph or as soon as the party learns of any information calling into question the qualifications of the court interpreter. A party shall raise any objections to court interpreter error at the time of the alleged interpretation error or as soon as the party has reason to believe that an interpretation error occurred that affected the outcome of the proceeding.

(5) **Record of the court interpretation.** Upon the request of a party, the court may make and maintain an audio recording of all spoken language court interpretations or a video recording of all signed language interpretations. Unless the parties agree otherwise, the party requesting the recording shall pay for it. Any recordings permitted by this subparagraph shall be made and maintained in the same manner as other audio or video recordings of court proceedings. This subparagraph shall not apply to court interpretations during jury discussions and deliberations.

(6) **Court interpretation for multiple case participants.** When more than one case participant needs a court interpreter for the same spoken language, the court may appoint the same court interpreter to provide interpretation services for those case participants. When more than one case participant needs court interpretation for a signed language, separate court interpreters shall be appointed for each case participant. If a party needs a separate court interpreter for attorney-client communications during a court proceeding, prior to the commencement of the court proceeding, the party shall obtain a court interpreter of the party's own choosing and at the party's own expense. If the party is a criminal defendant represented by court-appointed counsel, a court interpreter for attorney-client communications may be paid as allowed under the Indigent Defense Act and Public Defender Act.

(7) **Use of team court interpreters.** To avoid court interpreter fatigue and promote an accurate and complete court interpretation, when the court anticipates that a court proceeding requiring a court interpreter for a spoken language will last more than two (2) hours the court shall appoint a team of two (2) court interpreters to provide interpretation services for each spoken language. For court proceedings lasting less than two (2) hours, the court may appoint one (1) court interpreter but the court shall allow the court interpreter to take breaks approximately every thirty (30) minutes. The court shall appoint a team of two (2) court interpreters for each case participant who needs a signed language court interpreter when the court proceeding lasts more than one (1) hour. If a team of two (2) court interpreters are required under this subparagraph, the court may nevertheless proceed with only one (1) court interpreter if the following conditions are met:

(a) two (2) qualified court interpreters could not be obtained by the court;

(b) the court states on the record that it contacted the Administrative Office of the Courts for assistance in locating two (2) qualified court interpreters but two (2) could not be found; and

(c) the court allows the court interpreter to take a five (5)-minute break approximately every thirty (30) minutes.

(8) **Use of court interpreters for translations and transcriptions.** If a court interpreter is required to provide a sight translation, written translation, or transcription for use in a court proceeding, the court shall allow the court interpreter a reasonable amount of time to prepare an accurate and complete translation or transcription and, if necessary, shall continue the proceeding to allow for adequate time for a translation or transcription. Whenever possible, the court shall provide the court interpreter with advance notice of the need for a translation or transcription before the court proceeding begins and, if possible, the item to be translated or transcribed.

(9) **Modes of court interpretation.** The court shall consult with the court interpreter and case participants regarding the mode of interpretation to be used to ensure a complete and accurate interpretation.

(10) **Remote spoken language interpretation.** Court interpreters may be appointed to serve remotely by audio or audio-video means approved by the Administrative Office of the Courts for any proceeding when a court interpreter is otherwise not reasonably available for in-person attendance in the courtroom. Electronic equipment used during the hearing shall ensure that all case participants hear all statements made by all case participants in the proceeding. If electronic equipment is not available for simultaneous interpreting, the hearing shall be conducted to allow for consecutive interpreting of each sentence. The electronic equipment that is used must permit attorney-client communications to be interpreted confidentially.

(11) **Court interpretation equipment.** The court shall consult and coordinate with the court interpreter regarding the use of any equipment needed to facilitate the interpretation.

(12) **Removal of the court interpreter.** The court may remove a court interpreter for any of the following reasons:

(a) inability to adequately interpret the proceedings;

(b) knowingly making a false interpretation;

(c) knowingly disclosing confidential or privileged information obtained while serving as a court interpreter;

(d) knowingly failing to disclose a conflict of interest that impairs the ability to provide complete and accurate interpretation;

(e) failing to appear as scheduled without good cause;

(f) misrepresenting the court interpreter's qualifications or credentials;

(g) acting as an advocate; or

(h) failing to follow other standards prescribed by law and the New Mexico Court Interpreter's Code of Professional Responsibility.

(13) **Cancellation of request for a court interpreter.** A party shall advise the court in writing substantially in a form approved by the Supreme Court as soon as it becomes apparent that a court interpreter is no longer needed for the party or a witness to be called by the party. The failure to timely notify the court that a court interpreter is no longer needed for a proceeding is grounds for the court to require the party to pay the costs incurred for securing the court interpreter.

F. **Payment of costs for the court interpreter.** Unless otherwise provided in this rule, and except for court interpretation services provided by an employee of the court as part of the employee's normal work duties, all costs for providing court interpretation

services by a court interpreter shall be paid from the Jury and Witness Fee Fund in amounts consistent with guidelines issued by the Administrative Office of the Courts.

[Adopted by Supreme Court Order No. 12-8300-022, effective for all cases filed or pending on or after January 1, 2013.]

Committee commentary. — This rule governs the procedure for the use of court interpreters in court proceedings. In addition to this rule, the New Mexico Judiciary Court Interpreter Standards of Practice and Payment Policies issued by the Administrative Office of the Courts (the AOC Standards), also provide guidance to the courts on the certification, use, and payment of court interpreters. But in the event of any conflicts between the AOC Standards and this rule, the rule controls.

The rule requires the use of certified court interpreters whenever possible but permits the use of less qualified interpreters in some situations. For purposes of this rule, a certified court interpreter may not be reasonably available if one cannot be located or if funds are not available to pay for one. But in all instances, before a court may use a non-certified court interpreter, the court must contact the Administrative Office of the Courts (AOC) for assistance and to confirm whether funds may in fact be available to pay for a certified court interpreter.

The rule does not attempt to set forth the criteria for determining who should be a certified court interpreter. Instead, the task of certifying court interpreters is left to the AOC. When a court interpreter is certified by the AOC, the certified court interpreter is placed on the New Mexico Directory of Certified Court Interpreters, which is maintained by the AOC and can be viewed on its web site. A certified court interpreter is also issued an identification card by the AOC, which can be used to demonstrate to the court that the cardholder is a certified court interpreter.

In collaboration with the New Mexico Center for Language Access (NMCLA), the AOC is also implementing a new program for approving individuals to act as justice system interpreters and language access specialists who are specially trained to provide many interpretation services in the courts that do not require a certified court interpreter. Individuals who successfully complete the Justice System Interpreting course of study offered by the NMCLA are approved by the AOC to serve as justice system interpreters and will be placed on the AOC Registry of Justice System Interpreters. Those who are approved as justice system interpreters will also be issued identification cards that may be presented in court as proof of their qualifications to act as a justice system interpreter. Under this rule, if a certified court interpreter is not reasonably available, the court should first attempt to appoint a justice system interpreter to provide court interpretation services. If a justice system interpreter is not reasonably available, the court must contact the AOC for assistance before appointing a non-certified court interpreter for a court proceeding.

In addition to setting forth the procedures and priorities for the appointment of court interpreters, this rule also provides procedures for the use of court interpreters within

the courtroom. In general, the court is responsible for determining whether a juror needs a court interpreter, and the parties are responsible for notifying the court if they or their witnesses will need a court interpreter. But in most cases, the court will be responsible for paying for the cost of court interpretation services, regardless of who needs them. However, the court is not responsible for providing court interpretation services for confidential attorney-client communications during a court proceeding, nor is the court responsible for providing court interpretation services for witness interviews or pre-trial transcriptions or translations that the party intends to use for a court proceeding. When the court is responsible for paying the cost of the court interpretation services, the AOC standards control the amounts and procedures for the payment of court interpreters.

Although this rule generally applies to all court interpreters, the court should be aware that in some instances the procedures to follow will vary depending on whether a spoken or signed language court interpreter is used. Courts should also be aware that in some instances when court interpretation services are required for a deaf or hard-of-hearing individual, special care should be taken because severe hearing loss can present a complex combination of possible language and communication barriers that traditional American Sign Language/English interpreters are not trained or expected to assess. If a deaf or hard-of-hearing individual is having trouble understanding a court interpreter and there is an indication that the person needs other kinds of support, the court should request assistance from the AOC for a language assessment to determine what barriers to communication exist and to develop recommendations for solutions that will provide such individuals with meaningful access to the court system.

While this rule seeks to provide courts with comprehensive guidance for the appointment and use of court interpreters, the courts should also be aware that the AOC provides additional assistance through a full-time program director who oversees the New Mexico Judiciary's court interpreter program and who works in tandem with the Court Interpreter Advisory Committee appointed by the Supreme Court to develop policies and address problems associated with the provision of court interpreter services in the courts. Whenever a court experiences difficulties in locating a qualified court interpreter or is unsure of the proper procedure for providing court interpretation services under this rule, the court is encouraged, and sometimes required under this rule, to seek assistance from the AOC to ensure that all case participants have full access to the New Mexico state court system.

[Adopted by Supreme Court Order No. 12-8300-022, effective for all cases filed or pending on or after January 1, 2013.]

5-123. Public inspection and sealing of court records.

A. **Presumption of public access; scope of rule.** Court records are subject to public access unless sealed by order of the court or otherwise protected from disclosure under the provisions of this rule. This rule does not prescribe the manner in which the court shall provide public access to court records, electronically or otherwise. No person or entity shall knowingly file a court record that discloses material obtained from another

court record that is sealed, conditionally under seal, or subject to a pending motion to seal under the provisions of this rule.

B. **Definitions.** For purposes of this rule the following definitions apply:

(1) "court record" means all or any portion of a document, paper, exhibit, transcript, or other material filed or lodged with the court, and the register of actions and docket entries used by the court to document the activity in a case;

(2) "lodged" means a court record that is temporarily deposited with the court but not filed or made available for public access;

(3) "protected personal identifier information" means all but the last four (4) digits of a social security number, taxpayer-identification number, financial account number, or driver's license number, and all but the year of a person's date of birth;

(4) "public" means any person or entity, except the parties to the proceeding, counsel of record and their employees, and court personnel;

(5) "public access" means the inspection and copying of court records by the public; and

(6) "sealed" means a court record for which public access is limited by order of the court or as required by Paragraphs C or D of this rule.

C. **Limitations on public access.**

(1) In addition to court records protected pursuant to Paragraphs D and E of this rule, all court records in the following proceedings are confidential and shall be automatically sealed without motion or order of the court:

(a) grand jury proceedings in which a no bill has been filed under Section 31-6-5 NMSA 1978;

(b) proceedings for testing commenced under Section 24-2B-5.1 NMSA 1978;

(c) proceedings commenced upon an application for an order for wiretapping, eavesdropping or the interception of any wire or oral communication under Section 30-12-3 NMSA 1978;

(d) pre-indictment proceedings commenced under Chapter 31, Article 6 NMSA 1978 or Rule 5-302A NMRA [recompiled];

(e) proceedings commenced to remove a firearm-related disability under Section 34-9-19(D) NMSA 1978, subject to the firearm-related reporting requirements in Section 34-9-19 NMSA 1978.

The provisions of this subparagraph notwithstanding, the docket number and case type for the categories of cases listed in this paragraph shall not be sealed without a court order.

(2) In proceedings to determine competency under Chapter 31, Article 9 NMSA 1978, the following records shall be sealed automatically without order of the court:

(a) A motion for competency evaluation and responsive pleading;

(b) Any court record that contains the details of a competency, forensic, psychiatric, medical, or psychological assessment or evaluation;

(c) Any court record that includes the details of a treatment plan; and

(d) Any court record that includes an assessment of the defendant's dangerousness under Section 31-9-1.2 NMSA 1978 or an assessment of the defendant's risk under Section 31-9-1.6 NMSA 1978.

The provisions of this subparagraph notwithstanding, the register of actions and docket entries used by the court to document activity in the case shall not be sealed without a court order.

D. **Protection of personal identifier information.**

(1) The court and the parties shall avoid including protected personal identifier information in court records unless deemed necessary for the effective operation of the court's judicial function. If the court or a party deems it necessary to include protected personal identifier information in a court record, that is a non-sanctionable decision. Protected personal identifier information shall not be made available on publicly accessible court web sites. The court shall not publicly display protected personal identifier information in the courthouse. Any attorney or other person granted electronic access to court records containing protected personal identifier information shall be responsible for taking all reasonable precautions to ensure that the protected personal identifier information is not unlawfully disclosed by the attorney or other person or by anyone under the supervision of that attorney or other person. Failure to comply with the provisions of this subparagraph may subject the attorney or other person to sanctions or the initiation of disciplinary proceedings.

(2) The court clerk is not required to review documents for compliance with this paragraph and shall not refuse for filing any document that does not comply with this paragraph. The court clerk is not required to screen court records released to the public to prevent disclosure of protected personal identifier information.

(3) Any person requesting public access to court records shall provide the court with the person's name, address, and telephone number along with a government-issued form of identification or other acceptable form of identification.

E. **Motion to seal court records required.** Except as provided in Paragraphs C and D of this rule, no portion of a court record shall be sealed except by court order. Any party or member of the public may file a motion for an order sealing the court record. The motion is subject to the provisions of Rule 5-120 NMRA, and a copy of the motion shall be served on all parties who have appeared in the case in which the court record has been filed or is to be filed. Any party or member of the public may file a response to the motion to seal under Rule 5-120 NMRA. The movant shall lodge the court record with the court pursuant to Paragraph F when the motion is made, unless the court record was previously filed with the court or good cause exists for not lodging the court record pursuant to Paragraph F. Pending the court's ruling on the motion, the lodged court record will be conditionally sealed. If necessary to prevent disclosure, any motion, response or reply, and any supporting documents, shall be filed in a redacted version that will be subject to public access and lodged in a complete, unredacted version that will remain conditionally sealed pending the court's ruling on the motion. If the court denies the motion, the clerk shall return any lodged court records and shall not file them in the court file.

F. **Procedure for lodging court records.** A court record that is the subject of a motion filed under Paragraph E of this rule shall be secured in an envelope or other appropriate container by the movant and lodged with the court unless the court record was previously filed with the court or unless good cause exists for not lodging the court record. The movant shall label the envelope or container lodged with the court "CONDITIONALLY UNDER SEAL" and affix to the envelope or container a cover sheet that contains the information required under Rule 5-202 NMRA and which states that the enclosed court record is subject to a motion to seal. On receipt of a lodged court record, the clerk shall endorse the cover sheet with the date of its receipt and shall retain but not file the court record unless the court orders it filed. If the court grants an order sealing a court record, the clerk shall substitute the label provided by the movant on the envelope or container with a label prominently stating "SEALED BY ORDER OF THE COURT ON (DATE)" and shall attach a file-stamped copy of the court's order. Unless otherwise ordered by the court, the date of the court order granting the motion shall be deemed the file date of the lodged court record.

G. **Requirements for order to seal court records.**

(1) The court shall not permit a court record to be filed under seal based solely on the agreement or stipulation of the parties. The court may order that a court record be filed under seal only if the court by written order finds and states facts that establish the following:

(a) the existence of an overriding interest that overcomes the right of public access to the court record;

(b) the overriding interest supports sealing the court record;

(c) a substantial probability exists that the overriding interest will be prejudiced if the court record is not sealed;

(d) the proposed sealing is narrowly tailored; and

(e) no less restrictive means exist to achieve the overriding interest.

(2) The order shall require the sealing of only those documents, pages, or portions of a court record that contain the material that needs to be sealed. All other portions of each document or page shall be filed without limitation on public access. If necessary, the order may direct the movant to prepare a redacted version of the sealed court record that will be made available for public access.

(3) The order shall state whether the order itself, the register of actions, or individual docket entries are to be sealed.

(4) The order shall specify who is authorized to have access to the sealed court record.

(5) The order shall specify a date or event upon which it expires or shall explicitly state that the order remains in effect until further order of the court.

(6) The order shall specify any person or entity entitled to notice of any future motion to unseal the court record or modify the sealing order.

H. **Sealed court records as part of record on appeal.**

(1) Court records sealed in the magistrate, metropolitan, or municipal court that are filed in an appeal to the district court shall remain sealed in the district court. The district court judges and staff may have access to the sealed court records unless otherwise ordered by the district court. Requests to unseal such records or modify a sealing order entered in the magistrate, metropolitan, or municipal court shall be filed in the district court pursuant to Paragraph I of this rule if the case is pending on appeal.

(2) Court records sealed under the provisions of this rule that are filed in the appellate courts shall remain sealed in the appellate courts. The appellate court judges and staff may have access to the sealed court records unless otherwise ordered by the appellate court.

I. **Motion to unseal court records.**

(1) A sealed court record shall not be unsealed except by court order or pursuant to the terms of the sealing order itself. A party or member of the public may move to unseal a sealed court record. A copy of the motion to unseal is subject to the

provisions of Rule 5-120 NMRA and shall be served on all persons and entities who were identified in the sealing order pursuant to Subparagraph (6) of Paragraph G for receipt of notice. If necessary to prevent disclosure, the motion, any response or reply, and supporting documents shall be filed in a redacted version and lodged in a complete and unredacted version.

(2) In determining whether to unseal a court record, the court shall consider the matters addressed in Subparagraph (1) of Paragraph G. If the court grants the motion to unseal a court record, the order shall state whether the court record is unsealed entirely or in part. If the court's order unseals only part of the court record or unseals the court record only as to certain persons or entities, the order shall specify the particular court records that are unsealed, the particular persons or entities who may have access to the court record, or both. If, in addition to the court records in the envelope or container, the court has previously ordered the sealing order, the register of actions, or individual docket entries to be sealed, the unsealing order shall state whether those additional court records are unsealed.

J. **Failure to comply with sealing order.** Any person or entity who knowingly discloses any material obtained from a court record sealed or lodged pursuant to this rule may be held in contempt of court or subject to other sanctions as the court deems appropriate.

[Approved by Supreme Court Order No. 10-8300-007, for all court records filed on or after July 1, 2010; as amended by Supreme Court Order No. 10-8300-023 temporarily suspending Paragraph D for 90 days effective August 11, 2010; by Supreme Court Order No. 10-8300-037, extending the temporary suspension of Paragraph D for an additional 90 days, effective November 10, 2010; as amended by Supreme Court Order No. 11-8300-009, effective for all court records filed, lodged, publicly displayed in the courthouse, or posted on publicly accessible court web sites on or after February 7, 2011; as amended by Supreme Court Order No. 13-8300-016, effective for all cases pending or filed on or after December 31, 2013; as provisionally amended by Supreme Court Order No. 16-8300-003, effective for all cases pending or filed on or after May 18, 2016; approved as amended by Supreme Court Order No. 17-8300-002, effective for all cases pending or filed on or after March 31, 2017; as amended by Supreme Court Order No. 18-8300-023, effective for all cases filed on or after February 1, 2019.]

Committee commentary. — This rule recognizes the presumption that all documents filed in court are subject to public access. This rule does not address public access to other records in possession of the court that are not filed within the context of litigation pending before the court, such as personnel or administrative files. Nor does this rule address the manner in which a court must provide public access to court records.

Although most court records are subject to public access, this rule recognizes that in some instances public access to court records should be limited. However, this rule makes clear that no court record may be sealed simply by agreement of the parties to the litigation. And except as otherwise provided in this rule, public access to a court

record may not be limited without a written court order entered in accordance with the provisions of this rule. Unless otherwise ordered by the court, any limitations on the public's right to access court records do not apply to the parties to the proceeding, counsel of record and their employees, and court personnel. While employees of a lawyer or law firm who is counsel of record may have access to sealed court records, the lawyer or law firm remains responsible for the conduct of their employees in this regard.

Paragraph C of this rule recognizes that all court records within certain classes of cases should be automatically sealed without the need for a motion by the parties or court order. Most of the classes of cases identified in Paragraph C have been identified by statute as warranting confidentiality. However, this rule does not purport to cede to the legislature the final decision on whether a particular type of case or court record must be sealed. Paragraph C simply lists those classes of cases in which all court records shall be automatically sealed from the commencement of the proceedings without the need for a court order. Nonetheless, a motion to unseal some or all of the automatically sealed court records in a particular case still may be filed under Paragraph I of the rule.

For some of the classes of cases identified in Paragraph C, automatic sealing is subject to other statutory disclosure or reporting requirements. For example, under NMSA 1978, Section 34-9-19, the administrative office of the courts (AOC) is required to transmit to the federal bureau of investigation's national instant criminal background check system (NICS) information about a court order, judgment, or verdict regarding each person who has been "adjudicated as a mental defective" or "committed to a mental institution" under federal law. Automatic sealing under Paragraph C therefore does not prevent the AOC from transmitting such information to the NICS in the proceedings described in Subparagraphs C(5) and (6). A person who is the subject of the information compiled and reported by the AOC to NICS has a right to obtain and inspect that information. See NMSA 1978, § 34-9-19(K).

Aside from entire categories of cases that may warrant limitations on public access, numerous statutes also identify particular types of documents and information as confidential or otherwise subject to limitations on disclosure. *See, e.g*., Section 7-1-4.2(H) NMSA 1978 (providing for confidentiality of taxpayer information); Section 14-6-1(A) NMSA 1978 (providing for confidentiality of patient health information); Section 24-1-9.5 NMSA 1978 (limiting disclosure of test results for sexually transmitted diseases); Section 29-10-4 NMSA 1978 (providing for confidentiality of certain arrest record information); Section 29-12A-4 NMSA 1978 (limiting disclosure of local crime stoppers program information); Section 29-16-8 NMSA 1978 (providing for confidentiality of DNA information); Section 31-25-3 NMSA 1978 (providing for confidentiality of certain communications between victim and victim counselor); Section 40-8-2 NMSA 1978 (providing for sealing of certain name change records); Section 40-6A-312 NMSA 1978 (providing for limitations on disclosure of certain information during proceedings under the Uniform Interstate Family Support Act); Section 40-10A-209 NMSA 1978 (providing for limitations on disclosure of certain information during proceedings under the Uniform Child-Custody Jurisdiction and Enforcement Act); Section 40-13-7.1 NMSA 1978

(providing for confidentiality of certain information obtained by medical personnel during treatment for domestic abuse); Section 40-13-12 NMSA 1978 (providing for limits on internet disclosure of certain information in domestic violence cases); Section 44-7A-18 NMSA 1978 (providing for limitations on disclosure of certain information under the Uniform Arbitration Act). However, Paragraph C does not contemplate the automatic sealing of such items. Instead, if a party believes a particular statutory provision warrants sealing a particular court record, the party may file a motion to seal under Paragraph E of this rule. And any statutory confidentiality provision notwithstanding, the court must still engage in the balancing test set forth in Subparagraph (1) of Paragraph G of this rule before deciding whether to seal any particular court record. Paragraph D of this rule recognizes that certain personal identifier information often included within court records may pose the risk of identity theft and other misuse. Accordingly, Paragraph D discourages the inclusion of protected personal identifier information in a court record unless the court or a party deems its inclusion necessary for the effective operation of the court's judicial function. Although the decision to include protected personal identifier information in the court record is a non-sanctionable decision, the rule nonetheless prohibits public access to protected personal identifier information on court web sites and also prohibits the court from publicly displaying protected personal identifier information in the courthouse, which would include docket call sheets, court calendars, or similar material intended for public viewing.

The court need not review individual documents filed with the court to ensure compliance with this requirement, and the clerk may not refuse to accept for filing any document that does not comply with the requirements of Paragraph D. Moreover, the clerk is not required to screen court records released to the public to prevent the disclosure of protected personal identifier information. However, anyone requesting public access to court records shall provide the court with his or her name, address, and telephone number along with a government-issued form of identification or other acceptable form of identification. The court may also consider maintaining a log of this information.

Paragraphs E and F set forth the procedure for requesting the sealing of a court record. Any person or entity may file a motion to seal a court record, and all parties to the action in which the court record was filed, or is to be filed, must be served with a copy of the motion. Any person or entity may file a response to the motion to seal the court record, but, if the person or entity filing the response is not a party to the underlying litigation, that person or entity does not become a party to the proceedings for any other purpose.

Ordinarily, the party seeking to seal a court record must lodge it with the court at the time that the motion is filed. A lodged court record is only temporarily deposited with the court pending the court's ruling on the motion. Accordingly, a lodged court record is not filed by the clerk and remains conditionally sealed until the court rules on the motion. To protect the lodged court record from disclosure pending the court's ruling on the motion, the movant is required to enclose the lodged court record in an envelope or other appropriate container and attach a cover sheet to the envelope or container that includes the case caption, notes that the enclosed court record is the subject of a

pending motion to seal, and is clearly labeled “conditionally under seal.” If necessary to prevent disclosure pending the court’s ruling, the motion, any response or reply, and other supporting documents should either be lodged with the court as well or filed in redacted and unredacted versions so that the court may permit public access to the redacted pleadings until the court rules on the motion.

Although a lodged court record is not officially filed with the court unless and until the motion to seal is granted, the clerk need not keep lodged court records in a physically separate location from the rest of the court file. In this regard, the rule does not purport to require the clerk to maintain lodged court records in any particular manner or location. As long as the lodged record is protected from public disclosure, each court retains the discretion to decide for itself how it will store lodged court records, and this rule anticipates that most courts will choose to store and protect lodged and sealed court records in the same way that those courts have traditionally stored and protected sealed and conditionally sealed court records filed with the court before the adoption of this rule.

When docketing a motion to seal, the clerk’s docket entry should be part of the publicly available register of actions and should reflect that a motion to seal was filed, the date of filing, and the name of the person or entity filing the motion. However, any docket entries related to the motion to seal should avoid including detail that would disclose the substance of the conditionally sealed material before the court has ruled. If necessary to prevent disclosure, in rare cases, a court order granting a motion to seal may provide for the sealing of previous or future docket entries related to the sealed court records provided that the court’s register of actions contains, at a minimum, a docket entry containing the docket number, an alias docket entry or case name such as Sealed Pleading or In the Matter of a Sealed Case, and an entry indicating that the pleading or case has been sealed so that anyone inspecting the court’s docket will know of its existence.

If the court denies the motion to seal, the clerk will return the lodged court record to the party, it will not become part of the case file, and will therefore not be subject to public access. However, even if the court denies the motion, the movant still may decide to file the previously lodged court record but it then will be subject to public access.

If the court grants the motion to seal, it must enter an order in accordance with the requirements of Paragraph G. The order must state the facts supporting the court’s decision to seal the court record and must identify an overriding interest that overcomes the public’s right to public access to the court record and that supports the need for sealing. The rule itself does not identify what would constitute an overriding interest but anticipates that what constitutes an overriding interest will depend on the facts of the case and will be developed through case law on a case by case basis. The rule further provides that the sealing of the court record must be narrowly tailored and that there must not be a less restrictive alternative for achieving the overriding interest. To that end, the rule encourages the court to consider partial redactions whenever possible rather than the wholesale sealing of pages, documents, or court files. Paragraph G also

requires the court to specify whether any other matter beyond the court record (such as the order itself, the register of actions, or docket entries) will be sealed to prevent disclosure. The sealing order also must specify who may and may not have access to a sealed court record, which may include prohibiting access to certain parties or court personnel. In addition, the sealing order must specify a date or event upon which the order expires or provide that the sealing remains in effect until further order of the court. Finally, the order must list those persons or entities who must be given notice of any subsequently filed motion to unseal the court record or modify the sealing order.

Any court records sealed under the provisions of this rule remain sealed even if subsequently forwarded to the appellate court as part of the record on appeal. However, sealed court records forwarded to the appellate court as part of the record on appeal may be reviewed by the appellate court judges and staff unless otherwise ordered by the appellate court. Any other motions requesting modification to a sealing order in a case on appeal must be filed with the appellate court.

Motions to unseal previously sealed court records are governed by Paragraph I of this rule. A party or any member of the public may move to unseal a court record, and the rule does not provide a time limit for filing a motion to unseal a court record. Motions to unseal follow the same general procedures and standards used for motions to seal. A copy of a motion to unseal must be served on all persons and entities identified in the sealing order as entitled to receive notice of a future motion to unseal.

Although most court records should remain available for public access, when a court record is sealed under this rule, all persons and entities who do have access to the sealed material must act in good faith to avoid the disclosure of information the court has ordered sealed. That said, the protections provided by this rule should not be used to effect an unconstitutional prior restraint of free speech. But in the absence of a conflict with a countervailing First Amendment principle that would permit disclosure, any knowing disclosure of information obtained from a court record sealed by the court may subject the offending person or entity to being held in contempt of court or other sanctions as deemed appropriate by the court.

[Approved by Supreme Court Order No. 10-8300-007, for all court records filed on or after July 1, 2010; as amended by Supreme Court Order No. 11-8300-009, effective for all court records filed, lodged, publicly displayed in the courthouse, or posted on publicly accessible court web sites on or after February 7, 2011; as provisionally amended by Supreme Court Order No. 16-8300-003, effective for all cases pending or filed on or after May 18, 2016; approved by Supreme Court Order No. 17-8300-002, effective for all cases pending or filed on or after March 31, 2017.]

ANNOTATIONS

Bracketed material. — The bracketed material was added by the compiler and is not part of the rule. Pursuant to Supreme Court Order No. 22-8300-023, former Rule 5-

302A NMRA was recompiled and amended as Rule 5-302.2 NMRA, effective December 31, 2022.

The 2018 amendment, approved by Supreme Court Order No. 18-8300-023, effective February 1, 2019, provided a list of records, in proceedings to determine competency, that shall be sealed automatically without order of the court; in Paragraph C, added new subparagraph designation "(1)" and redesignated former Subparagraphs C(1) through C(4) as Subparagraphs C(1)(a) through C(1)(d), respectively, deleted former Subparagraph C(5) and redesignated former Subparagraph C(6) as Subparagraph C(1)(e), after "The provisions of this", deleted "paragraph" and added "subparagraph", and added a new Subparagraph C(2).

The 2017 amendment, approved by Supreme Court Order No. 17-8300-002, effective March 31, 2017, made proceedings commenced to remove a firearm-related disability, in which district court records are confidential and automatically sealed, subject to the statutory disclosure or reporting requirements of Section 34-9-19 NMSA 1978, provided that any attorney or other person granted access to electronic records in district court cases that contain protected personal identifier information must take reasonable precautions to protect that personal identifier information, and provided that any attorney or other person who unlawfully discloses such personal identifier information may be subject to sanctions or the initiation of disciplinary proceedings; in Subparagraph C(6), after "Section 34-9-19(D) NMSA 1978", added "subject to the firearm-related reporting requirements in Section 34-9-19 NMSA 1978"; and in Subparagraph D(1), added the last two sentences.

The 2013 amendment, approved by Supreme Court Order No. 13-8300-016, effective December 31, 2013, provided that pre-indictment proceedings commenced under the Rules of Criminal Procedure are confidential, and in Subparagraph (4) of Paragraph C, after "Article 6 NMSA 1978", added "or Rule 5-302A NMRA".

The 2011 amendment, approved by Supreme Court Order No. 11-8300-009, effective February 7, 2011, in Paragraph D, eliminated the former prohibition against including personal identifier information in court records without a court order, the prohibition against disclosing personal identifier information that the court orders to be included in a court record, and the exceptions to the prohibitions against the inclusion and disclosure of personal identifier information; and required the court and the parties to avoid including personal identifier information in court records unless they deem the inclusion of personal identifier information to be necessary to the court's function, prohibited the publication of personal identifier information on court web sites and by posting in the courthouse, and required persons requesting access to court records to provide personal information and identification.

5-124. Courtroom closure.

A. **Courtroom proceedings open.** All courtroom proceedings shall be open to the public unless the courtroom is closed by an order of the court entered under this rule.

An agreement of the parties to close the courtroom shall not constitute a sufficient basis for the issuance of an order for courtroom closure. Unless otherwise ordered by the court, the following persons may be present during a closed courtroom proceeding: the parties and their attorneys, witnesses while testifying, court employees and security personnel, and victims and victim's representatives as defined in the Victims of Crime Act, Section 31-26-3 NMSA 1978. This rule does not affect the court's inherent authority to impose reasonable time, place, and manner limitations on public access to the courtroom, including reasonable limitations on broadcasting, televising, photographing, and recording of court proceedings as set forth in Rule 23-107 NMRA.

B. **Motion for courtroom closure.** A motion for courtroom closure must advance an interest that overrides the public's interest in attending the proceeding.

(1) ***Motion of the court.*** If the court determines on the court's own motion that a courtroom proceeding should be closed, the court shall file and serve on each party an order to show cause why the proceeding should not be closed.

(2) ***Motion of a party, or other interested person or entity.*** A party, or any person or entity with a sufficient interest, may move to exclude the public from any portion of a courtroom proceeding. A written motion for courtroom closure shall be filed and served at the time of arraignment or within ninety (90) days thereafter, unless upon good cause shown the court waives the time requirement.

(3) ***Response.*** A party opposing a motion for courtroom closure or responding to an order to show cause may file a written response within fifteen (15) days after service of the motion or order to show cause, unless a different time period is ordered by the court.

(4) ***Reply.*** A party may file a written reply within fifteen (15) days after service of the written response, unless a different time period is ordered by the court.

(5) ***Response by non-party.*** Any member of the public may file a written response to a motion for courtroom closure at any time before the hearing required under Paragraph C of this rule. The court may grant a party additional time to reply to a response filed by a non-party.

(6) ***Continuance.*** In the court's discretion or at the request of the parties, the court may continue a courtroom proceeding to allow time to file written responses or replies.

C. **Public hearing.** Unless the court denies a motion for courtroom closure on the pleadings, the court shall hold a public hearing on any proposed courtroom closure considered under Subparagraph (B)(1) or (B)(2) of this rule.

(1) ***Notice of hearing to the public.*** Media organizations, persons, and entities that have requested to receive notice of proposed courtroom closures shall be

given timely notice of the date, time, and place of any hearing under this paragraph. Any member of the public shall be permitted a reasonable opportunity to be heard at the hearing.

(2) ***In camera review.*** Although the court is required to hold a public hearing on a motion for courtroom closure, this rule does not preclude the court from holding part of a hearing in camera for the limited purpose of reviewing sensitive or confidential information relevant to the motion. Any evidence or argument tendered to the court for an in camera review that is not ordered to be disclosed shall be placed under seal and preserved for appellate review. The record of the in camera hearing shall not be revealed without an order of the court.

D. **Order for courtroom closure.** An order for courtroom closure shall be in writing, shall articulate the overriding interest being protected, and shall specify the court's findings underlying the order. The court may order the exclusion of the public from all or part of a courtroom proceeding only if

(1) the court concludes that such order is necessary to preserve an overriding interest that is likely to be prejudiced if the courtroom is not closed;

(2) the order for courtroom closure is narrowly tailored to protect the overriding interest; and

(3) the court has considered reasonable alternatives to courtroom closure.

[Adopted by Supreme Court Order No. 16-8300-022, effective for all cases pending or filed on or after December 31, 2016.]

Committee commentary. — Both the United States Constitution and the New Mexico Constitution guarantee a criminal defendant the right to a public trial. *See* U.S. Const. amend. VI; N.M. Const. art. II, § 14. The New Mexico Constitution also guarantees certain crime victims "the right to attend all public court proceedings the accused has the right to attend." N.M. Const. art. II, § 24; *see also* NMSA 1978, Section 31-26-4(E) (1999) (same). Additionally, the public has a First Amendment right to attend criminal trials. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 566-67 (1980). Consistent with these constitutional rights, New Mexico statute requires all courtroom proceedings to be open to the public unless otherwise provided by law. *See* NMSA 1978, § 34-1-1 (1851) ("Except as provided in the Children's Code [32A-1-1 NMSA 1978] and in other laws making specific provisions for exclusion of the public, all courts of this state shall be held openly and publicly, and all persons whatsoever shall be freely admitted to the courts and permitted to remain so long as they shall observe good order and decorum.").

Certain statutes include exceptions to the general rule that courtroom proceedings should be open to the public and provide that specific types of courtroom proceedings should be closed. *See, e.g*., NMSA 1978, § 24-2B-5.1(B) (testing to identify the human

immunodeficiency virus). Additionally, numerous statutes identify particular types of information as confidential or otherwise subject to limitations on disclosure. *See, e.g*., NMSA 1978, § 43-1-19 (limiting the disclosure of information under the Mental Health and Developmental Disabilities Code); committee commentary to Rule 5-123 NMRA (listing statutory confidentiality provisions). Despite these statutory provisions, this rule does not authorize automatic courtroom closure for any type of criminal proceeding. Instead, if a party believes that courtroom closure is warranted for any reason, including the protection of confidential information, such party may file a motion for courtroom closure under Subparagraph (B)(2) of this rule. And statutory confidentiality provisions notwithstanding, the court must still engage in the balancing test set forth in Paragraph D of this rule before deciding whether to close any particular proceeding and must provide for public notice and hearing as set forth in Paragraph C of this rule prior to entering any order for courtroom closure.

The prerequisites to a courtroom closure order, as set forth in Paragraph D, are taken from *State v. Turrietta*, 2013-NMSC-036, ¶¶ 17, 19, 308 P.3d 964, which provides that the court cannot order a full or partial closure of the courtroom unless the closure is warranted under the four-factor "overriding interest" standard set forth in *Waller v. Georgia*, 467 U.S. 39 (1984). Under *Waller*,

[1] the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, [2] the closure must be no broader than necessary to protect that interest, [3] the [district] court must consider reasonable alternatives to closing the proceeding, and [4] it must make findings adequate to support the closure.

Turrietta, 2013-NMSC-036, ¶ 17 (alteration in original) (quoting *Waller*, 467 U.S. at 48).

Courts are obligated to consider reasonable alternatives to courtroom closure. *See id*. ¶¶ 28, 30; *Presley v. Georgia*, 558 U.S. 209, 214-15 (2010). For example, if the alleged overriding interest is the potential for witness intimidation, reasonable alternatives to closure might include "screening observers, admonishing spectators of possible criminal sanctions, the wait-and-see method, or increased security in the courtroom." *Turrietta*, 2013-NMSC-036, ¶ 29 (internal citations omitted). Or, to protect sensitive information conveyed by potential jurors during jury selection, the court could consider alternatives to closure such as sealing "[t]hose parts of the transcript reasonably entitled to privacy" or disclosing "the substance of the sensitive answers while preserving the anonymity of the jurors involved." *Press-Enterprise Co. v. Superior Court of Cal., Riverside Cnty*., 464 U.S. 501, 513 (1984). The range of reasonable alternatives available to the court will depend on the circumstances.

This rule permits public participation prior to the issuance of an order closing a courtroom proceeding. Under Subparagraph (B)(2), a non-party may file a motion for courtroom closure if such non-party has a sufficient interest in closing the proceeding, for example, if such non-party is the subject of testimony or evidence. Under Paragraph C, the public is entitled to notice and an opportunity to be heard before a courtroom proceeding is closed. The court shall follow the procedure developed by the Supreme

Court for providing notice of public hearings to media organizations and other persons and entities who have requested to receive notice under Subparagraph (C)(1) of this rule.

This rule shall not diminish the court's inherent authority to exclude disruptive persons from the courtroom to ensure decorum, prevent distractions, and ensure the fair administration of justice.

[Adopted by Supreme Court Order No. 16-8300-022, effective for all cases pending or filed on or after December 31, 2016.]

ARTICLE 2
Initiation of Proceedings

5-201. Methods of prosecution.

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

(1) a complaint;

(2) an information; or

(3) an indictment.

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

C. **Information.** An information is a written statement, signed by the district attorney, containing the essential facts, common name of the offense, and, if applicable, a specific section number of the New Mexico Statutes Annotated which defines the offense. It may be filed only in the district court. An information shall be substantially in the form approved by the court administrator, and shall state the names of all witnesses on whose testimony the information is based. On completion of a preliminary examination or acceptance of a waiver of the preliminary examination by the district court, an information shall be filed within thirty (30) days if a defendant is not in custody, and within ten (10) days if a defendant is in custody. Any offenses that are included in the bind-over order but not set forth in the criminal information shall be dismissed without prejudice. The court shall enter an order of dismissal on those offenses. If an information is not filed within these deadlines, the complaint shall be dismissed without prejudice by the court in which the action is pending.

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

[As amended by Supreme Court Order No. 20-8300-008, effective for all cases pending or filed on or after December 31, 2020; as amended by Supreme Court Order No. 22-8300-022, effective for all cases pending or filed on or after December 31, 2022.]

Committee commentary. — The Complaint. This rule governs complaints filed in the district court. If a complaint is filed in the district court, the district court shall set a first appearance under Rule 5-301 NMRA and proceed under the Rules of Criminal Procedure for the District Courts. Most complaints are filed in either the magistrate court or the metropolitan court. If the complaint charges solely a petty misdemeanor or misdemeanor, the magistrate or metropolitan court has jurisdiction to try the case. *See* NMSA 1978, § 35-3-4A (1985). If the complaint charges at least one capital, felonious, or other infamous crime, the defendant may be held to answer only on an information or indictment. N.M. Const. art. II, § 14; *see State v. Marrujo*, 1968-NMSC-118, 79 N.M. 363, 443 P.2d 856. If the complaint charges a crime which is not within the jurisdiction of the magistrate or metropolitan court, the magistrate or metropolitan court may only

(1) determine initially if there is probable cause on which to confine the defendant;

(2) advise the defendant of his or her rights at the first appearance;

(3) set and review conditions of release; and

(4) conduct preliminary examinations. *See* NMSA 1978, § 35-3-4 (1985).

Under this rule, Rule 6-201 NMRA, and Rule 7-201 NMRA, a complaint must state the common name of the offense, and, if applicable, the specific section number of the New Mexico Statutes Annotated which defines the offense. Two decisions of the Court of Appeals interpreting the former magistrate rule indicate that the complaint must carefully set forth the name and section number. In *State v. Raley*, 1974-NMCA-024, 86 N.M. 190, 521 P.2d 1031, the Court held that the initials “D.W.I.” were insufficient to state the common name of the offense. In *State v. Nixon*, 1976-NMCA-031, 89 N.M. 129, 548 P.2d 91, the Court held that it is not necessary to charge a specific subsection of the statutes. In both cases, the Court determined that the complaint must be dismissed. However, since the cases were decided under the former magistrate rules, there is no discussion of Rule 6-303 NMRA of the present Rules of Criminal Procedure for the Magistrate Courts governing technical defects in the pleadings. *See also* Rule 5-204

NMRA, an identical rule in the Rules of Criminal Procedure for the District Courts, and commentary.

The Information. This rule allows a prosecution to be commenced by the filing of the information. As a practical matter, the prosecution is generally commenced by the filing of the complaint in the magistrate or metropolitan court followed by either an indictment or a preliminary hearing and information. Nothing, however, prohibits the prosecution from first filing the information. *See State v. Bailey*, 1956-NMSC-123, 62 N.M. 111, 305 P.2d 725. *See also Pearce v. Cox*, 354 F.2d 884 (10th Cir. 1965). In that event, the accused is not required to plead to the information and may move the court to remand the case for a preliminary hearing. *See* Rule 5-601(C) NMRA and commentary. After the preliminary hearing, the defendant can then be tried on the information filed before the preliminary hearing. *State v. Nelson*, 1958-NMSC-018, 63 N.M. 428, 321 P.2d 202.

If the prosecution has been commenced by the filing of a complaint in the magistrate or metropolitan court and a preliminary hearing has been held, Paragraph C of this rule requires that the information be filed within thirty (30) days after completion of the preliminary examination. The information must conform to the bind-over order of the magistrate. *State v. Melendrez*, 1945-NMSC-020, 49 N.M. 181, 159 P.2d 768. It does not have to conform to the complaint which initiated the prosecution in the lower court. *State v. Vasquez*, 1969-NMCA-082, 80 N.M. 586, 458 P.2d 838.

The provision of Paragraph C of this rule requiring the information to contain the essential facts was taken from Rule 7 of the Federal Rules of Criminal Procedure. *See generally*, 1 Orfield, Criminal Procedure under the Federal Rules §§ 7:83-7:87 (1966). The United States Supreme Court has indicated that the pleading under Federal Rule 7 must be tested by two general criteria: (1) whether the pleading contains the elements of the offense to sufficiently apprise the defendant of what he or she must be prepared to meet; (2) whether he or she is accurately apprised of the charge so as to know if he or she is entitled to plead a former acquittal or conviction under the double jeopardy clause of the fifth amendment to the United States Constitution. *Russell v. United States*, 369 U.S. 749, 763-64 (1962). *Compare State v. Vigil*, 1973-NMCA-089, 85 N.M. 328, 512 P.2d 88, with *State v. Foster*, 1974-NMCA-150, 87 N.M. 155, 530 P.2d 949.

This rule must also be read in conjunction with Rule 5-204 and Rule 5-205(A) and (B) NMRA. Rule 5-205(A) and (B) identify certain allegations which need not be included in the pleading. Rule 5-204 indicates that the pleading is not invalid because of defects, errors, and omissions. In addition, the Court of Appeals has held that any asserted failure of the pleading to allege essential facts must be accompanied by a showing of prejudice because of that failure. *State v. Cutnose*, 1974-NMCA-130, 87 N.M. 307, 532 P.2d 896.

Paragraph C of this rule requires that the information be signed by the district attorney. *See* N.M. Const. art. II, § 14. This requirement can be met by the signature of an assistant district attorney. *See* NMSA 1978, § 36-1-2 (1984). The Constitution also indicates that the information may be filed by the attorney general. *See also* NMSA

1978, § 8-5-3 (1933). The deputy or an assistant attorney general would have the same authority as the attorney general. *See* NMSA 1978, § 8-5-5 (1988).

Article XX, Section 20 of the New Mexico Constitution contains language which would indicate that the accused must waive an indictment if the state proceeds by information. However, it has been held that Article II, Section 14 of the Constitution, the section allowing prosecution by information, eliminated the necessity of a waiver of a grand jury indictment. *See State v. Flores*, 1968-NMCA-057, 79 N.M. 420, 444 P.2d 605.

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

The Indictment. For the law governing the grand jury procedure and return of indictments, *see* NMSA 1978, §§ 31-6-1 to -15 (1969, as amended through 2003). The elements of an indictment are the same as required for an information and would be interpreted by the same criteria. *See, e.g., Cutnose*, 1974-NMCA-130. The state may proceed by indictment in the district court even if the prosecution was initiated originally by the filing of a complaint in the lower court. *See State v. Peavler*, 1975-NMSC-035, 88 N.M. 125, 537 P.2d 1387; *State v. Ergenbright*, 1973-NMSC-024, 84 N.M. 662, 506 P.2d 1209; *State v. Burk*, 1971-NMCA-018, 82 N.M. 466, 483 P.2d 940. This practice was recognized by the Supreme Court in the adoption of Rule 6-202(E) NMRA and Rule 7-202(E) NMRA, which provides that if the defendant is indicted before the preliminary examination, the magistrate or metropolitan court shall take no further action.

[As amended by Supreme Court Order No. 20-8300-008, effective for all cases pending or filed on or after December 31, 2020; as amended by Supreme Court Order No. 22-8300-022, effective for all cases pending or filed on or after December 31, 2022; as amended by Supreme Court Order No. S-1-RCR-2023-00022, effective for all cases filed on or after December 31, 2023.]

ANNOTATIONS

The 2023 amendment, approved by Supreme Court Order No. S-1-RCR-2023-00022, effective December 31, 2023, revised the committee commentary.

The 2022 amendment, approved by Supreme Court Order No. 22-8300-022, effective December 31, 2022, provided that any offenses included in a bind-over order that were not set forth in the criminal information shall be dismissed without prejudice and required that the court enter an order of dismissal on those offenses, made certain technical amendments, and revised the Committee commentary; added “Annotated” after each occurrence of “New Mexico Statutes” throughout the rule; in Paragraph C, added “Any offenses that are included in the bind-over order but not set forth in the criminal information shall be dismissed without prejudice. The court shall enter an order of dismissal on those offenses.”; and in Paragraph D, after “signed by the”, deleted “foreman” and added “foreperson”.

The 2020 amendment, approved by Supreme Court Order No. 20-8300-008, effective December 31, 2020, shortened the time within which to file an information when the defendant is in custody, removed a provision allowing the district court to extend the time for filing an information upon motion of the district attorney, required the district court to dismiss the complaint without prejudice if the information is not filed within the prescribed deadlines, and revised the committee commentary; and in Paragraph C, added "On completion of a preliminary examination or acceptance of a waiver thereof by the district court, an", and after "thirty (30) days", deleted "after completion of a preliminary examination or wavier thereof unless such time is extended by the court upon motion of the district attorney" and added "if a defendant is not in custody, and within ten (10) days if a defendant is in custody. If an information is not filed within these deadlines, the complaint shall be dismissed without prejudice by the court in which the action is pending.".

Cross references. — For defects, errors and amendment of information or indictment, *see* Rule 5-204 NMRA.

For criminal complaint form, *see* Rule 9-201 NMRA.

For criminal information form, *see* Rule 9-203 NMRA.

For grand jury indictment form, *see* Rule 9-204 NMRA.

I. GENERAL CONSIDERATION.

Constitutional rights not denied where information used rather than indictment. — There is no denial of a state or federal constitutional right where a defendant is proceeded against by information rather than by grand jury indictment. *State v. Franklin*, 1968-NMSC-176, 79 N.M. 608, 446 P.2d 883, cert. denied, 394 U.S. 965, 89 S. Ct. 1318, 22 L. Ed. 2d 566 (1969).

A person who is arrested before an information is filed is not forthwith entitled to grand jury action in his case and the subsequent filing of an information does not violate N.M. Const., art. XX, § 20, relating to waiver of indictment and plea to information in form of indictment. *State v. Reyes*, 1967-NMCA-023, 78 N.M. 527, 433 P.2d 506 (decided under former law).

Testimony by witness not listed. — Whether witness who was not listed on the indictment could be allowed to testify in rebuttal was a matter within the discretion of the trial court. *State v. Barboa*, 1973-NMCA-025, 84 N.M. 675, 506 P.2d 1222 (decided under former law).

Right to preliminary examination. — When the charge is by criminal information, defendant had a right to a preliminary examination. *State v. Vasquez*, 1969-NMCA-082, 80 N.M. 586, 458 P.2d 838 (decided under former law).

When charged by criminal information, a defendant has a right to a preliminary examination. No such right exists if the defendant is indicted by a grand jury. *State v. Burk*, 1971-NMCA-018, 82 N.M. 466, 483 P.2d 940, cert. denied, 404 U.S. 955, 92 S. Ct. 309, 30 L. Ed. 2d 271 (decided under former law).

Which is critical stage. — Where complaint and information are utilized in lieu of indictment, the preliminary hearing has been held to be a critical stage of the criminal process for purposes of applying the right-to-counsel provision of U.S. Const., amend. VI. *State v. Burk*, 1971-NMCA-018, 82 N.M. 466, 483 P.2d 940, cert. denied, 404 U.S. 955, 92 S. Ct. 309, 30 L. Ed. 2d 271 (decided under former law).

Which can be waived. — Pleading to an information waives the right to a preliminary hearing or to challenge any formal defects therein. *State v. Paul*, 1971-NMCA-040, 82 N.M. 619, 485 P.2d 375, cert. denied, 82 N.M. 601, 485 P.2d 357 (decided under former law).

Use of specific or general statutes. — For a specific and not a general statute to apply to a crime the specific and general statute must condemn the same offense, that is, the same proof is required under either the specific or general statute. *State v. Gutierrez*, 1975-NMCA-121, 88 N.M. 448, 541 P.2d 628.

Law reviews. — For survey, "Children's Court Practice in Delinquency and Need of Supervision Cases Under the New Rules," see 6 N.M.L. Rev. 331 (1976).

For comment, "The Use of an Information Following the Return of a Grand Jury No Bill: State v. Joe Nestor Chavez," see 10 N.M.L. Rev. 217 (1979-80).

For annual survey of New Mexico law relating to criminal law, see 12 N.M.L. Rev. 229 (1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 1 Am. Jur. 2d Actions § 57 et seq.

Bail: effect on liability of bail bond surety of state's delay in obtaining indictment or bringing defendant to trial, 32 A.L.R.4th 600.

Limitations on state prosecuting attorney's discretion to initiate prosecution by indictment or by information, 44 A.L.R.4th 401.

1A C.J.S. Actions §§ 237 to 242.

II. COMMENCEMENT OF PROSECUTION.

Indictments to be filed. — Neither the New Mexico Constitution nor these rules require that indictments be "returned in open court." Those provisions speak only in terms of "filing." *State v. Ellis*, 1976-NMCA-036, 89 N.M. 194, 548 P.2d 1212, cert. denied, 89 N.M. 206, 549 P.2d 284.

District court acquires jurisdiction over criminal charge upon filing information. *State v. Vasquez*, 1969-NMCA-082, 80 N.M. 586, 458 P.2d 838 (decided under former law).

Where no complaint, information or indictment has been filed which names the accused, no criminal prosecution has been commenced and the defendant is not an "accused" or a "defendant." *Sanchez v. Attorney Gen.*, 1979-NMCA-081, 93 N.M. 210, 598 P.2d 1170.

Constitutional provisions. — Under N.M. Const., art. II, § 14, for capital, felonious or infamous crimes a defendant may be proceeded against either by a grand jury indictment or by a criminal information. *State v. Burk*, 1971-NMCA-018, 82 N.M. 466, 483 P.2d 940, cert. denied, 404 U.S. 955, 92 S. Ct. 309, 30 L. Ed. 2d 271.

State to choose information or indictment. — The choice to proceed by information or indictment is that of the state. *State v. Burk*, 1971-NMCA-018, 82 N.M. 466, 483 P.2d 940, cert. denied, 404 U.S. 955, 92 S. Ct. 309, 30 L. Ed. 2d 271.

Charge need not be dismissed because of unverified information. — It is error for the trial court to dismiss robbery charges on the ground of an unverified information, where the prosecution has been commenced by criminal complaint, and defendants have already been arrested and have appeared at a preliminary examination before the information is filed. *State v. Smallwood*, 1980-NMCA-037, 94 N.M. 225, 608 P.2d 537.

Investigation not basis for malicious prosecution claim. — The investigative report of a drug inspector regarding the filling of forged prescriptions by a pharmacist did not initiate criminal proceedings against the pharmacist and could not be used as the basis for a claim of malicious prosecution. *Johnson v. Weast*, 1997-NMCA-066, 123 N.M. 470, 943 P.2d 117.

III. COMPLAINT.

Charge of burglary and grand larceny. — A criminal complaint subscribed by a county sheriff and charging defendant with burglary and grand larceny was insufficient to invoke the jurisdiction of the court in that the crimes charged therein purport to be in each case a felony and such as can be prosecuted only upon indictment or presentment by a grand jury, or by an information filed by the district attorney, attorney general or their deputies, as required by N.M. Const., art. II, § 14. *State v. Chacon*, 1957-NMSC-030, 62 N.M. 291, 309 P.2d 230.

Defective complaint. — To the extent that the complaint against defendant, standing alone, could be considered jurisdictionally defective for not setting forth all of the elements listed in this rule, any such defect was cured by the bill of particulars filed by the state; and even if complaint were defective, such defect would not be jurisdictional. *State v. Pina*, 1977-NMCA-020, 90 N.M. 181, 561 P.2d 43.

IV. INFORMATION.

A. IN GENERAL.

Constitutionality of provisions permitting felony prosecution by information. — The provisions of N.M. Const., art. II, § 14, permitting the prosecution of a felony by information, does not violate either U.S. Const., amend. V, requirement of a grand jury indictment or the due process clause of the U.S. Const., amend. XIV. *State v. Reyes*, 1967-NMCA-023, 78 N.M. 527, 433 P.2d 506.

The purpose of a criminal information is to furnish the accused with such a description of the charge against him as will enable him to prepare a defense and to make his conviction or acquittal res judicata against a subsequent prosecution for the same offense. *State v. Stephens*, 1979-NMSC-076, 93 N.M. 458, 601 P.2d 428, *overruled in part on other grounds by State v. Contreras*, 1995-NMSC-056, 120 N.M. 486, 903 P.2d 228; *State v. Naranjo*, 1980-NMSC-061, 94 N.M. 407, 611 P.2d 1101; *State v. Martin*, 1980-NMCA-019, 94 N.M. 251, 609 P.2d 333, cert. denied, 94 N.M. 628, 614 P.2d 545.

The purpose of a criminal information is to furnish the accused with such a description of the charge against him as will enable him to make a defense, to make his conviction or acquittal res judicata against a subsequent prosecution for the same offense, and to give the court reasonable information as to the nature and character of the crime charged. *State v. Herrod*, 1972-NMCA-163, 84 N.M. 418, 504 P.2d 26 (decided under former law).

The purpose of a criminal information is to furnish the accused with such a description of the charge against him as will enable him to make a defense. *State ex rel. Apodaca v. Our Chapel of Memories of N.M., Inc.*, 1964-NMSC-068, 74 N.M. 201, 392 P.2d 347(decided under former law).

The object of an information is first to furnish an accused with a description of the charge against him as will enable him to make his defense and to avail himself of his conviction or acquittal against a subsequent prosecution for the same offense; and second, that the court may be informed as to the facts alleged so it may determine whether the facts are sufficient to support a conviction, if one should be had. *Ex parte Williams*, 1954-NMSC-005, 58 N.M. 37, 265 P.2d 359 (decided under former law).

Subsection C does not require a preliminary hearing or a waiver of the hearing before an information is filed in the district court. — Where the State initially filed a criminal complaint in magistrate court charging defendant with six misdemeanors, and where, after the magistrate court denied the State's motion for continuance, the State voluntarily dismissed the complaint and refiled the case in district court by criminal information, charging defendant with the same misdemeanors, but erroneously stating that defendant waived a preliminary hearing, and where defendant filed a motion to dismiss the criminal information arguing that Rule 5-201(C) NMRA contemplates the

filing of a criminal information only after a preliminary hearing or waiver thereof and that neither of these events occurred, and where the district court dismissed the criminal information, interpreting Rule 5-201(C) to require a preliminary hearing or a waiver of the hearing before an information is filed in the district court, it was error to dismiss the criminal information, because nothing in the rule creates a specific preliminary hearing requirement for criminal informations charging misdemeanors. Rather, the language prescribes deadlines for filing the information if a preliminary hearing has occurred or waived prior to filing. *State v. Evans*, 2023-NMCA-004, *cert. denied*.

Information and bill of particulars read together. — In determining whether the acts alleged constitute the offense, the information and the bill of particulars are to be read together as a single instrument. When read together, if the acts alleged do not constitute the offense charged, the information may be quashed. *State v. Putman*, 1967-NMCA-020, 78 N.M. 552, 434 P.2d 77 (decided under former law).

Bill of particulars to be furnished even though information valid. — Bill of particulars must still be furnished, if requested, even though information is valid under the constitution and statutes. *State v. Graves*, 1963-NMSC-183, 73 N.M. 79, 385 P.2d 635 (decided under former law).

Waiver of relief for violation. — Any relief available for a Subdivision (c) (*see now* Paragraph C) violation is waived where this violation is raised for the first time on appeal. *State v. Keener*, 1981-NMCA-139, 97 N.M. 295, 639 P.2d 582.

B. ESSENTIAL FACTS.

Charge of criminal sexual penetration. — Where the information charged that defendant committed an act of sexual intercourse with a female under the age of 16 years, who was not his wife, the facts were a sufficient charge of the "essential facts" of statutory rape (now criminal sexual penetration), and the information did not fail to charge a crime by not specifically stating the sex and age of defendant. *State v. Vigil*, 1973-NMCA-089, 85 N.M. 328, 512 P.2d 88.

An information containing an open charge of murder meets all the requirements of this rule where it contains the essential facts and refers to the common name of the offense and to the applicable statutory section. *State v. Stephens*, 1979-NMSC-076, 93 N.M. 458, 601 P.2d 428, *overruled in part on other grounds*, *State v. Contreras*, 1995-NMSC-056, 120 N.M. 486, 903 P.2d 228.

C. SUFFICIENCY OF REFERENCE TO OFFENSE.

Charge of larceny of sheep is sufficient and may be supplemented by a bill of particulars. *State v. Shroyer*, 1945-NMSC-014, 49 N.M. 196, 160 P.2d 444 (decided under former law).

Charge defendant burglarized outhouse in nighttime was sufficient. *State v. Mares*, 1956-NMSC-031, 61 N.M. 46, 294 P.2d 284 (decided under former law).

Charge of grand larceny was sufficient. *State v. Johnson*, 1955-NMSC-070, 60 N.M. 57, 287 P.2d 247 (decided under former law).

Charge of embezzlement, which made entrustment the stepping stone to committing the crime, was a sufficient allegation of entrustment as a factor. *State v. Konviser*, 1953-NMSC-057, 57 N.M. 418, 259 P.2d 785 (decided under former law).

Charge that defendant delivered alcoholic liquor to a minor, contrary to provision of 60-10-16 NMSA 1978 (now 60-7B-1 NMSA 1978), prohibiting sale of liquor to minors unless accompanied by parent, guardian, etc., was not fatally defective in failing to set out that such minor was not accompanied by a parent, guardian or other person having custody. *State v. Cummings*, 1957-NMSC-105, 63 N.M. 337, 319 P.2d 946 (decided under former law).

Case committed from magistrate court. — A criminal information is sufficient if the crime charged in the complaint in the magistrate's court is kindred to that to which the accused is held to answer in the preliminary examination and the information is substantially in accord with the magistrate's commitment to district court. *State v. Vasquez*, 1969-NMCA-082, 80 N.M. 586, 458 P.2d 838 (decided under former law).

Identification of offense as felony or misdemeanor is not required. *Roessler v. State*, 1969-NMCA-003, 79 N.M. 787, 450 P.2d 196, cert. denied, 395 U.S. 967, 89 S. Ct. 2115, 23 L. Ed. 2d 754 (1969) (decided under former law).

Charge defendant did "murder" a certain named person sufficiently apprised defendant of the nature of the offense. *State v. Roy*, 1936-NMSC-048, 40 N.M. 397, 60 P.2d 646 (decided under former law).

Charge of statutory rape (now criminal sexual penetration) is valid and states the requisite essential facts when it charges that offense by referring both to the common name of the offense and its statutory section number. *State v. Vigil*, 1973-NMCA-089, 85 N.M. 328, 512 P.2d 88.

Information in statutory form enumerating sections defining offense and penalties was sufficient. *State v. Romero*, 1961-NMSC-139, 69 N.M. 187, 365 P.2d 58 (decided under former law).

Citation of repealed embezzlement statute, instead of statute which superseded it, was sufficient. *Smith v. Abram*, 1954-NMSC-061, 58 N.M. 404, 271 P.2d 1010 (decided under former law).

Reference to section of statute creating crime is sufficient. *State v. Lott*, 1963-NMSC-219, 73 N.M. 280, 387 P.2d 855 (decided under former law).

Reference to the section of a statute creating a crime is sufficient to identify the crime charged. *State v. Stephens*, 1979-NMSC-076, 93 N.M. 458, 601 P.2d 428, *overruled in part on other grounds by State v. Contreras*, 1995-NMSC-056, 120 N.M. 486, 903 P.2d 228.

Reference to specific section of municipal code sufficiently alleged offense of disturbing the peace. *Village of Deming v. Marquez*, 1965-NMSC-006, 74 N.M. 747, 398 P.2d 266 (decided under former law).

Voiding of penalty section is not sufficient grounds to void information which is sufficient under section without reference to penalty provisions. *State v. Ferris*, 1969-NMCA-093, 80 N.M. 663, 459 P.2d 462 (decided under former law).

V. INDICTMENTS.

A. IN GENERAL.

Use of false evidence. — The knowing use of false evidence or the failure to correct false evidence at grand jury proceeding was a violation of due process where the evidence was material to the guilt or innocence of the accused. Where the only grand jury witness upon whose testimony the indictment was based gave false testimony, indictment based on such evidence violated defendant's right to due process. *State v. Reese*, 1977-NMCA-112, 91 N.M. 76, 570 P.2d 614.

Indictment for criminal trespass charging violation of a specific statutory section, stating the common name of the offense, the date and the county, sufficiently informed defendant of what he must be prepared to meet and did not deprive him of due process. *State v. Cutnose*, 1974-NMCA-130, 87 N.M. 307, 532 P.2d 896, cert. denied, 87 N.M. 299, 532 P.2d 888 (1975).

Specificity of charging statute. — Indictment was not void under the specific versus general statute rule requiring charge under specific statute where the offense condemned is the same, where the father is charged with first-degree murder and not child abuse, because the offense of murder (30-2-1 NMSA 1978) and the offense of child abuse (30-6-1 NMSA 1978) resulting in the child's death are not the same, and the proof required for the two offenses is not the same, since, generally speaking, murder requires an intent, whereas child abuse does not. *State v. Gutierrez*, 1975-NMCA-121, 88 N.M. 448, 541 P.2d 628.

An attack on the eligibility of one grand juror does not raise an issue as to the jurisdiction of the court, but goes only to the procedural requirements for returning an indictment. *State v. Velasquez*, 1982-NMCA-154, 99 N.M. 109, 654 P.2d 562, cert. denied, 99 N.M. 148, 655 P.2d 160.

Second indictment titled "Superseding Grand Jury Indictment" was proper since it fit the definition and form of an indictment as set out in this rule. *State v. Martinez*, 1996-NMCA-109, 122 N.M. 476, 927 P.2d 31.

Use of the defendant's testimony at a second grand jury hearing for impeachment at trial did not affect the validity of the second indictment since it was ordered in response to the defendant's own motion. *State v. Martinez*, 1996-NMCA-109, 122 N.M. 476, 927 P.2d 31.

B. ESSENTIAL FACTS.

Generally. — What essential facts are required by Subdivision (d) (*see now* Paragraph D) depends on that which is conveyed by other parts of the indictment. Where the indictment provided the date, common name and statutory section number of the offense, identified witnesses upon whose testimony the indictment was based, including named personnel at the hospital, which was the scene of the offense, and defendant did not assert what essential facts were missing, the appellate court would not hold the indictment failed to allege essential facts. And since Rule 7(a) and (d) (*see now* Rule 5-204 NMRA) require a showing of prejudice due to a defect, error or omission in an indictment, which defendant has not made, the indictment charging criminal trespass was legally sufficient. *State v. Cutnose*, 1974-NMCA-130, 87 N.M. 307, 532 P.2d 896, cert. denied, 87 N.M. 299, 532 P.2d 888 (1975).

Indictment to give details of charge. — An indictment which does not furnish defendant with specific details as to the charges against which he is compelled to defend, fails to give him proper notice of the charges. *State v. Naranjo*, 1980-NMSC-061, 94 N.M. 407, 611 P.2d 1101.

Murder. — Where count one of the indictment referred to specific section numbers, and charged defendant with the murder of the named victim in a certain county on a specified date in violation of specific statutes, no essential facts were missing, and there was no violation of Subdivision (d) (*see now* Paragraph D). *State v. King*, 1977-NMCA-042, 90 N.M. 377, 563 P.2d 1170, *overruled on other grounds by State v. Reynolds*, 1982-NMSC-091, 98 N.M. 527, 650 P.2d 811.

Sufficiency of reference to diverse dates. — Where the indictment charged defendant with receiving and concealing stolen property contrary to statutory provisions and further charged that: "On diverse dates between March 20, 1965, and the 19th day of March, 1968 . . . [the defendant] did buy, procure, receive, or conceal things of value knowing the same to have been stolen or acquired by fraud or embezzlement" the indictment was in substantially the form prescribed by statute, and, insofar as form is concerned, no greater degree of conformity was required. *State v. Lindsey*, 1969-NMCA-121, 81 N.M. 173, 464 P.2d 903, cert. denied, 398 U.S. 904, 90 S. Ct. 1692, 26 L. Ed. 2d 62 (1970) (decided under former law).

C. SUFFICIENCY OF REFERENCE TO OFFENSE.

Charging of accessory. — Supreme court has held previously that 30-1-13 NMSA 1978, relating to accessories, does not require a person to be charged as an accessory and that an accessory may be charged and convicted as a principal. Subdivision (d) (*see now* Paragraph D), which requires that the indictment allege "essential facts constituting the offense," does not change the procedure authorized by Section 30-1-13 NMSA 1978, since "the offense," as used in Subdivision (d) (*see now* Paragraph D), means the principal offense. Thus, defendant was not required to be charged as an accessory and indictment was sufficient where the language contained therein informed defendant of the essential facts of the charge of armed robbery. *State v. Roque*, 1977-NMCA-094, 91 N.M. 7, 569 P.2d 417, cert. denied, 91 N.M. 4, 569 P.2d 414.

Sufficiency of statutory reference. — An indictment is valid and sufficient if it identifies the crime charged by reference to the statute establishing the offense. *State v. Lucero*, 1968-NMCA-021, 79 N.M. 131, 440 P.2d 806) (decided under former law).

It is sufficient if an indictment charges an offense by reference to the section or subsection creating the offense. *State v. Garcia*, 1969-NMCA-039, 80 N.M. 247, 453 P.2d 767 (decided under former law).

An indictment could charge by using the name given to the offense by the common law or by a statute and was valid and sufficient if it identified the crime charged by reference to the statute establishing the offense. *State v. Walsh*, 1969-NMCA-123, 81 N.M. 65, 463 P.2d 41 (decided under former law).

Where the initial indictment and amended indictment employed the name given the offense by statute and specifically referred to the section and subsection of the statute which created the offense, it cannot be said that the indictment failed to charge the particular offenses and consequently was not subject to amendment. *State v. Turner*, 1970-NMCA-024, 81 N.M. 450, 468 P.2d 421, cert. denied, 81 N.M. 506, 469 P.2d 151 (decided under former law).

Where the offense was charged in the name given it by the statute, stated in almost the identical language of the statutory definition thereof, had in terms of substantially the same meaning and express reference was made to the statute creating the offense, the requirements of former provisions regarding charging the offense were satisfied. *State v. Lindsey*, 1969-NMCA-121, 81 N.M. 173, 464 P.2d 903, cert. denied, 398 U.S. 904, 90 S. Ct. 1692, 26 L. Ed. 2d 62 (1970) (decided under former law).

An indictment is valid and sufficient where it refers to the statute creating the offense and also charges the offense in terms of the statutory language. *State v. Herrod*, 1972-NMCA-163, 84 N.M. 418, 504 P.2d 26 (decided under former law).

5-202. General rules of pleadings.

A. **Form.** Every pleading shall contain a caption setting forth the name of the court, the title of the action, the file number and a designation as to the type of pleading.

B. **Adoption by reference.** Statements made in one part of a pleading may be adopted by reference in another part of the same pleading.

C. **Name of defendant.** In any pleading, the name of the defendant, if known, shall be stated. If the name of the defendant is not known, he may be described by any name or description by which he can be identified with reasonable certainty.

D. **Joinder of defendants.** No complaint, information or indictment may charge more than one defendant. Defendants may be joined for trial pursuant to Rule 5-203.

[As amended, effective March 1, 1991.]

Committee commentary. — "Pleading," as used in this rule, includes a complaint, an information or an indictment. *See* Paragraph A of Rule 5-201 NMRA.

Paragraph A of this rule is patterned after Paragraph A of Rule 1-010 NMRA. Paragraph B of this rule is patterned after Paragraph C of Rule 1-010 NMRA.

ANNOTATIONS

The 1991 amendment, effective for cases filed in the district courts on or after March 1, 1991, added Paragraph D.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 71 C.J.S. Pleading §§ 5, 9.

5-203. Joinder; severance.

A. **Joinder of offenses.** Two or more offenses shall be joined in one complaint, indictment or information with each offense stated in a separate count, if the offenses, whether felonies or misdemeanors or both:

(1) are of the same or similar character, even if not part of a single scheme or plan; or

(2) are based on the same conduct or on a series of acts either connected together or constituting parts of a single scheme or plan.

B. **Joinder of defendants.** A separate complaint, indictment or information shall be filed for each defendant. Two or more defendants may be joined on motion of a party, or will be joined by the filing of a statement of joinder by the state contemporaneously with the filing of the complaints, indictments or informations charging such defendants:

(1) when each of the defendants is charged with accountability for each offense included;

(2) when all of the defendants are charged with conspiracy and some of the defendants are also charged with one or more offenses alleged to be in furtherance of the conspiracy; or

(3) when, even if conspiracy is not charged and not all of the defendants are charged in each count, the several offenses charged:

(a) were part of a common scheme or plan; or

(b) were so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of others.

C. **Motion for severance.** If it appears that a defendant or the state is prejudiced by a joinder of offenses or of defendants by the filing of a statement of joinder for trial, the court may order separate trials of offenses, grant a severance of defendants, or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance, the court may order the prosecutor to deliver to the court for inspection in camera any statements or confessions made by the defendants which the prosecution intends to introduce in evidence at the trial.

[As amended, effective March 1, 1991; August 1, 1992.]

Committee commentary. — Paragraph A of this rule was derived from American Bar Association Standards Relating to Joinder and Severance, Section 1.1 (Approved Draft 1968). For decisions upholding joinder of offenses under Paragraph A of this rule, *see State v. Riordan*, 86 N.M. 92, 519 P.2d 1029 (Ct. App. 1974) and *State v. McCallum*, 87 N.M. 459, 535 P.2d 1085 (Ct. App. 1975). *See* Paragraph C of this rule for the provisions on severance. Joinder under Paragraph A(2) of this rule has been suggested as a possible way of avoiding double jeopardy. *State v. Tanton*, 88 N.M. 5, 536 P.2d 269 (Ct. App. 1975).

As a result of a supreme court order, the committee prepared amendments to Paragraph A of this rule in 1979 which changed Paragraph A of this rule from a permissive to a mandatory rule.

The 1979 supreme court order provided as follows:

When a person is charged with more than one crime and the crimes can be incorporated in one information or indictment in separate counts, this practice shall be followed.

Paragraph B of this rule, providing a liberal procedure for joinder, was derived from American Bar Association Standards Relating to Joinder and Severance, Section 1.2 (Approved Draft 1968). *See* Paragraph C of this rule, providing for severance to avoid an injustice which may result from joinder under Paragraph B of this rule.

Paragraph B of this rule was amended by the committee in 1979 to implement a supreme court order requiring the joinder of certain defendants. The supreme court order provided as follows:

Likewise, if the charges against more than one defendant can be properly filed in one information or indictment, the defendants shall be charged jointly under one case number.

The 1990 amendment of Rule 5-202 and Paragraph B of this rule were made at the request of the state Administrative Office of the Courts to accommodate the automation of the district courts. These amendments have no substantive effect. The 1990 amendments were made to require separate files for each defendant. The state and the defendant will be required to file separate pleadings for each defendant joined pursuant to this rule. Joinder is automatically accomplished under Paragraph B by the filing of a statement of joinder by the state contemporaneously with two or more informations, indictments and complaints. Paragraph B was amended effective August 1, 1992, to make it clear that joinder of defendants is also permissible upon motion of any party if the other conditions of Paragraph B are met.

Paragraph C of this rule was derived in part from American Bar Association Standards Relating to Joinder and Severance, Section 2.2 (Approved Draft 1968). It is almost identical to Rule 14 of the Federal Rules of Criminal Procedure. Paragraph C of this rule requires a showing of prejudice before the court is compelled to sever the trial. Some examples of when prejudice may be shown include: (1) where the defendant might wish to testify in his own behalf on one offense but not on another; *see e.g.*, *Cross v. United States*, 335 F.2d 987, 989 (D.C. Cir. 1964); (2) where a combined trial might result in the admissibility of evidence of other crimes which would not normally be admissible under Paragraph B of Rule 11-404; *see e.g.*, *Drew v. United States*, 331 F.2d 85, 90 (D.C. Cir. 1964).

Paragraph C of this rule also allows the court to sever a joint trial of defendants where justice requires. Some examples cited by the American Bar Association Standards Relating to Joinder and Severance, supra, include: (1) where the number of defendants or the complexity of the evidence is such that the trier of fact probably will be unable to distinguish the evidence and apply the law intelligently as to the charges against each defendant; and (2) where the defendants have antagonistic defenses.

As revised, Paragraph C of this rule allows the admission of a statement of one codefendant deleting all references to the defendant seeking the severance, provided that, as deleted, the statement does not prejudice the defendant seeking severance.

An accused's right of cross-examination, secured by the confrontation clause of the sixth amendment, is violated at the accused's joint trial with a codefendant who does not testify by admission of codefendant's confession inculpating accused, notwithstanding jury instructions that codefendant's confession must be disregarded in determining accused's guilt or innocence. *Bruton v. United States*, 391 U.S. 123 (1968), 88 S. Ct.

1620, 20 L. Ed. 2d 476. *See* Parker v. Randolph, 442 U.S. 62, 99 S. Ct. 2132, 60 L. Ed. 2d 713 (1979) for an exception to the *Bruton* rule allowing the admission of interlocking confessions of codefendants in certain circumstances when accompanied by an appropriate limiting instruction to the jury. *See also State v. Shade & Vincent*, 104 N.M. 710, 726, 726 P.2d 864 (Ct. App. 1986) (cert. quashed, *Vincent v. State*, 104 N.M. 702, 726 P.2d 856).

Even though the court may review the confession or statement given by a codefendant which is produced to show reason for severance, such review may be held in camera, and the statement or confession need not be made part of the record.

[As revised, April 9, 1992.]

ANNOTATIONS

The 1992 amendment, effective for cases filed in the district courts on or after August 1, 1992, inserted "may be joined on motion of a party, or" near the beginning of the second sentence in Paragraph B.

The 1991 amendment, effective for cases filed in the district courts on or after March 1, 1991, in Paragraph B, substituted the present introductory language for the former introductory language, which read "Two or more defendants shall initially be joined in the same complaint, indictment or information"; and, in the first sentence of Paragraph C, substituted "by the filing of a statement of joinder" for "in any complaint, indictment or information, or by joinder".

Compiler's notes. — Paragraph A of this rule is similar to Rule 8(a) of the Federal Rules of Criminal Procedure.

Paragraph B of this rule is similar to Rule 8(b) of the Federal Rules of Criminal Procedure.

Paragraph C of this rule is similar to Rule 14 of the Federal Rules of Criminal Procedure.

I. JOINDER OF OFFENSES.

Preservation of improper joinder claim. — To preserve an improper joinder claim, a defendant must raise the claim prior to trial pursuant to Paragraph C of Rule 5-601 NMRA and ground the claim in the criteria enumerated in Paragraph A or Rule 5-203 NMRA. *State v. Paiz*, 2011-NMSC-008, 149 N.M. 412, 249 P.3d 1235.

Showing of prejudice not required for severance of improperly joined offenses. — At the trial level, a severance of improperly joined offenses under Paragraph A of Rule 5-203 NMRA does not require a showing of prejudice. The defendant only has to show that the offenses joined in the indictment, information, or complaint do not meet the

criteria for joinder under Paragraph A of Rule 5-203 NMRA. If the trial court finds that the defendant has made this showing, the trial court should sever the improperly joined offenses. *State v. Paiz*, 2011-NMSC-008, 149 N.M. 412, 249 P.3d 1235.

Factors to determine whether actual prejudice resulted from improper joinder of offenses. — The improper joinder of offenses is subject to a harmless error analysis. The factors set forth in *State v. Gallegos*, 2007-NMSC-007, 141 N.M. 185, 152 P.3d 828 to determine whether a defendant was actually prejudiced by the proper joinder of offenses are relevant to determine whether the improper joinder of offenses actually prejudiced the defendant or if it resulted in a harmless error. *State v. Paiz*, 2011-NMSC-008, 149 N.M. 412, 249 P.3d 1235.

Improperly joined offense resulted in actual prejudice. — Where a confrontation between defendant and others resulted in a shooting where one victim was killed and three other victims were injured; during a search of defendant's residence for evidence relating to the shooting, the police found cocaine and drug paraphernalia; defendant was charged with murder, shooting at a motor vehicle, various counts of aggravated battery with a deadly weapon, tampering with evidence, and drug trafficking; defendant filed a motion before trial to sever the drug trafficking charge; the motion specifically outlined the grounds for joinder in Paragraph A of Rule 5-203 NMRA; neither party argued that the shooting had any relationship to the trafficking of drugs; the main focus of the state's case-in-chief was the charges relate to the shooting; the drug trafficking charge comprised a small portion of the state's case-in-chief and there was little evidence linking defendant to drug trafficking; and the trial court did not emphasize to the jury that they should consider the evidence related to the shooting charges independently of the evidence related to the drug trafficking charge, Paragraph A of Rule 5-203 NMRA was violated when the drug trafficking count was joined to the counts related to the shooting and the improper joinder resulted in actual prejudice to defendant which was not harmless error. *State v. Paiz*, 2011-NMSC-008, 149 N.M. 412, 249 P.3d 1235.

Felon in possession of a firearm charge. — The denial of the defendant's motion to sever his felon in possession of a firearm charge from his other charges was not error where the defendant pled guilty to the felon in possession of a firearm charge prior to trial. *State v. Dominguez*, 2007-NMSC-060, 142 N.M. 811, 171 P.3d 750.

If multiple charges logically arise from the same episode or acts of a similar nature, then they may be tried together. *State v. Hernandez*, 1986-NMCA-040, 104 N.M. 268, 720 P.2d 303.

Generally. — As a statement of judicial policy rather than a rule of law the supreme court does not intend to encourage or approve piecemeal prosecution, which involves a myriad of problems threatening the existence of the state's judicial system. The risk of prejudice to the accused and the waste of time inherent in multiple trials both perpetuate delays in the judicial process and unconscionable expenditures of public funds, all of which could be avoided by prosecutors getting their facts straight, their theories clearly

in mind and trying all charges together. *State v. Tanton*, 1975-NMSC-057, 88 N.M. 333, 540 P.2d 813.

Joinder of crimes based in the same conduct is mandatory. — Failure to join crimes based in the same conduct bars piecemeal persecution in a subsequent trial. *State v. Gonzales*, 2013-NMSC-016, 301 P.3d 380, *aff'd on other grounds*, 2011-NMCA-081, 150 N.M. 494, 263 P.3d 271.

Failure to join crimes based in the same conduct. — Where defendant, who was drunk and driving recklessly, crashed into another vehicle, killing a child; defendant was charged with child abuse resulting in death; the State did not charge defendant with vehicular homicide; defendant's conviction of child abuse resulting in death was reversed by the Court of Appeals for insufficient evidence; and the State then sought to prosecute defendant for vehicular homicide based on the same conduct against the same victim, the State was barred from subsequently prosecuting defendant for vehicular homicide because the State violated the mandatory joinder rule. *State v. Gonzales*, 2013-NMSC-016, 301 P.3d 380, *aff'd on other grounds*, 2011-NMCA-081, 150 N.M. 494, 263 P.3d 271.

Compulsory joinder rule. — Where defendant was initially charged with assault with intent to commit murder, and where the district court directed a verdict on the charged offense and then sua sponte instructed the jury on a new and different charge of aggravated assault with a deadly weapon after the close of evidence, the district court's failure to properly instruct the jury on aggravated assault with a deadly weapon resulted in a bar to a subsequent prosecution on aggravated assault with a deadly weapon, because aggravated assault with a deadly weapon is not a lesser included offense of assault with intent to commit murder, and therefore defendant was not put on notice that he had to defend against aggravated assault with a deadly weapon, and the compulsory joinder rule bars subsequent prosecutions of charges not joined in the original trial that stem from the same conduct. *State v. Radosevich*, 2016-NMCA-060, 376 P.3d 871, *rev'd on other grounds*, 2018-NMSC-028.

Adoption of prosecutorial knowledge limitation to joinder rule. — When a prosecuting a defendant, if the state knows of offenses that have been or will be filed that are required to be joined pursuant to Rule 5-203(A) NMRA, the state must join these charges into a single prosecution if the offenses were committed in the same county. *State v. Summers*, 2023-NMCA-083.

Joinder was required where the state had knowledge of the factual basis for the subsequent charges. — Where defendant was arrested for possession of burglary tools and trespassing after he was found wearing gloves and a ski mask with cut-out eye holes in the back lot of an auto dealership, located next to a mobile home park, carrying a screwdriver, and in possession of several pieces of jewelry, and where investigators later discovered a freshly cut hole in the fence between the auto dealership and the mobile home park, found a backpack and briefcase near the hole in the fence that contained tools and silver kitchenware, and determined that the jewelry

belonged to the owner of the mobile home park, and where, pursuant to a plea and disposition agreement in magistrate court, the state agreed to dismiss the felony possession of burglary tools charge in exchange for defendant's no contest plea to misdemeanor criminal trespassing, and where the state, in a separate case and prior to defendant's sentencing for the criminal trespassing case, charged defendant with nonresidential burglary based on the same criminal episode, and where defendant moved the district court to dismiss the nonresidential burglary case, claiming that the second prosecution violated his double jeopardy rights and should have been joined with the criminal trespassing case pursuant to Rule 5-203 NMRA, and where the district court denied defendant's motion, finding that jeopardy had not yet attached and that the state did not violate the mandatory joinder rule because the state did not have enough evidence to charge the offense of nonresidential burglary when it charged defendant with possession of burglary tools and trespassing, the district court erred in denying defendant's motion to dismiss, because the record demonstrated that the state knew of defendant's involvement in the burglary of the mobile home park as early as the night of defendant's arrest and had ample opportunity to join the nonresidential burglary charge with the charges in the magistrate court case. Pursuant to Rule 5-203(A), the charge of nonresidential burglary and the charges in the first case should have been joined by the state. *State v. Summers*, 2023-NMCA-083.

Rule permits joinder of additional offenses post-indictment, but prior to case being submitted to a jury. — Where defendant was charged in two separate cases after he allegedly surreptitiously videotaped the minor daughter (victim) of his former girlfriend unclothed in her bathroom, and where defendant, in his motion to dismiss the second indictment, claimed that the state was required under Rule 5-203 NMRA to bring all charges related to defendant's alleged videotaping of victim in a single indictment and that because the state chose not to pursue the charges in a single indictment, dismissal of his second case was appropriate, the district court did not err in denying defendant's motion to dismiss but should have granted the pretrial motion to join the two cases, because the offenses in both cases were related to defendant's alleged videotaping of victim in her bathroom, were of the same or similar character or based on the same conduct or on a series of acts either connected together or constituting parts of a single scheme or plan, and because Rule 5-203 NMRA permits additional offenses to be joined post-indictment, but prior to a case being submitted to a jury. *State v. Webb*, 2017-NMCA-077.

Joinder of DWI and speeding not required where the offenses are not based on the same conduct. — Where defendant was stopped by law enforcement for driving 111 miles per hour in a 55 mile-per-hour zone, and was subsequently determined to be driving while impaired, and where the state charged defendant with third degree felony DWI, which was later changed to a misdemeanor DWI, and with speeding in a separate magistrate court cause, the district court did not err in denying defendant's motion to dismiss the DWI charge where defendant claimed that joinder of the two cases was compulsory, because the speeding offense played no part in the per se DWI charge, and thus the offenses are not of the same or similar character, nor are the offenses based on the same conduct. *State v. Aragon*, 2017-NMCA-005.

Joinder is not required for offenses committed in different counties located in different judicial districts. — Where defendant was charged with forgery and identity theft in Lea county, located in the Fifth Judicial District, and escape from jail in Otero county, located in the Twelfth Judicial District, and where the Lea county district court dismissed the identity theft and forgery charges due to the state's failure to join those charges with defendant's escape from jail charge pursuant to Rule 5-203(A) NMRA, the district court erred in dismissing the Lea county charges because requiring joinder of offenses committed exclusively within one county with an offense committed and charged in another county, located in a different judicial district, would contravene New Mexico's venue requirement. *State v. Grubb*, 2020-NMCA-047, cert. denied.

Review of evidence on motion for consolidation. — A motion for consolidation necessitates a review of the evidence to determine whether the charges logically arise from the same episode or acts of a similar nature. *State v. Burdex*, 1983-NMCA-087, 100 N.M. 197, 668 P.2d 313.

Abatement of inferior court proceedings. — Proceedings pending in an inferior court ought to be abated when charges are instituted in district court in relation to the same episode. Since such procedures would promote judicial economy, the overriding state interest being the efficient prosecution of all crimes and especially felonies, a defendant in such a situation would have a right to move the inferior court for an abatement to abide the event in district court and should a defendant in such a case, for whatever reason, fail to so move, he might well have thereby waived any right to complain of piecemeal prosecution. *State v. Tanton*, 1975-NMSC-057, 88 N.M. 333, 540 P.2d 813.

Effect of misjoinder. — An information shall not be invalid or insufficient because of a misjoinder of the offenses charged. *State v. Everitt*, 1969-NMCA-010, 80 N.M. 41, 450 P.2d 927.

Where joinder proper. — Where two counts of fraud and one count of conspiracy to defraud arose from unfinished construction contracts, including contracts for the remodeling of homes and contracts for the purchase of materials for such remodelings, joinder was proper. *State v. McCallum*, 1975-NMCA-030, 87 N.M. 459, 535 P.2d 1085, cert. denied, 87 N.M. 457, 535 P.2d 1083.

Three sales of controlled substances by the defendant to the same individual in the same community and all within a comparatively short period of time clearly constitute the kind of situation intended to be covered by this rule. *State v. Riordan*, 1974-NMCA-013, 86 N.M. 92, 519 P.2d 1029.

It is not a denial of due process for a prosecutor to include in a criminal information two misdemeanor charges arising out of the same incident as the felony charge. *State v. Riddall*, 1991-NMCA-033, 112 N.M. 78, 811 P.2d 576.

In this case, the bank robberies were similar and distinctive and the cars used in the bank robberies were stolen using a distinctive method. The tampering-with-evidence

charge involved altering or hiding a gun allegedly used in both the murder and the bank robberies. All of the charges were clearly related to crimes that were the same, similar, a series of connected acts, or part of a single scheme or plan. Thus, all of the crimes charged were subject to joinder under Paragraph A. *State v. Griffin*, 1993-NMSC-071, 116 N.M. 689, 866 P.2d 1156.

Since there was admissible evidence tending to show that the two alleged offenses were committed in a similar manner and by a single individual, the trial court did not err in rejecting the defendant's motion for severance. *State v. Jones*, 1996-NMCA-020, 121 N.M. 383, 911 P.2d 891, *aff'd*, 1997-NMSC-016, 123 N.M. 73, 934 P.2d 267.

Where defendant stabbed the victim and then slashed the tires on the vehicles in the victim's driveway, defendant's charged offenses of murder and criminal damage to property were properly joined because the offenses were based on the same conduct or on a series of acts either connected together or constituting parts of a single scheme or plan; the tire slashing evidence explained defendant's blood spatters on or near the vehicles, which helped to place defendant at the scene of the murder and show the intermingling of his and the victim's blood; as well, in a separate trial for criminal damage, the evidence of the homicide is evidence of defendant's motive for slashing the tires, and the stabbing evidence is also necessary background for why defendant's and the victim's DNA were mingled in blood spatter on or near the vehicles, crucial evidence placing defendant at the scene of the criminal damage. Since the evidence in either case would be cross-admissible, the evidence did not prejudice defendant and the trial court did not abuse its discretion by refusing to sever the two cases. *State v. Smith*, 2016-NMSC-007.

Alternative charge held improper. — A complaint charging defendants with larceny over $2,500 or, in the alternative, possession of stolen property having a value over $2,500, did not comply with this Rule. *State v. Stephens*, 1990-NMCA-081, 110 N.M. 525, 797 P.2d 314).

Failure to sever not ineffective assistance. — Defendant's right to effective assistance of counsel was not violated by defense counsel's failure to move to sever the count of possession of a firearm by a felon from counts of first-degree murder and shooting into an occupied motor vehicle. Joinder of the felon in possession charge with the other charges was not per se prejudicial and the prior felony of vehicular homicide was so dissimilar from charges of murder or shooting into an occupied vehicle that its introduction into evidence was insufficient to cause defendant undue prejudice and require severance. *State v. Gonzales*, 1992-NMSC-003, 113 N.M. 221, 824 P.2d 1023.

Insufficient showing of prejudice. — Assertion by defendant, charged with attempted murder and attempted armed robbery, that attempted murder charge was over-emphasized and poisoned the minds of the jury and that the two charges were not part of the same transaction did not make sufficient affirmative showing of prejudice to show error in motion for severance. *State v. Paul*, 1972-NMCA-043, 83 N.M. 619, 495 P.2d 797.

Joinder of two informations, one charging three counts of aggravated burglary, three counts of second degree criminal sexual penetration (CSP II), and one count of CSP III, and the other, one count of aggravated burglary and one count of attempted CSP II, did not result in prejudice so great as to deny defendant a fair trial. *Lucero v. Kerby*, 133 F.3d 1299 (10th Cir.), cert. denied, 523 U.S. 1110, 118 S. Ct. 1684, 140 L. Ed. 2d 821 (1998).

Severance within trial court's discretion. — Though joinder of offenses in an indictment is authorized by this rule, severance of the counts for trial is a matter of discretion for the trial court. *State v. McCall*, 1983-NMCA-109, 101 N.M. 616, 686 P.2d 958, *rev'd on other grounds,* 1984-NMSC-007, 101 N.M. 32, 677 P.2d 1068.

Where no prejudice, no error in refusing to sever counts. — Where the strength and quality of the evidence on the various counts convinces the appellate court that the defendant was not prejudiced by the failure to sever multiple counts submitted to the jury, the trial court did not err in refusing to sever. *State v. Montano*, 1979-NMCA-101, 93 N.M. 436, 601 P.2d 69, cert. denied, 93 N.M. 683, 604 P.2d 821.

Defendant was not prejudiced by court's denial of his motion to sever trial on robbery and murder charges from trial on drug paraphernalia charges; jury was competent to evaluate the drug evidence separately from the robbery and murder evidence. *State v. Duffy*, 1998-NMSC-014, 126 N.M. 132, 967 P.2d 807.

In a prosecution for murder, the trial court did not abuse its discretion in joining escape charges because the court determined properly that escape evidence would be cross-admissible in separate trials and weighed the probative value against the danger of unfair prejudice. *State v. Jacobs*, 2000-NMSC-026, 129 N.M. 448, 10 P.3d 127, *overruled on other grounds by State v. Martinez*, 2021-NMSC-002.

Waiver of mandatory joinder. — A defendant waives his right to compulsory joinder if he fails to raise the issue prior to the time at which jeopardy attaches in a subsequent prosecution. *State v. Jackson*, 2020-NMCA-034, cert. denied.

Defendant waived his compulsory joinder claim by failing to raise the issue before his second trial. — Where defendant was charged in two separate cases based on events that occurred between defendant and his former girlfriend on April 4, 2015 and April 10, 2015, and where defendant was convicted of the crimes charged as a result of the events that occurred on April 10, 2015 and, one year later, convicted of all crimes charged as a result of the events that occurred on April 4, 2015, and where defendant argued on appeal that his convictions stemming from his second trial should be vacated because the state violated Rule 5-203(A) NMRA by failing to join the offenses from the two separate cases, defendant waived his right to have the charges joined under Rule 5-203(A) NMRA by failing to raise the issue before jeopardy attached in his second trial. *State v. Jackson*, 2020-NMCA-034, cert. denied.

II. JOINDER OF DEFENDANTS.

Generally. — So far as concerns essentials in the ascertainment of truth and the administration of justice, a joint trial of two defendants on two separate indictments for one crime differs in no respect from a single trial of the same defendants joined in one indictment for the identical crime. *State v. Fagan*, 1967-NMCA-032, 78 N.M. 618, 435 P.2d 771 (decided under former law).

Conspiracy charge. — Trial of multiple defendants was properly joined under Subdivisions (b) and (c) (*see now* Paragraphs B(1) and B(2)) where conspiracy was charged against all and it was difficult, if not impossible, to separate the proof as to each defendant without leaving gaps in the testimony. *State v. Johnston*, 1982-NMCA-083, 98 N.M. 92, 645 P.2d 448.

Denial of motion to sever is not error where the charges contained in the indictment grew out of an alleged crime spree by the defendant and his codefendants and the victims of the robberies testify as to certain similarities in the modus operandi and patterns of the crimes. *State v. Burdex*, 1983-NMCA-087, 100 N.M. 197, 668 P.2d 313.

III. MOTION FOR SEVERANCE.

Severance of felon in possession charge. — A trial judge is required to sever or bifurcate a felon in possession charge when the trial judge determines that prior felony evidence is not cross-admissible. The trial judge may exercise discretion only as to whether to sever or bifurcate in considering the competing advantages and disadvantages of the two alternatives. *State v. Garcia*, 2011-NMSC-003, 149 N.M. 185, 246 P.3d 1057, *modifying State v. Dominguez*, 2007-NMSC-060, 142 N.M. 811, 171 P.3d 750.

Severance as matter of right. — Where it was obvious to the trial court that the prosecution intended to use one defendant's illegally induced confession at the joint trial, and that evidence would not have been admissible at separate trials of either of the other two defendants, those defendants were entitled to severance of their trials as a matter of right, and failure to sever their trials constituted reversible error. *State v. Benavidez*, 1975-NMCA-013, 87 N.M. 223, 531 P.2d 957 (decided prior to 1980 amendment).

Rule explicitly requires prejudice and prejudice only. *State v. Volkman*, 1974-NMCA-079, 86 N.M. 529, 525 P.2d 889.

“Prejudice” construed. — A defendant is prejudiced in this context if there is an appreciable risk that reversal will be warranted because of a later determination of actual prejudice. *State v. Chavez*, 2021-NMSC-017.

Preserving the claim of severance. — The issue of prejudice is inherent in a claim for severance. In a joint trial, each codefendant who claims that the trial court erred by failing to sever must individually preserve the claim for severance. *State v. Chavez*, 2021-NMSC-017.

Where defendant was charged with first-degree murder, conspiracy to commit first-degree murder, arson, and tampering with evidence due to his involvement in the murder of a man, and where defendant's case was joined with that of a coconspirator under Rule 5-203(B) NMRA, and where defendant's codefendant moved for severance, but where defendant consistently opposed the joinder with the coconspirator but never argued for severance, defendant failed to preserve the claim for severance or issue of prejudice, because the party claiming error must have raised the issue below clearly and have invoked a ruling by the court. Opposing joinder is not sufficient to preserve the claim for severance; a defendant must raise the specific claim for severance and issue of prejudice. *State v. Chavez*, 2021-NMSC-017.

Fact that two charges are joined in one trial does not, in itself, show legal prejudice to defendant. *State v. Silver*, 1971-NMCA-112, 83 N.M. 1, 487 P.2d 910 (decided under former law).

To obtain a severance, defendant must prove he was prejudiced. *State v. Gallegos*, 1989-NMCA-066, 109 N.M. 55, 781 P.2d 783.

Failure to sever multiple counts not error where defendant not prejudiced. — Where the strength and quality of the evidence on various counts convinces the appellate court that the defendant was not prejudiced by the failure to sever multiple counts submitted to the jury, the trial court did not err in refusing to sever. *State v. Montano*, 1979-NMCA-101, 93 N.M. 436, 601 P.2d 69, cert. denied, 93 N.M. 683, 604 P.2d 821.

Failure to sever two counts of forgery arising from two separate incidents involving alteration of bingo cards did not prejudice defendant where evidence of the two offenses would be independently admissible in separate trials to prove the essential elements of intent and knowledge. *State v. Nguyen*, 1997-NMCA-037, 123 N.M. 290, 939 P.2d 1098.

When failure to request findings constitutes waiver. — The failure to request findings by the trial court when they are required by this rule could be construed as a waiver. However, where the state stipulated that it would present a confession against one defendant and admitted that this hearsay evidence would not be admissible in a separate trial of the moving defendants, no findings were necessary and there was no waiver. *State v. Volkman*, 1974-NMCA-079, 86 N.M. 529, 525 P.2d 889.

Motion for severance of defendants is waived if it is not made before trial or before or at the close of all the evidence. *State v. Garcia*, 1972-NMCA-142, 84 N.M. 519, 505 P.2d 862, cert. denied, 84 N.M. 512, 505 P.2d 855.

Bad reputation or conviction not sufficient ground for severance. — It is insufficient ground for severance that other defendants have bad reputations or have confessed to or been convicted of other crimes. *State v. Aull*, 1967-NMSC-233, 78 N.M.

607, 435 P.2d 437, cert. denied, 391 U.S. 927, 88 S. Ct. 1829, 20 L. Ed. 2d 668 (1968) (decided under former law).

The bad reputation of codefendants does not require severance. *State v. Johnston*, 1982-NMCA-083, 98 N.M. 92, 645 P.2d 448.

Defendant prejudiced where evidence of one burglary interspersed with that of another burglary. — Where defendant objected to consolidated trials and filed a motion for separate trials of two burglaries because the alleged felonies occurred at different times and places, and related to property belonging to different owners, but where the motion was denied, and evidence given at trial of facts pertaining to the one alleged burglary was interspersed with that of other alleged burglary, the trial court's denial of severance was prejudicial to defendant and constituted an abuse of discretion. *State v. Johnson*, 1972-NMCA-082, 84 N.M. 29, 498 P.2d 1372.

Control of procedural matters where defendant acts contrary to counsel's advice. — Where defendant claimed there was an abuse of discretion because the trial court acceded to his express wish not to have the counts severed when court-appointed counsel, directed to remain on the case by the trial court, was asking for a severance, and that the trial court thus ignored counsel's control over procedural matters, then defendant was representing himself in connection with the motion and proceeding contrary to counsel's advice and the court could not say that counsel, at the time, was controlling the matter. There was no abuse of discretion in these circumstances. *State v. Clark*, 1971-NMCA-176, 83 N.M. 484, 493 P.2d 969, cert. denied, 83 N.M. 473, 493 P.2d 958 (1972) (decided under former law).

Review of evidence on motion for severance. — A motion for severance necessitates a review of the evidence to determine whether the charges logically arise from the same episode or acts of a similar nature. *State v. Burdex*, 1983-NMCA-087, 100 N.M. 197, 668 P.2d 313.

Numerous counts insufficient to establish prejudice to defendant. — A claim that a criminal prosecution involves too many counts to try at one time is insufficient in and of itself to establish prejudice to the defendant. *State v. Burdex*, 1983-NMCA-087, 100 N.M. 197, 668 P.2d 313.

Conviction not reversed if evidence against joint defendant is not crucial. — Even where the trial court errs in failing to find that the prosecution will probably present evidence against a joint defendant which would not be admissible in a separate trial of the moving defendant, supreme court will not reverse a defendant's conviction if said error is harmless and the evidence admitted is not crucial to a determination of the defendant's guilt. *State v. Rondeau*, 1976-NMSC-044, 89 N.M. 408, 553 P.2d 688.

Where no showing, that joinder of counts was prejudicial. — The trial court did not abuse its discretion in denying the defendant's motion for a complete severance as to all counts of fraud and conspiracy where there was no showing by the defendant that

joinder of the counts in the trial resulted in prejudice, and evidence of the other counts was admissible whether the counts were severed or not. *State v. McCallum*, 1975-NMCA-030, 87 N.M. 459, 535 P.2d 1085, cert. denied, 87 N.M. 457, 535 P.2d 1083.

No severance where jury separates evidence. — Where several codefendants were jointly indicted for aggravated battery, but where the jury was able to separate the evidence against each defendant and differentiate among degrees of culpability, the trial court correctly refused to sever the defendants' trial. *State v. Dominguez*, 1993-NMCA-042, 115 N.M. 445, 853 P.2d 147.

Severance is within court's discretion. — Severance of cases is a matter of procedure which is addressed to the sound discretion of the trial court. *State v. Baca*, 1973-NMCA-054, 85 N.M. 55, 508 P.2d 1352; *State v. Robinson*, 1979-NMCA-001, 93 N.M. 340, 600 P.2d 286, cert. denied, 92 N.M. 532, 591 P.2d 286, *overruled on other grounds by Santillanes v. State*, 1993-NMSC-012, 115 N.M. 215, 849 P.2d 358; *State v. Pacheco*, 1990-NMCA-071, 110 N.M. 599, 798 P.2d 200.

This rule leaves the decision to grant or deny a separate trial largely in the hands of the trial court. *State v. McGill*, 1976-NMCA-100, 89 N.M. 631, 556 P.2d 39; *State v. Schifani*, 1978-NMCA-080, 92 N.M. 127, 584 P.2d 174, cert. denied, 92 N.M. 180, 585 P.2d 324.

Though joinder of offenses in an indictment is authorized, severance of the counts for trial is a matter of discretion for the trial court. *State v. McCall*, 1983-NMCA-109, 101 N.M. 616, 686 P.2d 958, *rev'd on other grounds*, 1984-NMSC-007, 101 N.M. 32, 677 P.2d 1068.

Evidence, inadmissible in a separate trial, was admitted in a joint trial. — Where defendant was convicted of murdering two victims and sexual criminal penetration of the second victim; the trial court permitted the State to present all the evidence of each separate murder and the criminal sexual penetration in a joint trial; much of the evidence was not cross admissible under Rule 11-404 NMRA as an exception to the prohibition on propensity evidence and had a potential for significant prejudicial effect because it showed that each murder involved a particularly gruesome killing of the victim and that defendant changed defendant’s story about the second murder multiple times; the state intertwined the facts of the two murders in its opening statement, its case in chief, and in its closing statements by portraying the crimes as having a common theme, by alternating its discussion and presentation of evidence between the two murders rather than discussing and presenting evidence of one murder and then separately discussing and presenting evidence of the other murder, and by relying on the jury’s knowledge of the second murder to discredit defendant with regard to the first murder; and the state relied on the evidence of defendant’s actions and statements in relation to the second murder to prove that defendant committed the first murder, the trial court committed reversible error, not harmless error, by failing to sever the murder charges into separate trials. *State v. Lovett*, 2012-NMSC-036, 286 P.3d 265.

There is no error unless abuse prejudices defendant. — Granting or denial of severance of cases must not be disturbed unless there is a clear showing of abuse of discretion which results in prejudice to the defendant. *State v. Baca*, 1973-NMCA-054, 85 N.M. 55, 508 P.2d 1352.

Trial court's denial of motion for severance of offenses is not error absent a showing of an abuse of discretion which results in prejudice to defendant. *State v. Clark*, 1971-NMCA-176, 83 N.M. 484, 493 P.2d 969, cert. denied, 83 N.M. 473, 493 P.2d 958 (1972).

The appellate issue is whether the trial court abused its discretion in denying the motion to sever. *State v. McGill*, 1976-NMCA-100, 89 N.M. 631, 556 P.2d 39; *State v. Schifani*, 1978-NMCA-080, 92 N.M. 127, 584 P.2d 174, cert. denied, 92 N.M. 180, 585 P.2d 324; *State v. Robinson*, 1979-NMCA-001, 93 N.M. 340, 600 P.2d 286, cert. denied, 92 N.M. 532, 591 P.2d 286, *overruled on other grounds by Santillanes v. State*, 1993-NMSC-012, 115 N.M. 215, 849 P.2d 358.

The denial of the request for severance is not a basis for reversal unless abuse of discretion and prejudice is shown. *State v. Silver*, 1971-NMCA-112, 83 N.M. 1, 487 P.2d 910 (decided under former law).

Abuse of discretion in denying severance. — District court abused its discretion in denying a severance at defendant's trial for three crimes involving larceny and fraudulent signing of a credit card, where the crimes charged in the indictment were remote in both time and place of occurrence, defendant's modi operandi were not similar in each crime, and the victims of the crimes were all different, as were the articles stolen or attempted to be stolen. *State v. Gallegos*, 1989-NMCA-066, 109 N.M. 55, 781 P.2d 783.

One test for abuse of discretion in denying motion to sever charges is whether prejudicial testimony, inadmissible in a separate trial, is admitted in a joint trial. *State v. Jones*, 1995-NMCA-073, 120 N.M. 185, 899 P.2d 1139.

Insufficient evidence of endangerment by medical neglect. — Where defendant, whose six-month-old baby died from a loss of blood associated with blunt abdominal trauma and a lacerated liver, was found not guilty of inflicting the injuries, but was convicted of negligently permitting endangerment by medical neglect, the State was required to put forth substantial evidence that defendant’s neglect, failing to obtain medical care earlier, resulted in the child’s death, but the state failed to present any evidence that defendant’s neglect contributed to the child’s death. Without some evidence to establish a causal connection between defendant’s neglect and the death of the child, there was insufficient evidence to support defendant’s conviction for endangerment by medical neglect. *State v. Nichols,* 2016-NMSC-001, *rev’g* 2014-NMCA-040, 321 P.3d 937.

Denial of severance held proper. — Where defendant was charged with child abuse due to medical negligence resulting in the death of one of defendant's twin six-month-old babies and child abuse of the other twin baby who did not die; defendant filed a motion seeking severance of and separate trial on the charges relating to the surviving baby on the ground that at a joint trial, the State would introduce evidence of the surviving baby's injuries that was not independently admissible on the charges relating to the deceased baby; the jury found defendant not guilty of the charges relating to the surviving baby; and defendant did not demonstrate how the admission of evidence relating to the surviving baby caused prejudice to defendant's defense on the charge relating to the deceased baby, defendant was not entitled to a new trial on the charge relating to the deceased baby. *State v. Nichols*, 2014-NMCA-040, cert. granted, 2014-NMCERT-003.

Where defendant was charged with felony possession of a firearm, felony murder, armed robbery, and tampering with evidence; the judgment and sentence order from defendant's prior felonies was admitted into evidence; the state never identified the names or any detail of the prior offenses, only generically mentioned the fact of the prior offenses as an element of the felon in possession charge, and avoided any other mention of the prior crimes; there was substantial evidence, aside from the reference to the prior felonies, to support defendant's convictions of felony murder, armed robbery, and tampering with evidence; the court instructed the jury to consider each charged offense separately; and the charged offenses were of a dissimilar nature, the failure of the court to sever the felon in possession charge from the other charges did not prejudice defendant and constituted harmless error. *State v. Garcia*, 2011-NMSC-003, 149 N.M. 185, 246 P.3d 1057.

On defendant's claim that the number of armed robbery charges (six), for which he was jointly tried, prejudiced him as a matter of law, consideration was given to the fact severance was discretionary with the trial court, that evidence as to certain of the charges was admissible on other charges and that the jury acquitted the defendant of some of the charges, and the trial court's denial of the motion to sever was upheld. *State v. McGill*, 1976-NMCA-100, 89 N.M. 631, 556 P.2d 39.

A denial of a motion to sever is not error where the charges contained in the indictment grew out of an alleged crime spree by the defendant and his codefendants and the victims of the robberies testify as to certain similarities in the modus operandi and patterns of the crimes. *State v. Burdex*, 1983-NMCA-087, 100 N.M. 197, 668 P.2d 313.

A severance is not required when defendant simply wants to testify on one count but not on the other. *State v. Foye*, 1983-NMCA-118, 100 N.M. 385, 671 P.2d 46.

Trial court's decision denying defendant's motion to sever his trial did not result in reversible error where evidence of defendant's guilt on drug possession charge was overwhelming and trial court's instruction would have sufficed to cure any prejudice had the possession offense been the only charge. *State v. Roybal*, 1992-NMCA-114, 115 N.M. 27, 846 P.2d 333.

The trial court did not err in denying defendant's motion to sever counts of fraud and receiving a bribe from other counts where there was no evidence the multiplicity of charges confused the jury, the multiplicity of charges were not cumulative, and the counts were predicate offenses for a racketeering charge. *State v. Armijo*, 1997-NMCA-080, 123 N.M. 690, 944 P.2d 919.

Denial of severance proper where evidence is cross-admissible in separate trials. — The trial court did not abuse its discretion in denying motion for severance where defendant could not show prejudice from joinder of charges because evidence of multiple charges would have been cross-admissible in separate trials pursuant to Rule 11-404 NMRA. *State v. Flores*, 2015-NMCA-002, cert. granted, 2014-NMCERT-012.

Where substantial evidence supported each conviction, adverse evidence was relevant to each charge and jury applied evidence to each count, trial court did not abuse its discretion in denying motion to sever the three counts against the defendant for trial. *State v. Schifani*, 1978-NMCA-080, 92 N.M. 127, 584 P.2d 174, cert. denied, 92 N.M. 180, 585 P.2d 324.

Dual jury trials. — The use of dual juries is a modified form of severance and is reviewed under the same standard of review as an action on a motion to sever, i.e., defendant must show abuse of discretion and prejudice. *State v. Padilla*, 1998-NMCA-088, 125 N.M. 665, 964 P.2d 829, cert. denied, 125 N.M. 322, 961 P.2d 167.

Law reviews. — For survey, "Children's Court Practice in Delinquency and Need of Supervision Cases Under the New Rules," see 6 N.M.L. Rev. 331 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 1 Am. Jur. 2d Actions § 70 et seq.; 21 Am. Jur. 2d Criminal Law § 20.

Appealability of order sustaining demurrer, or its equivalent, to complaint on ground of misjoinder or nonjoinder of parties or misjoinder of causes of action, 56 A.L.R.2d 1238.

Consolidated trial upon several indictments or informations against same accused, over his objection, 59 A.L.R.2d 841.

Propriety of use of multiple juries at joint trial of multiple defendants in state criminal prosecution, 41 A.L.R.4th 1189.

Joinder of offenses under Rule 8(a), Federal Rules of Criminal Procedure, 39 A.L.R. Fed. 479.

Defendant's right, under Rule 14, Federal Rules of Criminal Procedure, to severance in federal criminal trial because of codefendant's identification with an unpopular group, 40 A.L.R. Fed. 937.

What constitutes "series of acts or transaction" for purposes of Rule 8(b) of Federal Rules of Criminal Procedure, providing for joinder of defendants who are alleged to have participated in same series of acts or transaction, 62 A.L.R. Fed. 106.

1A C.J.S. Actions §§ 154 to 176.

5-204. Amendment or dismissal of complaint, information and indictment.

A. **Defects, errors and omissions.** A complaint, indictment, or information shall not be deemed invalid, nor shall the trial, judgment, or other proceedings thereon be stayed, arrested, or in any manner affected, because of any defect, error, omission, imperfection, or repugnancy therein which does not prejudice the substantial rights of the defendant upon the merits. The court may at any time prior to a verdict cause the complaint, indictment or information to be amended in respect to any such defect, error, omission or repugnancy if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced.

B. **Surplusage.** Any unnecessary allegation contained in a complaint, information, or indictment may be disregarded as surplusage.

C. **Variances.** No variance between those allegations of a complaint, indictment, information, or any supplemental pleading which state the particulars of the offense, whether amended or not, and the evidence offered in support thereof shall be grounds for the acquittal of the defendant unless such variance prejudices substantial rights of the defendant. The court may at any time allow the indictment or information to be amended in respect to any variance to conform to the evidence. If the court finds that the defendant has been prejudiced by an amendment, the court may postpone the trial or grant other relief as may be proper under the circumstances.

D. **Effect.** No appeal, or motion made after verdict, based on any such defect, error, omission, repugnancy, imperfection, variance, or failure to prove surplusage shall be sustained unless it is affirmatively shown that the defendant was in fact prejudiced in the defendant’s defense on the merits.

E. **Refiled proceedings.** If an indictment or information is dismissed and a subsequent indictment or information is filed arising out of the same incident, the bond shall continue in effect pending review by the district court.

F. **Effect on bail.** The dismissal of an indictment or information shall not exonerate a bond posted by a paid surety prior to the expiration of the time for automatic exoneration under Rule 5-406(A)(1) or (A)(2) NMRA.

[As amended by Supreme Court Order No. 05-8300-012, effective September 1, 2005; as amended by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017.]

Committee commentary. — This rule was designed to make clear that criminal pleadings should not be held invalid for any technical defect, error, or omission. *See e.g., State v. Lucero*, 79 N.M. 131, 440 P.2d 806 (Ct. App. 1968). The defendant must show that prejudice resulted from the allowance of an amendment to the pleading. *State v. Padilla*, 86 N.M. 282, 523 P.2d 17 (Ct. App.), cert. denied, 86 N.M. 281, 523 P.2d 16 (1974).

ANNOTATIONS

The 2017 amendment, approved by Supreme Court Order No. 17-8300-005, effective July 1, 2017, limited the provision in Paragraph F to bonds posted by paid sureties, and revised the citation form in the reference to Rule 5-406 NMRA; in Paragraph F, after "exonerate a bond", added "posted by a paid surety", after "automatic exoneration", deleted "pursuant to Subparagraphs (1) or (2) of Paragraph A of" and added "under", after "Rule 5-406", added "(A)(1) or (A)(2)", and after "NMRA", deleted "of these rules".

The 2005 amendment, effective September 1, 2005, added Paragraphs E and F relating to refiled proceedings and the effect on bail.

Compiler's notes. — Paragraphs A and C of this rule are similar to Rule 52 of the Federal Rules of Criminal Procedure.

Paragraph B of this rule is similar to Rule 7(d) of the Federal Rules of Criminal Procedure.

The annotations listed under "Defects, errors and omissions" make no distinction between pre- or post- verdict motions or appeals.

Cross references. — For motion for severance of offenses or defendants, *see* Rule 5-203 NMRA.

For pretrial motions, defenses and objections, *see* Rule 5-601 NMRA.

For post-conviction motions, *see* Rule 5-802 NMRA.

I. GENERAL CONSIDERATION.

Amendment of indictment. — Where the defendant was indicted for possession of child pornography with intent to distribute under the 1993 version of Section 30-6A-3 NMSA 1978 which required intent to distribute, and the trial court found the defendant guilty of sexual exploitation by possession under the 2001 version of the statute which does not require intent to distribute because the time frames for the corresponding criminal acts fell under the 2001 version, the amendment of the indictment did not charge an additional or different offense and the defendant's substantial rights were not prejudiced. *State v. Dietrich*, 2009-NMCA-031, 145 N.M. 733, 204 P.3d 748, cert. denied, *overruled in part by State v. Marquez*, 2021-NMCA-046.

Amendment of indictment to add lesser included offense. — Where, based on the victim's statements to police, defendant was indicted for criminal sexual penetration of a minor; at defendants' trial, the victim's testimony varied from an assertion of penetration to an assertion that defendant made contact with the victim's private part; and the court permitted the State to amend the indictment to charge the lesser included offense of criminal sexual contact of a minor, defendant was not prejudiced by the amendment of the indictment nor did the amendment constitute fundamental error because defendant was on notice of the lesser included offense and could have anticipated that evidence of criminal sexual contact of a minor would be presented at trial. *State v. Romero*, 2013-NMCA-101, cert. denied, 2013-NMCERT-009.

Changing the date on the charges listed on the indictment does not create an entirely new charge. *State v. Dombos*, 2008-NMCA-035, 143 N.M. 668, 180 P.3d 675, cert. denied, 2008-NMCERT-002.

Amendment to information amounted to a new charge. — Where defendant was charged with breaking and entering, attempt to commit breaking and entering, criminal trespass, and resisting, evading, or obstructing an officer, and where, at trial, the state amended the trespassing charge by changing the address of the location of the alleged trespass, the amendment to the criminal trespass charge violated Rule 5-204(A) NMRA, because this rule allows a court to amend an information prior to the verdict to correct a defect or error, but it does not allow the district court to amend if there is an additional or different offense charged, and in this case, the state's amendment sought to add a new charge after the close of evidence. Defendant was not on notice prior to trial under these facts that the state actually intended to charge a separate count of trespass at a different location, and the lack of adequate notice prejudiced defendant. *State v. Ancira*, 2022-NMCA-053, cert. denied.

Generally. — That a person may not be punished for a crime without a formal and sufficient accusation even if he voluntarily submits to the jurisdiction of the court cannot be questioned as it is regarded as fundamental that the accused must be tried only for the offense charged in the information. *State v. Villa*, 1973-NMCA-125, 85 N.M. 537, 514 P.2d 56.

Information not required to charge identical crime as complaint. — The information is not required to charge the identical crime stated in the complaint. *State v. Vasquez*, 1969-NMCA-082, 80 N.M. 586, 458 P.2d 838 (decided under former law).

Showing of prejudice required. — Subdivisions (a) and (d) (*see now* Paragraphs A and D) require a showing of prejudice due to a defect, error or omission in an indictment, and where defendant has not made such showing, the indictment is legally sufficient. *State v. Cutnose*, 1974-NMCA-130, 87 N.M. 307, 532 P.2d 896, cert. denied, 87 N.M. 299, 532 P.2d 888 (1975).

Sufficiency of criminal trespass charge. — Where defendant's indictment for criminal trespass charged him with violation of a specific statutory section, stating the common

name of the offense, the date and the county, it sufficiently informed defendant of what he must be prepared to meet and did not deprive him of due process. *State v. Cutnose*, 1974-NMCA-130, 87 N.M. 307, 532 P.2d 896, cert. denied, 87 N.M. 299, 532 P.2d 888 (1975).

Waiver of preliminary hearing or defects. — Pleading to an information waives the right to a preliminary hearing or any formal defects therein. *State v. Paul*, 1971-NMCA-040, 82 N.M. 619, 485 P.2d 375, cert. denied, 82 N.M. 601, 485 P.2d 357 (decided under former law).

Effect of failure to request bill of particulars. — A defendant failing, as here, to request a bill of particulars, if he deems the information insufficient, will not be heard on appeal to complain of a deficiency in the information. *State v. Lott*, 1963-NMSC-219, 73 N.M. 280, 387 P.2d 855 (decided under former law).

Advance notice. — Lack of advance notice concerning the motion to amend the information which erroneously cited the wrong statute is not a meritorious claim since the amendment can be made at any time and, absent a showing of prejudice (here, defendant was given 24 hours' notice), is not grounds for reversal. *State v. Wesson*, 1972-NMCA-013, 83 N.M. 480, 493 P.2d 965 (decided under former law).

Period of cross-examination of victims following amendment not prejudicial. — When, based on evidence presented in depositions of the victims, the information was amended to delete and amend certain charges without adding any charges, the failure to give the defendant the opportunity to cross-examine the victims on the charges in the amended information was not prejudicial. *State v. Trujillo*, 1995-NMCA-008, 119 N.M. 772, 895 P.2d 672.

Law reviews. — For survey, "Children's Court Practice in Delinquency and Need of Supervision Cases Under the New Rules," see 6 N.M.L. Rev. 331 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Failure to swear or irregularity in swearing witnesses appearing before grand jury as ground for dismissal of indictment, 23 A.L.R.4th 154.

When is dismissal of indictment appropriate remedy for misconduct of government official, 57 A.L.R. Fed. 824.

71 C.J.S. Pleading §§ 286 to 293.

II. DEFECTS, ERRORS AND OMISSIONS.

Where the defendant covertly videotaped minor female victims using the bathroom; the indictment failed to specify which photographs provided the factual basis for each count of the indictment for sexual exploitation of children but three months prior to trial the prosecution notified the defendant of the images that provided the factual

basis for each count of the charge, the defendant was not prejudiced. *State v. Myers*, 2009-NMSC-016, 146 N.M. 128, 207 P.3d 1105, overruling, in part, *State v. Rendleman*, 2003-NMCA-150, 134 N.M. 744, 82 P.3d 554.

Delay in filing information. — Where the procedural defect is the delay in filing the information, absent a showing of prejudice from this delay, a prosecution under the information is proper. *State v. Keener*, 1981-NMCA-139, 97 N.M. 295, 639 P.2d 582.

Explanation as to resubmitted matter entails no prejudice. — Where the prosecutor does no more than explain why a matter, previously considered, is again being presented to the grand jury, no prejudice to the defendant exists. *State v. Saiz*, 1979-NMCA-062, 92 N.M. 776, 595 P.2d 414.

Omission of date. — To the extent that the complaint against defendant, standing alone, could be considered defective as not including the date, any such defect was cured by the bill of particulars, alleging the date of violation, filed by the state. *State v. Pina*, 1977-NMCA-020, 90 N.M. 181, 561 P.2d 43.

Specified date of offense is a material allegation. — When the state elects to proceed on a specific date, and so alleges in the charging document, the date specified becomes a material allegation of the offense charged, thereby precluding the state from establishing guilt based on a different date. *State v. Mankiller*, 1986-NMCA-053, 104 N.M. 461, 722 P.2d 1183.

Date of acts. — The information charging defendant with sodomy (now criminal sexual penetration) was void for failure to give him notice of the charges against him where it failed to state the date of the offense so as to specify which of three different acts subsequently testified to by the state's principal witness was charged, and defendant's conviction was reversed. *State v. Foster*, 1974-NMCA-150, 87 N.M. 155, 530 P.2d 949.

Correction of date did not prejudice defendant. — Trial court did not err in allowing the indictment to be amended to correct the date of the alleged incident since the defendant was not prejudiced thereby. *State v. Marquez*, 1998-NMCA-010, 124 N.M. 409, 951 P.2d 1070, cert. denied, 124 N.M. 311, 950 P.2d 284.

Failure to note date of filing. — Jurisdiction of district court is not lost by the failure of the trial court to note the date of filing on the information, where there is nothing showing defendant was prejudiced in his defense on the merits. *State v. Vigil*, 1973-NMCA-089, 85 N.M. 328, 512 P.2d 88.

Time of offense. — An indictment or information is not required to allege the time of the offense. *State v. Selgado*, 1967-NMSC-147, 78 N.M. 165, 429 P.2d 363 (decided under former law).

Misjoinder of offenses. — An information shall not be invalid or insufficient because of a misjoinder of the offenses charged. *State v. Everitt*, 1969-NMCA-010, 80 N.M. 41, 450 P.2d 927 (decided under former law).

Meaning of "duplicity". — "Duplicity" is the joinder of two or more distinct and separate offenses in the same count. *State v. King*, 1977-NMCA-042, 90 N.M. 377, 563 P.2d 1170, *overruled on other grounds by State v. Reynolds*, 1982-NMSC-091, 98 N.M. 527, 650 P.2d 811.

Failure to charge offense. — In prosecution for evasion of gross receipts tax, indictment that was defective, because it failed to inform defendants of the charge that they attempted to evade a tax owed by the corporation that they owned, could properly be amended under this rule to include that defendants were officers and owners of the corporation and committed the offenses in their capacity as officers and owners, without prejudice to the substantial rights of the defendants on the merits. *State v. Dunlap*, 1977-NMCA-083, 90 N.M. 732, 568 P.2d 258.

Omission of entrustment from embezzlement charge. — A pleading expressly charging embezzlement does not fail by omitting entrustment as a factor. *State v. Konviser*, 1953-NMSC-057, 57 N.M. 418, 259 P.2d 785 (decided under former law).

Hearing of evidence by jury where joinder of crimes. — The fact that the jury heard evidence for two separate crimes under one information does not in itself afford proof of prejudice, as such proof is usually present where joinder is properly allowed. *State v. Brewer*, 1952-NMSC-029, 56 N.M. 226, 242 P.2d 996 (decided under former law).

Addition of new charges. — Defendant was prejudiced when trial court permitted state to amend indictment, after all evidence was in, to allege three methods by which offense of criminal sexual penetration in the second degree could be committed rather than only one method as alleged in the original indictment, since the jury was permitted by such amendment to convict the defendant under a theory which had not been tried. *State v. Armijo*, 1977-NMCA-070, 90 N.M. 614, 566 P.2d 1152.

Amended information to correct omission of count, not vindictive prosecution. — Where two counts were added by amendment to an information after they had inadvertently been omitted from the magistrate's written bind over order and from the original information, the filing of the amended information following the defendant's successful motion for a mistrial did not amount to vindictive prosecution. *State v. Coates*, 1985-NMSC-091, 103 N.M. 353, 707 P.2d 1163.

Reinstatement of deleted charge. — Where the taking of evidence had been concluded before counts 2, 3 and 4, charging various degrees of murder with a firearm, were stricken and any defense to the firearm charge had been presented in defending against the firearm charge in those counts, there was no prejudice in the reinstatement of the firearm charge. *State v. King*, 1977-NMCA-042, 90 N.M. 377, 563 P.2d 1170,

overruled on other grounds by State v. Reynolds, 1982-NMSC-091, 98 N.M. 527, 650 P.2d 811.

Conviction under necessarily included offense. — Conviction of first-degree murder under the felony-murder rule for an attempt to commit a felony when the charge under the indictment alleged the completion of the felony did not infringe fundamental rights of defendant, since the attempt to commit the crime charged is a necessarily included offense. *State v. Turnbow*, 1960-NMSC-081, 67 N.M. 241, 354 P.2d 533 (decided under former law).

Conviction for voluntary manslaughter under information charging first-degree murder will be sustained where defendant fails to object to charge. *State v. Parker*, 1930-NMSC-004, 34 N.M. 486, 285 P. 490 (decided under former law).

Charging in the alternative. — There was nothing unfair about charging the defendant in the alternative with fraud or embezzlement, particularly since the charges arose out of the same events and carried the same penalties, and defendant was furnished with a most detailed statement of fact including the complete district attorney's file, police reports and a citation of authorities the state was relying on in support of each of the alternative charges. *State v. Ortiz*, 1977-NMCA-036, 90 N.M. 319, 563 P.2d 113.

Statutory misreference. — A statutory misreference did not make the information fatally defective when the amendment, to correct the statutory misreference, was proper. *State v. Wesson*, 1972-NMCA-013, 83 N.M. 480, 493 P.2d 965.

Where allegations, notwithstanding the misreference to offense, are sufficient to charge the offense they provide no grounds for error. *State v. Holly*, 1968-NMCA-075, 79 N.M. 516, 445 P.2d 393 (decided under former law).

If the acts charged in an indictment are sufficient to constitute an offense under any statutes, a misreference, whether in the caption of the indictment or in the body thereof, to the statutes violated, does not render the indictment invalid. *Smith v. Abram*, 1954-NMSC-061, 58 N.M. 404, 271 P.2d 1010 (decided under former law).

Motion to dismiss because of statutory misreference in indictment was frivolous where misreference was patent typing error. *State v. Trujillo*, 1978-NMCA-041, 91 N.M. 641, 578 P.2d 342, cert. denied, 91 N.M. 751, 580 P.2d 972.

Miswriting. — Where the indictment charged an offense under the statutes the indictment is not to be held invalid or insufficient because of a "miswriting" or similar defect. Rather, the indictment may be amended in respect to such defect, however, if defendant is prejudiced by any such defect the court may postpone the trial. No appeal "based on any such defect" is to be sustained "unless it is affirmatively shown that the defendant was in fact prejudiced thereby in his defense upon the merits." *State v. Lucero*, 1968-NMCA-021, 79 N.M. 131, 440 P.2d 806 (decided under former law).

Where original indictment charged a common name - kidnapping, and referred to a specific section which defined kidnapping, and where the deficiency in charging kidnapping in the original indictment was limited to the use of "confined" rather than "held to service" against the will, that deficiency could not, as defendant contended, be considered as a charge of false imprisonment because the original indictment did not attempt to frame a false imprisonment charge. Correcting the deficiency merely involved amendment of the indictment to cure a drafting defect, which is authorized in Subdivision (a) (*see now* Paragraph A). *State v. Padilla*, 1974-NMCA-029, 86 N.M. 282, 523 P.2d 17, cert. denied, 86 N.M. 281, 523 P.2d 16.

Failure to name victim. — An information is not fatally defective in failing to name the victim of the statutory rape (now criminal sexual penetration) charged. *Ex parte Kelley*, 1953-NMSC-011, 57 N.M. 161, 256 P.2d 211 (decided under former law).

Inserting defendant's first name by amending information after testimony was closed but before case went to jury, where there was no surprise or prejudice, was not error. *State v. Martinez*, 1929-NMSC-040, 34 N.M. 112, 278 P. 210 (decided under former law).

Failure to include exact baptismal name of deceased was not a fatal variance where there was no doubt of his identity. *State v. Martinez*, 1929-NMSC-040, 34 N.M. 112, 278 P. 210 (decided under former law).

Use of witnesses not appearing on original charge. — Failure to endorse informer's name as witness on indictment was not grounds for reversal on basis of surprise appearance since no claim was made that the testimony could not be reasonably anticipated and since defendants never asserted they desired a delay in order to rebut the surprise testimony. *State v. Maes*, 1970-NMCA-053, 81 N.M. 550, 469 P.2d 529, cert. denied, 81 N.M. 588, 470 P.2d 309 (decided under former law).

Whether names of witnesses may be endorsed on the information during trial is a matter resting within the sound discretion of the court. It is not enough that a defendant claim surprise or prejudice in the calling of an adverse witness or one whose name does not appear upon the information charging him with crime. Nor is the mere admission of testimony of such witness error; rather, error follows from a denial of an opportunity to rebut the objectionable evidence. Here, defendant knew the day before that the witness would testify, knew the nature of the testimony, did not request postponement or continuance and admission of testimony was not an abuse of discretion. *State v. Carlton*, 1972-NMCA-015, 83 N.M. 644, 495 P.2d 1091, cert. denied, 83 N.M. 631, 495 P.2d 1078 (decided under former law).

That the court granted the prosecutor's motion to endorse the information thereby adding the witness's name who had testified, in the absence of abuse of discretion, was not error. *State v. Lujan*, 1968-NMSC-088, 79 N.M. 200, 441 P.2d 497 (decided under former law).

Incorrect address. — When after the amendment the address of the offense is correctly stated, defendant has not asked for a postponement and has not shown that he is prejudiced by the amendment correcting the typing error, contention that indictment is fatally defective is without merit. *State v. Lucero*, 1968-NMCA-021, 79 N.M. 131, 440 P.2d 806 (decided under former law).

III. SURPLUSAGE.

Proof of identity of victim is not surplusage. *State v. Vallo*, 1970-NMCA-002, 81 N.M. 148, 464 P.2d 567 (decided under former law).

Address and ownership of burglarized residence. — The allegations as to address and ownership of burglarized residence are unnecessary, and may be disregarded as surplusage. *State v. Lucero*, 1968-NMCA-021, 79 N.M. 131, 440 P.2d 806 (decided under former law).

IV. VARIANCES.

Generally. — Variance between evidence and allegations was not sufficient grounds for acquittal where no prejudice was shown, and failure of defense counsel to object did not establish ineffective counsel. *State v. Chacon*, 1969-NMCA-112, 80 N.M. 799, 461 P.2d 932 (decided under former law).

Under Paragraph C a variance is not treated as a different offense; a defendant would be able to preclude a second prosecution and avoid double jeopardy by demonstrating the variance. *State v. Johnson*, 1986-NMCA-084, 105 N.M. 63, 728 P.2d 473, cert. denied, 481 U.S. 1051, 107 S. Ct. 2185, 95 L. Ed. 2d 84 (1987).

The defendant was properly convicted of resisting, evading or obstructing an officer, because the evidence supported the verdict of the jury to that charge, and his opportunity to prepare and defend against the charge was not impaired by the fact that such an offense varied from the crime charged in the criminal information, i.e., aggravated assault upon a peace officer. *State v. Hamilton*, 1988-NMCA-023, 107 N.M. 186, 754 P.2d 857.

Failure to allege offense. — Information may be quashed where the acts alleged in the information and bill of particulars, when read together, do not constitute the offense which is charged. *State v. Putman*, 1967-NMCA-020, 78 N.M. 552, 434 P.2d 77 (decided under former law).

Variance of name. — When the indictment named Yolanda Duran as the owner of the burglarized residence and upon questioning she testified that she was divorced, that her married name had been Romero and that she goes by both "Duran" and "Romero," "Yolanda Duran" is either her true name or a name by which she is known and is sufficient identification for the purpose of identifying the owner of the burglarized residence. *State v. Lucero*, 1968-NMCA-021, 79 N.M. 131, 440 P.2d 806.

Specified date of offense is material allegation. — When the state elects to proceed on a specific date, and so alleges in the charging document, the date specified becomes a material allegation of the offense charged, thereby precluding the state from establishing guilt based on a different date. *State v. Mankiller*, 1986-NMCA-053, 104 N.M. 461, 722 P.2d 1183.

Variance of date. — Where, on two separate incidents, defendant directed the victim to perform oral sex on defendant's friend after the three injected methamphetamine together; defendant was charged with causing criminal sexual penetration during the commission of a felony; the information and the State's pretrial alibi notice did not allege precise dates of the incidents, but generally alleged that the offenses occurred on or about November 12, 2007; the affidavit for defendant's arrest warrant stated that the victim said the incidents occurred between Halloween and Thanksgiving; at trial, the victim testified that the victim was unsure of the dates of the incidents because the victim was high on methamphetamine; on cross examination, the victim testified that the incidents probably occurred a couple of weeks before Halloween; defendant presented the defense that defendant was absent from the state from November 2 to December 10, 2007; defendant used the victim's uncertainty about the exact dates of the incidents to attack the victim's credibility; and the district court allowed the State to amend the dates of the offenses to allege that they occurred on, about or between October 1, 2007 and November 22, 2007, defendant was not prejudiced by the amended date description and defendant waived any claim of prejudice when defendant attempted to exploit the victim's uncertainty about the dates. *State v. Stevens*, 2014-NMSC-011.

Variance of date. — Although the complaint charged that a sheep slaughter without inspection occurred on or about March 17, 1976, the bill of particulars stated the killing occurred on March 17, 1976, and the proof at trial was that the slaughter occurred on March 16, 1976, there was nothing showing the variance prejudiced defendant's rights. *State v. Pina*, 1977-NMCA-020, 90 N.M. 181, 561 P.2d 43.

Variance of ownership. — Where the amendment of the information charging larceny was made to conform to the evidence, that three people instead of one owned the trailer involved, the trial court was of the opinion that the defendant was not prejudiced thereby, especially since defendant made no request for a continuance or postponement and did not show that he was in fact prejudiced by the amendment. *State v. Parker*, 1969-NMCA-056, 80 N.M. 551, 458 P.2d 803, cert. denied, 80 N.M. 607, 458 P.2d 859 (decided under former law).

Variance in verb tense. — In a criminal fraud case, the defendants' argument that the instruction using the words "would pay" constituted a material variance from the language of the indictment using the words "were paying," was without merit. *State v. Crews*, 1989-NMCA-088, 110 N.M. 723, 799 P.2d 592.

Amendment to add alternative murder theory. — Allowing the state to amend the indictment to add the charge of depraved mind murder did not add a different offense, but rather added an alternative theory of first degree murder, and defendant was thus

not prejudiced by the amendment. *State v. Lucero*, 1998-NMSC-044, 126 N.M. 552, 972 P.2d 1143.

Amendment to add predicate felonies to felony murder charge. — Where defendant was charged by indictment with felony murder; the indictment listed attempted murder and kidnapping as predicate felonies and stated that the defendant murdered the victim while in the commission of attempted murder or kidnapping; after the conclusion of the state's evidence, the district court permitted the state to include the predicate felonies of aggravated assault with a deadly weapon against defendant's friend and an individual who assisted the friend; the individual who assisted the friend was not identified in the indictment as a victim of any of the predicate felonies; defendant was also charged by indictment with attempted murder of the friend and aggravated assault with a deadly weapon against the friend and the individual who assisted the friend; the attempted murder and the aggravated assault charges arose from the same underlying conduct as the felony murder; and defendant was aware that defendant had to defend against the aggravated assault charge with respect to the individual who assisted the friend and had notice that the victim's murder occurred while in the commission of the attempted murder and aggravated assault against the friend, defendant's substantial rights were not prejudiced by the addition of the predicate felonies. *State v. Branch*, 2010-NMSC-042, 148 N.M. 601, 241 P.3d 602.

Amendment charging new offense not permitted. — Paragraph C of this rule does not authorize the trial court to permit an amended information that charges defendant with an additional or different offense. *State v. Roman*, 1998-NMCA-132, 125 N.M. 688, 964 P.2d 852.

No prejudice by amendment where defendant on notice. — There is no surprise to the defendant as a result of an amendment of an indictment where he is on notice from the beginning that he must defend against each element originally alleged. *State v. Vialpando*, 1979-NMCA-083, 93 N.M. 289, 599 P.2d 1086, cert. denied, 93 N.M. 172, 598 P.2d 215.

Effect of jury verdict on variance. — Variance between indictment and proof offered at trial as to the name and address of the party and place burglarized is not jurisdictional as the error can be cured by verdict of the jury. *State v. Jaramillo*, 1973-NMCA-029, 85 N.M. 19, 508 P.2d 1316, cert. denied, 85 N.M. 5, 508 P.2d 1302, 414 U.S. 1000, 94 S. Ct. 353, 38 L. Ed. 2d 236 (1973); *State v. Montgomery*, 1923-NMSC-001, 28 N.M. 344, 212 P. 341 (cases decided under former law).

V. EFFECT.

Generally, as to deficiencies raised through habeas corpus. — In habeas corpus proceeding the information or indictment under which a petitioner was sentenced is not open to review on grounds of deficiencies therein on claim embezzlement charge failed to allege value or property embezzled. Such proceeding is a collateral attack upon the judgment and the only question for decision is whether the trial court possessed

jurisdiction of the parties, jurisdiction of the subject matter, and the power impose the sentence. *Roehm v. Woodruff*, 1958-NMSC-083, 64 N.M. 278, 327 P.2d 339 (decided under former law).

Variance. — Variance, relating to name and address of parties and place burglarized, between the particulars stated in the indictment and the proof thereof at the trial is not sufficient to warrant a reversal when raised for the first time on appeal. *State v. Jaramillo*, 1973-NMCA-029, 85 N.M. 19, 508 P.2d 1316, cert. denied, 85 N.M. 5, 508 P.2d 1302, 414 U.S. 1000, 94 S. Ct. 353, 38 L. Ed. 2d 236 (1973) (decided under former law).

A variance between charge and proof cannot be raised for the first time after verdict by a motion for new trial or in arrest of judgment. *State v. Mares*, 1956-NMSC-031, 61 N.M. 46, 294 P.2d 284 (decided under former law).

5-205. Unnecessary allegations.

A. **Generally unnecessary allegations.** It shall be unnecessary for a complaint, indictment or an information to contain the following allegations unless such allegations are necessary to give the defendant notice of the crime charged:

(1) time of the commission of offense;

(2) place of the commission of offense;

(3) means by which the offense was committed;

(4) value or price of any property;

(5) ownership of property;

(6) intent with which an act was done;

(7) description of any place or thing;

(8) the particular character, number, denomination, kind, species or nature of money, checks, drafts, bills of exchange or other currency;

(9) the specific degree of the offense charged;

(10) any statutory exceptions to the offense charged; or

(11) any other similar allegation.

B. **Inclusion by state.** The state may include any of the unnecessary allegations set forth in Paragraph A of this rule in a complaint, indictment or information without

thereby enlarging or amending such complaint, indictment or information, and such allegations shall be treated as surplusage the same as if contained in a statement of facts.

C. **Statement of facts.** Upon motion of the defendant, the court may order the state to file a statement of facts setting forth any or all of the unnecessary allegations set forth in Paragraph A of this rule. Such statement of facts shall not enlarge or amend the complaint, indictment or information, and such allegations shall be treated as surplusage.

Committee commentary. — Section 14 of Article 2 of the New Mexico Constitution gives the defendant a right to "demand the nature and cause of the accusation." This rule provides a basic procedure for the exercise of an accused's right to determine the "nature of the accusation" to provide more specificity of the factual allegations clarifying what he or she is alleged to have done in violation of the law. *See State v. Crews*, 110 N.M. 723, 739, 799 P.2d 592, 608 (Ct. App. 1989) (recognizing that "[t]he purpose of a statement of facts is to provide the defendant with sufficient information about the nature and character of the crime charged"). A motion for a statement of facts should not be confused with a motion for discovery of the evidence that may prove or disprove those factual allegations, "the cause of the accusation," addressed in the discovery provisions of Rules 5-501 to -512 NMRA.

The statement of facts replaces the bill of particulars, former Trial Court Rule 35-4409 (compiled as 41-6-8 NMSA, 1953 Comp., abrogated by the supreme court with the adoption of these rules). This rule is designed to avoid the technicalities of the bill of particulars without diminishing the basic constitutional right of the defendant. *See State v. Campos*, 79 N.M. 611, 447 P.2d 20 (1968); *State v. Graves*, 73 N.M. 79, 385 P.2d 635 (1963).

For a prerule decision holding that the place of the commission of the offense or the owner of the property were not necessary allegations, *see State v. Lucero*, 79 N.M. 131, 440 P.2d 806 (Ct. App. 1968). For a prerule decision holding that the degrees of the crime need not be set forth in the charge, *see State v. Roy*, 40 N.M. 397, 60 P.2d 647 (1936). As indicated in the rule, any of these allegations could be necessary under certain circumstances to give the defendant notice of the crime charged. *State v. Foster*, 87 N.M. 155, 530 P.2d 949 (Ct. App. 1974).

[As amended by Supreme Court Order No. 13-8300-008, effective for all cases pending or filed on or after May 13, 2013.]

ANNOTATIONS

The 2013 amendment, approved by Supreme Court Order No. 13-8300-008, effective May 13, 2013, revised the committee commentary.

Cross references. — For methods of prosecution, *see* Rule 5-201 NMRA.

For defects, errors or omissions, *see* Rule 5-204 NMRA.

For pretrial motions, *see* Rule 5-601 NMRA.

For right to demand the nature and cause of accusation against defendant, *see* N.M. Const., art. II, § 14.

I. UNNECESSARY ALLEGATIONS.

Time of offense. — An indictment or information is not required to allege the time of the offense. *State v. Selgado*, 1967-NMSC-147, 78 N.M. 165, 429 P.2d 363 (decided under former law).

A charging document need not allege time or date of offense charged unless such allegations are necessary to give a defendant notice of the crime charged. Thus, where the time of commission of the alleged offenses was an element unessential to the crimes charged, and thus an allegation unnecessary to the information, the criminal information sufficiently charged the offenses. *State v. Cawley*, 1990-NMSC-088, 110 N.M. 705, 799 P.2d 574.

Exception to time as unnecessary allegation. — The information charging defendant with sodomy was void for failure to give him notice of the charges against him where it failed to state the date of the offense so as to specify which of three different acts subsequently testified to by the state's principal witness was charged, and defendant's conviction was reversed. *State v. Foster*, 1974-NMCA-150, 87 N.M. 155, 530 P.2d 949.

Where a criminal offense is charged generally, and is then followed with a detailed statement of the facts, the prosecution is limited to establishing the facts so detailed; therefore, surplusage provisions of these rules making an allegation of the time of the offense unnecessary are inapplicable where the amended indictment gave defendant notice that he was charged with crimes on specific dates and the trial court's refusal to instruct that guilt was to be determined on the basis of acts occurring on or about the dates of the two burglaries charged was reversible error where there was evidence of several burglaries, and evidence connecting the defendant to at least one additional burglary for which defendant was not being tried. *State v. Salazar*, 1974-NMCA-026, 86 N.M. 172, 521 P.2d 134.

Address and ownership. — The allegations as to address and ownership of burglarized residence are unnecessary and may be disregarded as surplusage. *State v. Lucero*, 1968-NMCA-021, 79 N.M. 131, 440 P.2d 806 (decided under former law).

Means by which offense committed. — The means or elements of embezzlement are not required to be alleged. *Smith v. Abram*, 1954-NMSC-061, 58 N.M. 404, 271 P.2d 1010 (decided under former law).

Criminal information charging defendant with "possession of cocaine to-wit: by consumption" charged the usual crime of possession of cocaine; the additional language concerning consumption was simply additional information provided by the state to show how it planned to prove possession and including the method of proof in the charging instrument did not change the basic charge of possession of cocaine that is criminalized pursuant to 30-31-23 NMSA 1978. *State v. McCoy*, 1993-NMCA-064, 116 N.M. 491, 864 P.2d 307, *rev'd in part on other grounds sub nom. State v. Hodge*, 1994-NMSC-087, 118 N.M. 410, 882 P.2d 1.

Value. — Although information should have alleged value, jurisdiction does not depend upon the value of the property embezzled; value merely denotes the grade of the offense. *Roehm v. Woodruff*, 1958-NMSC-083, 64 N.M. 278, 327 P.2d 339 (decided under former law).

Ownership. — Laws making allegations regarding ownership unnecessary in an information which charges larceny and provides for a bill of particulars is not unconstitutional since ownership in any particular person is not an element of the offense. *State v. Shroyer*, 1945-NMSC-014, 49 N.M. 196, 160 P.2d 444 (decided under former law).

Intent. — Where criminal intent is an essential part of the offense, failure to allege such intent would be a fatal defect, although intent may be alleged in general terms, or by use of equivalent terms. *State v. Shedoudy*, 1941-NMSC-044, 45 N.M. 516, 118 P.2d 280, *rev'd on other grounds*, 1944-NMSC-042, 48 N.M. 354, 151 P.2d 57 (decided under former law).

Checks included as money. — Checks are included within scope of information which charged embezzlement of money. *State v. Peke*, 1962-NMSC-033, 70 N.M. 108, 371 P.2d 226, cert. denied, 371 U.S. 924, 83 S. Ct. 293, 9 L. Ed. 2d 232 (1962) (decided under former law).

II. STATEMENT OF FACTS.

Failure to request statement of facts is waiver. — Where an information charged conspiracy to commit a felony as well as three other separate felonies, it provided sufficient notice of the underlying felony or felonies. When the defendant did not request a statement of facts, he waived any claim that he did not know which of the three felonies, or whether all of them, constituted the felony he was charged with conspiring to commit. *State v. Martin*, 1980-NMCA-019, 94 N.M. 251, 609 P.2d 333, cert. denied, 94 N.M. 628, 614 P.2d 545.

Notice by other means. — Although a defendant may not have requested a statement of facts, the purpose of this rule has been fulfilled when, through some other method, e.g., affidavits attached to criminal complaints, the defendant was put fully on notice of the crimes with which he was charged and the circumstances surrounding them. *State*

v. Hernandez, 1986-NMCA-040, 104 N.M. 268, 720 P.2d 303, cert. denied, 104 N.M. 201, 718 P.2d 1349.

Providing grand jury tapes fulfilled purpose of statement of facts. — Where a defendant was provided with grand jury tapes, the purpose of a statement of facts was fulfilled, as the defendant was provided with adequate information upon which to prepare his defense. *State v. Aaron*, 1984-NMCA-124, 102 N.M. 187, 692 P.2d 1336.

Where error to deny bill of particulars. — In prosecution for burglary, court committed reversible error when it failed to grant motion for bill of particulars as to where robbery occurred, the type of building wherein it occurred and the type of container valuables were allegedly taken from. *State v. Graves*, 1963-NMSC-183, 73 N.M. 79, 385 P.2d 635 (decided under former law).

Charge of larceny of "certain articles of personal property" of a certain value, in possession of sheriff, was such that motion for bill of particulars should not have been denied. *State v. Campos*, 1968-NMSC-177, 79 N.M. 611, 447 P.2d 20 (decided under former law).

Error to deny bill of particulars where there is insufficient specificity in charging document. — Where defendant was indicted on twelve counts of criminal sexual penetration of a minor, and where the indictment charged six factually undifferentiated acts per victim occurring between two dates, about two months apart, the district court erred in denying defendant’s motion for a bill of particulars, because procedural due process requires the State to provide reasonable notice of charges against a person and a fair opportunity to defend, and a charging defect encompassed by cookie-cutter allegations within a broad time period gives rise to the possibility that a defendant might suffer double jeopardy in his initial trial by being convicted and punished multiple times on undifferentiated counts for what might have been the same offense. *State v. Huerta-Castro*, 2017-NMCA-026.

Bill to be provided despite valid information. — Validity of information under constitutional statutes does not satisfy requirement of bill of particulars if requested. *State v. Graves*, 1963-NMSC-183, 73 N.M. 79, 385 P.2d 635 (decided under former law).

Where defendant given entire transcript and exhibits. — Defendant who was given entire transcript of 172 pages and 11 exhibits from the preliminary hearing, and asked for bill of particulars yet was evasive when asked by the court what he wanted, and did not answer the question, was not entitled to bill of particulars, was afforded reasonable information, and state was not required to plead the evidence. *State v. Archuleta*, 1970-NMCA-131, 82 N.M. 378, 482 P.2d 242, cert. denied, 82 N.M. 377, 482 P.2d 241 (1971) (decided under former law).

Where bill not requested. — Defendant who never requested bill of particulars will not be heard to complain on appeal that bill was not furnished him. *State v. Gibby*, 1967-NMSC-219, 78 N.M. 414, 432 P.2d 258 (decided under former law).

Bill of particulars to become matter of record. *State v. Roy*, 1936-NMSC-048, 40 N.M. 397, 60 P.2d 646 (decided under former law).

Where sufficient notice of offense. — Charge of murder "by shooting with a gun" was sufficient to enable defendant to prepare defense without bill of particulars. *State v. Smith*, 1966-NMSC-128, 76 N.M. 477, 416 P.2d 146 (decided under former law).

Information charging larceny of sheep is sufficient and may be supplemented by a bill of particulars. *State v. Shroyer*, 1945-NMSC-014, 49 N.M. 196, 160 P.2d 444 (decided under former law).

Denial of motion upheld. — District court did not err in denying defendant's motion for a statement of facts, where it was admitted that trial counsel did receive a copy of the grand jury indictment and police report and interviewed the state's witnesses. *State v. Serna*, 1991-NMCA-102, 112 N.M. 738, 819 P.2d 688.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 61A Am. Jur. 2d Pleading §§ 31 to 33, 35 to 37, 57, 58, 623.

71 C.J.S. Pleading §§ 6, 26, 36.

5-206. Signing of pleadings.

Every pleading, motion and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address and telephone number shall be stated. A party who is not represented by an attorney shall sign the party's pleading and state the party's address and telephone number. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion or other paper and that to the best of the signer's knowledge, information and belief it is not interposed for delay. If a pleading, motion or other paper is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. If a pleading, motion or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. For a willful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted. A "signature" means an original signature, a copy of an original signature, a computer generated signature or any other signature otherwise authorized by law.

[As amended, effective August 1, 1989; January 1, 1997.]

Committee commentary. — This rule is substantially the same as Rule 1-011.

New Mexico has enacted an Electronic Authentication Documentation Act which provides for the Secretary of State to register electronic signatures using the public key technology. *See* Section 14-15-4 NMSA 1978.

ANNOTATIONS

The 1997 amendment, effective January 1, 1997, added the last sentence defining "signature".

Am. Jur. 2d, A.L.R. and C.J.S. references. — 22 C.J.S. Criminal Law § 324 et seq.

5-207. Withdrawn.

ANNOTATIONS

Withdrawals. — Pursuant to Supreme Court Order No. 09-8300-006, Rule 5-207 NMRA, relating to filings of complaints, was withdrawn effective May 6, 2009.

5-208. Issuance of warrant for arrest and summons.

A. **Time.** On the docketing of any criminal action, the court may issue a summons or arrest warrant.

B. **Preference for summons.** The court shall issue a summons, unless in its discretion, the court finds that the interests of justice would be better served by the issuance of a warrant and if the requirements of Paragraph C of this rule are met.

C. **Basis for warrant.** The court may issue a warrant for arrest on an indictment or a sworn written statement of the facts showing probable cause for issuance of the warrant. The showing of probable cause shall be based on substantial evidence, which may be hearsay in whole or in part, provided there is a substantial basis for believing the source of the hearsay to be credible and for believing that there is a factual basis for the information furnished. Before ruling on a request for a warrant the court may require the affiant to appear personally and may examine under oath the affiant and any witnesses the affiant may produce, but the additional evidence shall be reduced to writing and supported by oath or affirmation. The court may also permit a request for an arrest warrant by any method authorized by Rule 5-211(F) NMRA for search warrants and may issue an arrest warrant remotely if the requirements of Rule 5-211(F) NMRA and this rule are met.

D. **Form.**

(1) **Warrant.** The warrant shall be signed by the court and shall contain the name of the defendant or, if the defendant’s name is unknown, any name or description

by which the defendant can be identified with reasonable certainty. It shall describe the offense charged and shall command that the defendant be arrested and brought before the court. The warrant may set conditions of release for the defendant only for:

(a) penalty assessment misdemeanor charges; or

(b) traffic code misdemeanor charges, except for:

(i) driving under the influence of intoxicating liquor or drugs, contrary to Section 66-8-102 NMSA 1978; and

(ii) operating a motorboat while under the influence of intoxicating liquor or drugs, contrary to Section 66-13-3 NMSA 1978.

(2) **Summons.** The summons shall be in the same form as the warrant except that it shall summon the defendant to appear before the court at a stated time and place. A summons or arrest warrant shall be substantially in the form approved by the Supreme Court.

[As amended by Supreme Court Order No. 12 8300 016, effective for all cases pending or filed on or after June 29, 2012; as amended by Supreme Court Order No. 19-8300-018, effective for all cases pending or filed on or after December 31, 2019; as amended by Supreme Court Order No. S-1-RCR-2024-00068, effective for all cases pending or filed on or after May 8, 2024.]

Committee commentary. — When a criminal action is docketed in a magistrate or metropolitan court by the filing of a complaint, either Rule 6-204 NMRA or Rule 7-204 NMRA, which are substantially identical to this rule, will govern the procedure.

Paragraph C of this rule requires a written showing of probable cause before an arrest warrant may be issued. The constitutional basis for this requirement is Article II, Section 10 of the New Mexico Constitution, although that provision does not expressly mention arrest warrants. *Cf. State v. Gibby*, 1967-NMSC-219, 78 N.M. 414, 432 P.2d 258.

Paragraph C of this rule codified case law allowing the issuance of a warrant on probable cause based on hearsay evidence. This provision was taken from Rule 4(b) of the Federal Rules of Criminal Procedure. *See* 48 F.R.D. 553, 55860 (1970); 62 F.R.D. 27172 (1974). Neither the proposed federal rule nor this rule attempts to establish what constitutes probable cause based on hearsay as that determination can only be made on a case by case basis, taking into account the unlimited variation and sources of information and the varying reliability of the information received by the affiant from others. 62 F.R.D. 271, 27374 (1974). The fact that the information may involve double hearsay does not mean that the affidavit fails to provide probable cause. *State v. Alderete*, 1975-NMCA-058, 88 N.M. 14, 536 P.2d 278.

Paragraph C was amended in 2012 to permit alternate methods for requesting and issuing arrest warrants. *See* Rule 5 211(F) and the related committee commentary for more information.

Paragraph D was amended in 2024 to prevent release of defendants arrested on warrants before the defendant's first appearance or other hearing, with exceptions for penalty assessment misdemeanor charges and certain traffic code misdemeanor charges.

In 2019, this rule was amended to incorporate language from rules governing the courts of limited jurisdiction, which express a preference for the use of a summons when practicable. *See* Rule 6-204 NMRA; Rule 7-204 NMRA; Rule 8-203 NMRA.

[As amended by Supreme Court Order No. 12 8300 016, effective for all cases pending or filed on or after June 29, 2012; as amended by Supreme Court Order No. 19-8300-018, effective for all cases filed on or after December 31, 2019; as amended by Supreme Court Order No. S-1-RCR-2024-00068, effective for all cases pending or filed on or after May 8, 2024.]

ANNOTATIONS

The 2024 amendment, approved by Supreme Court Order No. S-1-RCR-2024-00068, effective May 8, 2024, provided that the warrant for arrest may set condition of release for the defendant only for penalty assessment misdemeanor charges or certain traffic code misdemeanor charges, made certain technical changes, revised the committee commentary, and substituted "on" for "upon" throughout the rule; and in Subparagraph D(1), added "The warrant may set conditions of release for the defendant only for:", and added Items D(1)(a) and D(1)(b).

The 2019 amendment, approved by Supreme Court Order No. 19-8300-018, effective for all cases pending or filed on or after December 31, 2019, substantially rewrote the rule to incorporate language from rules governing courts of limited jurisdiction, and revised the committee commentary; and deleted former Paragraphs B through D and added new Paragraphs B through D.

The 2012 amendment, approved by Supreme Court Order No. 12-8300-016, effective for all cases pending or filed on or after June 29, 2012, added the last sentence in Paragraph D of the rule, and added the last paragraph of the committee commentary.

Compiler's notes. — Paragraphs B and C are similar to Rules 4(c) and 9(b) of the Federal Rules of Criminal Procedure.

Paragraph D is similar to Rules 4(a) and (c) and 9(a) of the Federal Rules of Criminal Procedure.

Cross references. — For issuance of summons or warrant, *see* Section 31-1-4 NMSA 1978.

For forms on criminal summons, certificate of mailing, certificate of service and affidavit of service by other person making service, *see* Rule 9-208 NMRA.

For affidavit for arrest warrant form, *see* Rule 9-209 NMRA.

For inapplicability of Rules of Evidence to proceedings for issuance of arrest warrants and criminal summonses, *see* Rule 11-1101 NMRA.

I. GENERAL CONSIDERATION.

Judge lacks authority to order production of handwriting exemplars. — Absent legislative, or judicial, authorization, a judge has no authority to order a defendant either to produce handwriting exemplars or be held in contempt, prior to arrest or charge. *Sanchez v. Attorney Gen.*, 1979-NMCA-081, 93 N.M. 210, 598 P.2d 1170.

Law reviews. — For comment, "Criminal Procedure - Preventive Detention in New Mexico," see 4 N.M.L. Rev. 247 (1974).

For survey, "Children's Court Practice in Delinquency and Need of Supervision Cases Under the New Rules," see 6 N.M.L. Rev. 331 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Private citizen's right to institute mandamus to compel a magistrate or other appropriate official to issue a warrant, or the like, for an arrest, 49 A.L.R.2d 1285.

22 C.J.S. Criminal Law § 334; 72 C.J.S. Process § 2.

II. FORM.

Generally. — A warrant is a writ or precept issued by a magistrate, justice or other competent authority, addressed to a sheriff, constable or other officer, requiring him to arrest the body of a person therein named, and bring him before the magistrate or court, to answer or be examined, touching some offense which he is charged with having committed. *State v. Barreras*, 1958-NMSC-085, 64 N.M. 300, 328 P.2d 74 (decided under former law).

Purpose of warrant. — The purpose of a warrant is to acquire jurisdiction over the person of the accused, to bring him before the court. *State v. Barreras*, 1958-NMSC-085, 64 N.M. 300, 328 P.2d 74 (decided under former law).

Unsigned warrant invalid. — Since the bench warrant upon which defendant was arrested was not properly signed by the court, the warrant was invalid and evidence

seized thereunder must be suppressed. *State v. Gurrola*, 1995-NMCA-138, 121 N.M. 34, 908 P.2d 264.

Effect of invalid complaint. — Where the warrant was issued on an invalid complaint, the district court did not lose jurisdiction to try the defendant on the subject charges. *State v. Baca*, 1970-NMCA-075, 81 N.M. 686, 472 P.2d 651, cert. denied, 81 N.M. 721, 472 P.2d 984 (decided under prior law).

III. BASIS FOR WARRANT.

Generally. — Before a warrant for arrest may be issued, the judicial officer issuing it must be supplied with sufficient information to support an independent judgment that probable cause exists for the warrant, so as to allow a relatively independent magistrate to be interposed between the arresting force and the citizen whose right not to be arrested without cause is guaranteed by U.S. Const., amend. IV. This probable cause standard must be at least as stringently applied in the case of warrantless arrests as in the instance of an arrest with a warrant. *State v. Gorsuch*, 1974-NMCA-143, 87 N.M. 135, 529 P.2d 1256.

Generally, as to test for probable cause. — Before an arrest warrant may be issued, the magistrate issuing it "must be supplied with sufficient information to support an independent judgment that probable cause exists for the warrant" and the test for probable cause is whether the police officer has reasonable grounds for belief of defendant's guilt. *State v. Alderete*, 1975-NMCA-058, 88 N.M. 14, 536 P.2d 278.

The substance of all the definitions of probable cause is a reasonable ground for belief of guilt. *State v. Hilliard*, 1970-NMCA-039, 81 N.M. 407, 467 P.2d 733.

Reasonable grounds for belief under this rule is a state of facts that would lead the police officer, as a man of reasonable caution, to believe the defendant committed the crime for which he is arrested. *State v. Alderete*, 1975-NMCA-058, 88 N.M. 14, 536 P.2d 278.

Examination of facts to be case by case. — The existence of "probable cause," whether for issuance of a search warrant or warrant of arrest, or for arrest without a warrant, or for search and seizure without a warrant, involves a case-by-case examination of the facts and no two cases are precisely alike. *State v. Aull*, 1967-NMSC-233, 78 N.M. 607, 435 P.2d 437, cert. denied, 391 U.S. 927, 88 S. Ct. 1829, 20 L. Ed. 2d 668 (1968).

Sources of information. — In determining if probable cause exists, police officers may rely on information coming to them from official sources as well as other known reliable sources; therefore, a telephone call, followed by a letter, received by the police department from the federal bureau of investigation and connecting the defendant with the crime was held to be information coming from a responsible official source, and,

therefore, it was sufficient to constitute probable cause and reasonable grounds for arrest. *State v. Alderete*, 1975-NMCA-058, 88 N.M. 14, 536 P.2d 278.

Double hearsay acceptable. — Where the victim identified defendant as one of two men who shot him and this identification would have provided probable cause if given directly to the affiant detective, then the fact that the affiant detective's information was double hearsay did not keep that information from providing probable cause. *State v. Alderete*, 1975-NMCA-058, 88 N.M. 14, 536 P.2d 278.

5-209. Service of summons; failure to appear.

A. **Service.** A summons shall be served in accordance with Rule 1-004 NMRA unless the court directs service by mail. A copy of the complaint, indictment, or information shall be attached to the summons. Service shall be made at least ten (10) days before the defendant is required to appear. If service is made by mail an additional three (3) days shall be added under Rule 5-104 NMRA. Service by mail is complete on mailing.

B. **Failure to appear.** If a defendant fails to appear in person, or by counsel when permitted by these rules, at the time and place specified in the summons, the court may issue a warrant for the defendant's arrest, and thereafter the action shall be treated as if the warrant had been the first process in the action.

(1) ***Exception for initial appearance; returned mail.***

(a) For a defendant's initial appearance in court, if a mailed summons has been returned as not delivered and the defendant has failed to appear in person, or by counsel when permitted by these rules, at the time and place specified in the summons, the court may either

(i) direct service to be made by a person authorized by Rule 1-004(D) NMRA; or

(ii) issue a warrant for the defendant's arrest with the directive that the defendant be released on the defendant's own recognizance, unless the court makes a finding of fact that supports the imposition of an appropriate bond.

(b) If the summons is returned as not delivered after a warrant has been issued under Paragraph B of this rule, the court may cancel or quash the warrant, waive or suspend the administrative bench warrant fee, and proceed under Subparagraph (1)(a) of this paragraph.

[As amended by Supreme Court Order No. 22-8300-026, effective for all cases pending or filed on or after December 31, 2022.]

Committee commentary. — Paragraph A of this rule incorporates Rule 1-004 NMRA as the procedure for service of summons on a defendant. This procedure is more often used in misdemeanor than felony cases. Paragraph B of this rule, providing for arrest if the defendant fails to respond and appear to the summons, was derived from Rule 4(a) of the Federal Rules of Criminal Procedure. See generally, 1 Wright, Federal Practice and Procedure, § 51 (1969).

Subparagraph (B)(1) was added in 2022 to address situations in which a defendant is mailed a summons for the defendant's first appearance in a criminal case and the summons is returned to the court as undelivered or undeliverable. In these instances, the defendant has not received notice to appear. Subparagraph (B)(1) applies only to the first appearance, i.e., bond arraignment, and not to subsequent appearances as the defendant is under an obligation to keep the court apprised of a current mailing address after the defendant's first appearance.

Courts should avoid issuing a warrant or leaving a warrant in place when facts indicate that the defendant did not receive proper notice. In deciding whether facts indicate that an appropriate bond should be imposed, the judge should consider factors such as the defendant's failure to appear history and whether there was contact between the defendant and law enforcement that indicates the defendant received notice.

Warrants issued under Subparagraph (B)(1) of this rule are not bench warrants for failure to appear. Rather, these warrants are arrest warrants issued on the underlying charge as prescribed in Rules 5-208 and 5-210 NMRA.

[As amended by Supreme Court Order No. 22-8300-026, effective for all cases pending or filed on or after December 31, 2022.]

ANNOTATIONS

The 2022 amendment, approved by Supreme Court Order No. 22-8300-026, effective December 31, 2022, provided the citation for the rule that governs how a summons is to be served; provided that the three-day mailing period under Rule 5-104 NMRA applies to the time limits when a summons is served by mail, and revised the Committee commentary; provided additional options for the court to address the situation in which a mailed summons for a defendant's initial appearance has been returned as not delivered and the defendant has failed to appear at the time and place specified in the summons; in Paragraph A, after "in accordance with", deleted "the rules governing service of process in civil actions" and added "Rule 1-004 NMRA", and added "If service is made by mail an additional three (3) days shall be added under Rule 5-104 NMRA."; and in Paragraph B, added Subparagraph B(1).

Compiler's notes. — Paragraph B of this rule is similar to Rules 4(a), in part, and 9(a), in part, of the Federal Rules of Criminal Procedure.

Cross references. — For computation of time, *see* Rule 5-104 NMRA.

For presence of defendant, appearance of counsel, *see* Rule 5-612 NMRA.

For service of process in civil actions, *see* Rule 1-004 NMRA.

For forms on criminal summons, certificate of mailing, certificate of service and affidavit of service by other person making service, *see* Rule 9-208 NMRA.

For affidavit for bench warrant form, *see* Rule 9-211 NMRA.

For forms on bench warrant and return, *see* Rule 9-212 NMRA.

Contempt proceedings. — Where plaintiff property owner brought suit against adjoining property owner to restrain him from certain actions, and court issued order restraining both parties, whereupon defendant had the court issue an order requiring plaintiff to show cause why he should not be held in contempt for violation of restraining order, plaintiff failed to appear within the meaning of this rule when he sent his counsel to respond to the show cause order for him, as appearance by counsel was not a permitted response under Rule 47 (*see now* Rule 5-612 NMRA). Trial court was therefore authorized to issue an arrest warrant under this rule, but was not authorized to try and sentence the plaintiff under Rule 47 (*see now* Rule 5-612 NMRA) without his being present. *Lindsey v. Martinez*, 1977-NMCA-086, 90 N.M. 737, 568 P.2d 263.

Law reviews. — For survey, "Children's Court Practice in Delinquency and Need of Supervision Cases Under the New Rules," see 6 N.M.L. Rev. 331 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 62B Am. Jur. 2d Process § 59 et seq.

Foreign railway corporation as subject to service of process in state in which it merely solicits interstate business, 46 A.L.R. 570, 95 A.L.R. 1478.

Constitutionality, construction and applicability of statutes relating to service of process on unincorporated association, 79 A.L.R. 305.

Constitutionality, construction and effect of statute providing for service of process upon statutory agent in action against foreign corporation as regards communication to corporation of facts of service, 89 A.L.R. 658.

Power of state to provide for service, other than personal, of process upon nonresident individual doing business within the state so as to subject him to judgment in personam, 91 A.L.R. 1327.

Who, other than public official, may be served with process in action against foreign corporation doing business in state, 113 A.L.R. 9

Substituted service, service by publication or service out of the state, in action in personam against resident or domestic corporation, as contrary to due process of law, 126 A.L.R. 1474, 132 A.L.R. 1361.

Delay in issuance or service of summons as requiring or justifying order discontinuing suit, 167 A.L.R. 1058.

Leaving process or notice at residence as compliance with requirement that party be served "personally" or "in person," "personally served," etc., 172 A.L.R. 521.

Attorney representing foreign corporation in litigation as its agent for service of process in unconnected actions or proceedings, 9 A.L.R.3d 738.

Who is "general" or "managing" agent of foreign corporation under statute authorizing service of process on such agent, 17 A.L.R.3d 625.

Construction of phrase "usual place of abode," or similar terms referring to abode, residence or domicil, as used in statutes relating to service of process, 32 A.L.R.3d 112.

Stipulation extending time to answer or otherwise proceed as waiver of objection to jurisdiction for lack of personal service, 77 A.L.R.3d 841.

72 C.J.S. Process § 1 et seq.

5-210. Arrests without a warrant; arrest warrants.

A. **To whom directed.** Whenever a warrant is issued in a criminal action, including by any method authorized Rule 5-211(F) NMRA, it shall be directed to a full-time salaried state or county law enforcement officer, a municipal police officer, a campus police officer, or an Indian tribal or pueblo law enforcement officer. The warrant may limit the jurisdictions in which it may be executed. A copy of the warrant shall be docketed in the court as captioned on the warrant. The person obtaining the warrant shall cause it to be entered into a law enforcement information system. Upon arrest the defendant shall be brought before the court without unnecessary delay.

B. **Arrest.** The warrant shall be executed by the arrest of the defendant. If the arresting officer has the warrant in the officer’s possession at the time of the arrest, a copy shall be served on the defendant upon arrest. If the officer does not have the warrant in the officer’s possession at the time of the arrest, the officer shall then inform the defendant of the offense and of the fact that a warrant has been issued and shall serve the warrant on the defendant as soon as practicable.

C. **Return.** The arresting officer shall make a return of the warrant, or any duplicate original, to the court as captioned on the warrant and notify immediately all law enforcement agencies, previously advised of the issuance of the warrant for arrest, that

the defendant has been arrested. The return shall be docketed in the court as captioned on the warrant.

D. **Arrests without a warrant.** If the defendant is arrested without a warrant, a criminal complaint shall be prepared and a copy given to the defendant prior to transferring the defendant to the custody of the detention facility. If the defendant is not provided a copy of the criminal complaint upon transfer to a detention facility, without just cause or sufficient reason, the complaint may be dismissed without prejudice or defendant may be released from custody. If the defendant is in custody and the court is open, the criminal complaint shall be filed immediately with the court. If the court is not open and the defendant remains in custody, the complaint shall be filed the next business day of the court. If the defendant is not in custody, the complaint shall be filed with the court as soon as practicable.

E. **Duty to remove warrant.** If the warrant has been entered into a law enforcement information system, upon the arrest of the defendant, the person executing the warrant shall cause it to be removed from the system. If the court withdraws the warrant, the court shall cause the warrant to be removed from the warrant information system.

[As amended, effective September 1, 1990; November 1, 1991; as amended by Supreme Court Order No. 20-8300-008, effective for all cases pending or filed on or after December 31, 2020.]

Committee commentary. — For the rules governing execution and return of arrest warrants issued by the magistrate, metropolitan and municipal courts, *see* Rules 6-206, 7-206, and 8-205 NMRA, which are substantially identical to this rule. *See also* Rule 5-301 NMRA comm. cmt.

Although not explicit in this rule, under NMSA 1978, Section 33-3-28, detention officers have the same authority as peace officers "with respect to arrests and enforcement of laws when on the premises of a local jail[.]"

Paragraph B of this rule was derived from Rule 4(d)(3) of the Federal Rules of Criminal Procedure. *See* 62 F.R.D. 271-72 (1974). The Court of Appeals has held that "physical possession of the warrant is not essential to a lawful arrest when the validity of the arrest warrant is not involved." *See State v. Grijalva*, 1973-NMCA-061, 85 N.M. 127, 509 P.2d 894.

Paragraph D was added in 1990 to require in warrantless arrest cases that the defendant be given a copy of the criminal complaint prior to being transferred to the custody of a detention facility. Similar language was added to Rules 6-201, 7-201, and 8-201 NMRA. The right to a copy of the criminal complaint was added to Rule 5-210(D) NMRA and its counterparts to ensure that the defendant has notice of the criminal charges. A 2020 amendment to each of the applicable rules explicitly provides alternative remedies in the form of the dismissal of the complaint without prejudice or

the defendant's release from custody where a lack of compliance with the complaint delivery requirement is shown to prejudice the defendant.

In 1991, the Supreme Court amended the criminal complaint form to delete the requirement that the complaint be sworn to before a notary or judicial officer before it is filed with the court. Law enforcement officers are required to swear or affirm under penalty of perjury that the facts set in the complaint are true to the best of their information and belief.

There is no absolute requirement that a copy of a criminal complaint be given to a defendant who, because of drugs, alcohol, or rage is unable to read and understand the charges. Rather, it would be a better practice to place the complaint with other belongings of the defendant until such time as the defendant can understand the nature of the charges.

This rule does not provide a precise definition as to the point in time at which a defendant is deemed to have been transferred to the custody of a detention facility. Nothing in these rules prevents the police from briefly detaining a defendant in a detention facility pending completion of preliminary police investigatory procedures so long as the police have not transferred jurisdiction to release the defendant to the detention facility. The police, however, must be free to release the defendant if, after the preliminary investigation and screening, charges are not filed.

The defendant has a number of rights prior to arraignment or first appearance. These preliminary rights include

(a) The statutory right to 3 telephone calls within 20 minutes after detention; NMSA 1978, § 31-1-5 (1973);

(b) In warrantless arrest and detention cases, the right to be given a copy of the criminal complaint prior to transfer to custody of a detention facility; and

(c) In warrantless arrest and detention cases, the constitutional right to a prompt probable cause determination. *See* Rule 5-301 and comm. cmt.

The court may dismiss criminal charges for denying an accused the right to three (3) telephone calls, the right to a copy of the criminal complaint, or the right to a prompt probable cause determination if the court finds that the denial of one of these rights resulted in prejudice to the defendant or if the court finds that the law enforcement officers acted in bad faith. *See State v. Bearly*, 1991-NMCA-022, 112 N.M. 50, 811 P.2d 83; *see also State v. Gibby*, 1967-NMSC-219, 78 N.M. 414, 432 P.2d 258.

[As revised, effective November 1, 1991; as amended by Supreme Court Order No. 20-8300-008, effective for all cases pending or filed on or after December 31, 2020.]

ANNOTATIONS

The 2020 amendment, approved by Supreme Court Order No. 20-8300-008, effective December 31, 2020, provided that an arrest warrant may limit the jurisdictions in which it may be executed, required that a copy of the warrant be docketed in the court as captioned on the warrant, required that the person obtaining the warrant to enter the warrant into a law enforcement information system, required the law enforcement officer who executes the warrant and arrests the defendant to notify immediately all law enforcement agencies previously advised of the issuance of the warrant for arrest that defendant has been arrested, provided the district court with discretion, in cases where the defendant was arrested without a warrant and where the defendant is not provided a copy of the criminal complaint upon transfer to a detention facility, without just cause or sufficient reason, to dismiss a complaint without prejudice or to order the release of the defendant from custody, and, if the warrant has been entered into a law enforcement information system, upon the arrest of the defendant, required the person executing the warrant to remove the warrant from the law enforcement information system, or if the court withdraws the warrant, required the court to remove the warrant from the law enforcement information system, made technical amendments, and revised the committee commentary; in Paragraph A, after "a criminal action", added "including by any method authorized Rule 5-211(F) NMRA", after "campus", deleted "security" and added "police", and added "The warrant may limit the jurisdictions in which it may be executed. A copy of the warrant shall be docketed in the court as captioned on the warrant. The person obtaining the warrant shall cause it to be entered into a law enforcement information system."; in Paragraph B, added "The warrant shall be executed by the arrest of the defendant."; in Paragraph C, after "shall make a return", added "of the warrant, or any duplicate original", and after "as captioned on the warrant", added the remainder of the paragraph; in Paragraph D, added "If the defendant is not provided a copy of the criminal complaint upon transfer to a detention facility, without just cause or sufficient reason, the complaint may be dismissed without prejudice or defendant may be released from custody."; and added Paragraph E.

The 1991 amendment, effective for cases filed in the district courts on or after November 1, 1991, in Paragraph D, rewrote the second and third sentences and added the last sentence.

Cross references. — For issuance of warrant for arrest and summons, *see* Rule 5-208 NMRA.

For forms on warrant for arrest and return where defendant is found, *see* Rule 9-210 NMRA.

Effect of unlawfully issued warrant and illegal arrest on conviction. — Where defendant was properly before the court under the information filed against him and pleads thereto, and there was no contention made that he did not receive a fair trial or that the verdict of guilty upon which his conviction was entered was not supported by the evidence, his conviction was not thereby rendered void even where the warrant was unlawfully issued and his arrest illegal. *State v. Halsell*, 1970-NMCA-021, 81 N.M. 239, 465 P.2d 518 (decided under former law).

Liability for arrest of person with same name. — A citizen who in good faith and upon probable cause swears out a criminal complaint identifying the accused by name is not liable for malicious prosecution where the officer arrests a person bearing that name but who is not in fact the person against whom the complaint was made. *Barnett v. Cal M, Inc.*, 1968-NMSC-159, 79 N.M. 553, 445 P.2d 974.

Law reviews. — For survey, "Children's Court Practice in Delinquency and Need of Supervision Cases Under the New Rules," see 6 N.M.L. Rev. 331 (1976).

For article, "Survey of New Mexico Law, 1982-83: Criminal Procedure," see 14 N.M.L. Rev. 109 (1984).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 550 to 559, 562.

Necessity of showing warrant upon making arrest under warrant, 40 A.L.R. 62.

Liability for false imprisonment, of officer executing warrant for arrest as affected by its being returnable to wrong court, 40 A.L.R. 290.

Power of private person to whom warrant of arrest is directed to deputize another to make the arrest or to delegate his power in that respect, 47 A.L.R. 1089.

Territorial extent of power to arrest under a warrant, 61 A.L.R. 377.

Civil liability of officer making arrest under warrant as affected by his failure to exhibit warrant, or to state fact of, or substance of, warrant, 100 A.L.R. 188.

Validity of arrest made in reliance upon uncorrected or outdated warrant list or similar police records, 45 A.L.R.4th 550.

Search and seizure of telephone company records pertaining to subscriber as violation of subscriber's constitutional rights, 76 A.L.R.4th 536.

22 C.J.S. Criminal Law § 334 et seq.

5-211. Search warrants.

A. **Issuance.** A warrant may be issued by the court to search for and seize any

(1) property which has been obtained or is possessed in a manner which constitutes a criminal offense;

(2) property designed or intended for use or which is or has been used as the means of committing a criminal offense;

(3) property which would be material evidence in a criminal prosecution; or

(4) person for whose arrest there is probable cause or who is unlawfully restrained. A warrant shall issue only on a sworn written statement of the facts showing probable cause for issuing the warrant.

B. **Contents.** A search warrant shall be executed by a full-time salaried state or county law enforcement officer, a municipal police officer, a campus security officer, an Indian tribal or pueblo law enforcement officer, or a civil officer of the United States authorized to enforce or assist in enforcing any federal law. The warrant shall state the date and time it was issued by the judge and shall contain or have attached the sworn written statement of facts showing probable cause for its issuance and the name of any person whose sworn written statement has been taken in support of the warrant. A search warrant shall direct that it be served between the hours of 6:00 a.m. and 10:00 p.m., according to local time, unless the issuing judge, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at any time.

C. **Execution.** A search warrant shall be executed within ten (10) days after the date of issuance. The officer seizing property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the affidavit for search warrant, a copy of the search warrant, and a copy of the inventory of the property taken or shall leave the copies of the affidavit for search warrant, the search warrant, and inventory at the place from which the property was taken.

D. **Return.** The return of the warrant, or any duplicate original, shall be made promptly after execution of the warrant. The return shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if the person is present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be signed by the officer and the person in whose presence the inventory was taken. The court shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

E. **Probable cause.** As used in this rule, "probable cause" shall be based on substantial evidence, which may be hearsay in whole or in part, provided there is a substantial basis for believing the source of the hearsay to be credible and for believing that there is a factual basis for the information furnished.

F. **Methods for requesting warrant.** A request for a search warrant may be made using any of the following methods, provided that the request should be made in writing whenever possible:

(1) by hand-delivery of an affidavit substantially in the form approved by the Supreme Court with a proposed search warrant attached;

(2) by oral testimony in the presence of the judge provided that the testimony is reduced to writing, supported by oath or affirmation, and served with the warrant; or

(3) by transmission of the affidavit and proposed search warrant required under Subparagraph (1) of this paragraph to the judge by telephone, facsimile, electronic mail, or other reliable electronic means.

G. **Testimony, oaths, remote transmissions, and signatures.**

(1) Before ruling on a request for a warrant the judge may require the affiant to appear personally, telephonically, or by audio-video transmission and may examine under oath the affiant and any witnesses the affiant may produce, provided that any additional evidence shall be reduced to writing, supported by oath or affirmation, and served with the warrant.

(2) If the judge administers an oath or affirmation remotely to the affiant or any witnesses the affiant may produce, the means used must be designed to ensure that the judge confirms the identity of the affiant and any witnesses the affiant may produce.

(3) If the judge issues the warrant remotely, it shall be transmitted by reliable electronic means to the affiant and the judge shall file a duplicate original with the court. Upon the affiant's acknowledgment of receipt by electronic transmission, the electronically transmitted warrant shall serve as a duplicate original and the affiant is authorized, but not required, to write the words "duplicate original" on the transmitted copy. The affiant may request that the duplicate original warrant filed by the judge be sealed or lodged in accordance with Rule 5-123 NMRA.

(4) Any signatures required under this rule by the judge or affiant may be by original signature, a copy of an original signature, a computer generated signature, or any other signature otherwise authorized by law.

[As amended, effective October 1, 1974 and July 1, 1980; as amended by Supreme Court Order No. 12-8300-016, effective for all cases pending or filed on or after June 29, 2012; as amended by Supreme Court Order No. 17-8300-016, effective for all cases pending or filed on or after December 31, 2017.]

Committee commentary. — This rule is patterned after Rule 41 of the Federal Rules of Criminal Procedure.

For other court rules governing issuance, etc., of search warrants by the magistrate, metropolitan, or municipal court, *see* Rules 6-208, 7-208, and 8-207 NMRA. These rules are substantially identical and are based on the New Mexico constitutional requirements. *See* N.M. Const., Art. 2, § 10. The court rules replaced the former search warrant statute, repealed in 1972. *See* N.M. Laws 1967, ch. 245, §§ 1 and 2, formerly compiled as 41-18-1 and 41-18-2, 1953 Comp.

“Property” in Paragraph A of this rule is defined in Rule 41(h) of the Federal Rules of Criminal Procedure “to include documents, books, papers and any other tangible objects.” The committee is of the opinion that this would include such things as blood, fingerprints, and handwriting samples. *See Sanchez v. Attorney General*, 1979-NMCA-081, 93 N.M. 210, 598 P.2d 1170.

As amended in 1979, this rule provides a procedure for the obtaining of a search warrant to conduct a search of premises for a person even when a warrant is not required. As stated in the advisory committee note to Rule 41 of the Federal Rules of Criminal Procedure:

> That part of the amendment which authorizes issuance of a search warrant to search for a person unlawfully restrained is consistent with ALI Model Code of Pre-Arraignment Procedure § SS 210.3(1)(d) (Proposed Official Draft, 1975), which specifies that a search warrant may issue to search for ‘an individual * * * who is unlawfully held in confinement or other restraint.’ As noted in the Commentary thereto, *id.* at p. 507: “Ordinarily such persons will be held against their will and in that case the persons are, of course, not subject to ‘seizure.’ But they are, in a sense, ‘evidence’ of crime, and the use of search warrants for these purposes presents no conceptual difficulties.”

In *United States v. Watson*, 423 U.S. 411, 96 S. Ct. 820, 46 L. Ed. 2d 598 (1976), the Court alluded to “the still unsettled question” of whether, absent exigent circumstances, officers acting without a warrant may enter private premises to make an arrest. Some courts have indicated that probable cause alone ordinarily is sufficient to support an arrest entry, *United States v. Fernandez*, 480 F.2d 726 (2d Cir. 1973); *United States ex rel. Wright v. Woods*, 432 F.2d 1143 (7th Cir. 1970). There exists some authority, however, that except under exigent circumstances a warrant is required to enter the defendant's own premises, *United States v. Calhoun*, 542 F.2d 1094 (9th Cir. 1976); *United States v. Lindsay*, 506 F.2d 166 (D.C. Cir. 1974); *Dorman v. United States*, 435 F.2d 385 (D.C. Cir. 1970), or, at least to enter the premises of a third party, *Virgin Islands v. Gereau*, 502 F.2d 914 (3d Cir. 1974); *Fisher v. Volz*, 486 F.2d 333 (3d Cir. 1974); *Huotari v. Vanderport*, 380 F. Supp. 645 (D. Minn. 1974).

A warrant must be served between the hours of 6:00 a.m. and 10:00 p.m. unless for reasonable cause shown the issuing judge authorizes the execution at any time. The time periods designated were taken from the definition of “day time” in Rule 41(h) of the Federal Rules of Criminal Procedure.

Paragraph C requires the officer seizing property under the warrant to leave a copy of the affidavit for search warrant, the search warrant, and the inventory at the place from which the property was taken. In *State v. Malloy*, 2001-NMCA-067, 131 N.M. 222, 34 P.3d 611, the State moved to seal affidavits for search warrants in a sexual exploitation of children investigation. The district court ordered the narrative portions of the affidavits be partially and temporarily sealed in order to protect the ongoing investigation and the

identity of the alleged victims. *Id.* ¶ 2. Upon execution, law enforcement delivered copies of the search warrants with the sealed portions redacted to the defendant. *Id.* ¶¶ 3-4. The Court of Appeals held that "the requirement of delivery of the affidavit for search warrant is ministerial and, without a showing of prejudice to the defendant, suppression is not warranted." *Id.* ¶ 1.

Paragraph E of this rule was derived in part from Rule 41(c) of the Federal Rules of Procedure. On the use of hearsay evidence to establish probable cause, *see State v. Perea*, 1973-NMCA-123, 85 N.M. 505, 513 P.2d 1287. *See also*, 48 F.R.D. 553, 630 (1970).

Uncorroborated information given by an unknown informant to support an affidavit for probable cause may be found to be reliable if the information is personal to the informant and other information given by the informant has been corroborated by information supplied by a reliable confidential informant. *State v. Turkal*, 1979-NMSC-071, 93 N.M. 248, 599 P.2d 1045.

The tests for evaluating the supporting affidavit for probable cause were set forth in *Perea*, 1973-NMCA-123, ¶¶ 5-8: (1) technical requirements of elaborate specificity are not required; (2) any inferences to be drawn from statements of the affiant must be drawn by the judge and not the police officer; (3) affidavits are tested by less rigorous standards than those governing the admissibility of evidence at trial; and (4) where affiant is relying on an informant, the affidavit must set forth some of the underlying circumstances supporting the affiant's conclusion that the information is credible or reliable. Only a probability of criminal conduct need be established and common sense should control the magistrate's determination of probable cause, which should be shown great deference by the reviewing court. *State v. Bowers*, 1974-NMCA-135, 87 N.M. 74, 529 P.2d 300. *See also State v. Alderete*, 1975-NMCA-058, 88 N.M. 14, 536 P.2d 278.

As in the federal rule, any additional evidence received by the court when the affiant appears personally must be made a part of the facts showing probable cause. In addition, under this rule, the additional evidence must be reduced to writing and sworn to in order to comply with the constitutional requirement of a "written showing of probable cause."

For cases showing examples of the sufficiency of descriptions in warrants, *see State v. Ferrari*, 1969-NMSC-146, 80 N.M. 714, 460 P.2d 244 (instrumentalities of the crime in a murder case); *State v. Sero*, 1970-NMCA-102, 82 N.M. 17, 474 P.2d 503 (sufficiency of the description of the place to be searched); *State v. Quintana*, 1975-NMCA-034, 87 N.M. 414, 534 P.2d 1126, cert. denied, 88 N.M. 29, 536 P.2d 1084, cert. denied, 423 U.S. 832, 96 S. Ct. 54, 46 L. Ed. 2d 50 (1975) (sufficiency of description of controlled substances).

Absent a showing of prejudice, defects in the return of service will not invalidate the warrant. *See State v. Wise*, 1977-NMCA-074, 90 N.M. 659, 567 P.2d 970, cert. denied,

91 N.M. 4, 569 P.2d 414 (1977); *State v. Baca*, 1974-NMCA-098, 87 N.M. 12, 528 P.2d 656, cert. denied, 87 N.M. 5, 528 P.2d 649 (1974).

In 2012, Paragraphs F and G were added to permit multiple methods for requesting and issuing warrants. Beyond the traditional in-person submission of a written affidavit and proposed warrant, Paragraph F permits requesting a search warrant through oral testimony in the presence of the judge or by submission of the affidavit and proposed search warrant in person, over the telephone, by fax, by email, or by other electronic means. A judge is not required to accept requests for warrants by alternative methods, but, if the judge decides to do so, the judge must ensure that any oath or affirmation administered by remote means is done in a way that allows the judge to confirm the identity of the affiant. For example, the oath or affirmation may be accomplished by audio-visual means that allows the judge to see the person to whom the oath or affirmation is administered. Or the oath or affirmation may be accomplished by telephone or other audio method if done in a way that allows the judge to confirm identity, such as by having the call made through a known law enforcement telephone number with a verifiable badge number given by the officer requesting the warrant. *See, e.g.*, Rule 11-901(A) NMRA. If the judge accepts a request for warrant by remote means, the judge must ensure that the sworn statement of facts offered in support of the warrant is reduced to writing to be served along with the warrant. And if the judge issues the warrant by remote means, the judge must file a duplicate original warrant with the court and the affiant may request that the warrant and affidavit be sealed upon an adequate showing under Rule 5-123 NMRA. Paragraph B was amended to require that the warrant include the date and time of its issuance. All duplicate originals shall reflect the date and time as indicated by the judge. Any signatures required under this rule by the judge or affiant may be by original signature, a copy of an original signature, a computer generated signature, or any other signature otherwise authorized by law. *See, e.g.*, NMSA 1978, Sections 14-15-1 to -6 (Electronic Authentication of Documents Act); Rule 5-103.2(D) NMRA (recognizing possibility for future electronic filing of documents in criminal cases).

[As amended by Supreme Court Order No. 12-8300-016, effective for all cases pending or filed on or after June 29, 2012; as amended by Supreme Court Order No. 17-8300-016, effective for all cases pending or filed on or after December 31, 2017.]

ANNOTATIONS

The 2017 amendment, approved by Supreme Court Order No. 17-8300-016, effective for all cases pending or filed on or after December 31, 2017, provided that a request for a search warrant should be made in writing whenever possible, made certain technical revisions to the rule, and revised the committee commentary; in Paragraph C, after “affidavit for search warrant”, deleted “and” and added “a copy of”; in Paragraph D, after “property was taken, if”, deleted “they are” and added “the person is”; in Paragraph E, after “shall be based”, deleted “upon” and added “on”; in Paragraph F, in the introductory clause, after “following methods”, added “provided that the request should

be made in writing whenever possible"; and in Subparagraph G(1), after "provided that", deleted "such" and added "any".

The 2012 amendment, approved by Supreme Court Order No. 12-8300-016, effective for all cases pending or filed on or after June 29, 2012, in Paragraph B, directed that the warrant shall state the date and time it was issued by the judge; in Paragraph D, at the beginning of the first sentence added "of the warrant, or any duplicate original"; added new Paragraphs F and G; and added the last paragraph of the committee commentary.

Cross references. — For requirement of probable cause in search and seizure cases, *see* N.M. Const., art. II, § 10.

For issuances of summonses or warrants, *see* 31-1-4 NMSA 1978.

For affidavit for search warrant form, *see* Rule 9-213 NMRA.

For forms on search warrant and return and inventory, *see* Rule 9-214 NMRA.

For application for inspectorial search order, *see* Rule 9-801 NMRA.

For forms on inspection order and return, *see* Rule 9-802 NMRA.

For inapplicability of Rules of Evidence to proceedings for issuance of arrest warrants and criminal summonses, *see* Rule 11-1101 NMRA.

I. GENERAL CONSIDERATION.

Showing of probable cause is not limited to written statements. — A "showing" of probable cause required under Article II, Section 10 of the New Mexico Constitution is not limited to a writing that the issuing judge sees rather than hears or ascertains by other means. Rather, the plain meaning of "showing" as used in Article II, Section 10 is a presentation or statement of facts or evidence that may be accomplished through visual, audible, or other sensory means. *State v. Boyse*, 2013-NMSC-024, *rev'g* 2011-NMCA-113, 150 N.M. 712, 265 P.3d 1285.

A search warrant may be obtained by telephone. — Where a police officer, who was investigating cruelty to animals, prepared a detailed, type-written affidavit as part of an application for a search warrant of defendant's property; the officer contacted the on-call magistrate judge by telephone; over the telephone, the judge administered an oath to the officer who then read the written affidavit to the judge; the judge approved the search warrant over the telephone; and the officer noted the judge's approval on the search warrant form and executed the search warrant, the search warrant was valid because Article II, Section 10 of the New Mexico Constitution allows for requesting and approving search warrants by telephone. *State v. Boyse*, 2013-NMSC-024, *rev'g* 2011-NMCA-113, 150 N.M. 712, 265 P.3d 1285.

Requirements of search warrant statutes are mandatory in every material respect. *State v. Dalrymple*, 1969-NMCA-072, 80 N.M. 492, 458 P.2d 96 (decided under former law).

Search and seizure is constitutionally lawful under either of three instances: if conducted pursuant to a legal search warrant, by consent or incident to a lawful arrest. *State v. Sedillo*, 1968-NMCA-035, 79 N.M. 289, 442 P.2d 601 (decided under former law).

Good faith exception to exclusionary rule. — There is no good faith exception to the exclusionary rule under N.M. Const., art. II, § 10. *State v. Gutierrez*, 1991-NMCA-059, 112 N.M. 774, 819 P.2d 1332, *aff'd*, 1993-NMSC-062, 116 N.M. 431, 863 P.2d 1052.

Fact defendant was not present when the search occurred does not make the search unreasonable. *State v. Everitt*, 1969-NMCA-010, 80 N.M. 41, 450 P.2d 927 (decided under former law).

Where a search warrant authorizes the seizure of certain items, but the warrant gives the police officers no authority to seize other items, such authority does not extend beyond that conferred by the warrant. *State v. Turkal*, 1979-NMSC-071, 93 N.M. 248, 599 P.2d 1045.

There is no provision under the New Mexico statutes for the securing of a telephone warrant. *United States v. Chavez*, 812 F.2d 1295 (10th Cir. 1987).

Attorney general's agents not precluded from seeking warrants. — Nothing in this rule precludes agents of the attorney general's office to seek out search warrants, so long as law enforcement officers actually execute the warrant. *State v. Elam*, 1989-NMCA-006, 108 N.M. 268, 771 P.2d 597, cert. denied, 493 U.S. 832, 110 S. Ct. 105, 107 L. Ed. 2d 68 (1989).

Search without warrant. — Absent a search warrant or valid consent to enter, intrusion into a private residence by law officers must be supported by a showing that the entry was justified by exigent circumstances: Whether exigent circumstances exist is within the fact finding function of the trial court and must be proofed by the state by a preponderance of the evidence. *State v. Burdex*, 1983-NMCA-087, 100 N.M. 197, 668 P.2d 313.

Warrant requirement not applicable to contraband discovered during inventory search. — If, during an inventory search, evidence of a crime is discovered, a search warrant should normally be obtained prior to seizing the evidence, but where the evidence is contraband the case is removed from the warrant requirement which might normally otherwise apply. *State v. Foreman*, 1982-NMCA-001, 97 N.M. 583, 642 P.2d 186.

Law reviews. — For survey, "Children's Court Practice in Delinquency and Need of Supervision Cases Under the New Rules," see 6 N.M.L. Rev. 331 (1976).

For note, "Search and Seizure - Search Warrants - Probable Cause - Reliability of Confidential and Anonymous Informants - State v. Brown," see 12 N.M.L. Rev. 517 (1982).

For note, "Refusing to 'Turn the Other Cheek' - New Mexico Rejects Federal 'Good Faith' Exception to the Exclusionary Rule: State v. Gutierrez," see 24 N.M.L. Rev. 545 (1994).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 68 Am. Jur. 2d Searches and Seizures §§ 108 to 233.

Preventing, obstructing or delaying service or execution of search warrant as contempt, 39 A.L.R. 1354.

Illustrations of distinction, as regards search and seizure, between papers or other articles which merely furnish evidence of crime, and the actual instrumentalities of crime, 129 A.L.R. 1296.

Previous illegal search for or seizure of property as affecting validity of subsequent search warrant or seizure thereunder, 143 A.L.R. 135.

Authority to consent for another to search and seizure, 31 A.L.R.2d 1078.

Requisites and sufficiency of affidavit upon which search warrant is issued as regards the time when information as to offense was received by officer or his informant, 100 A.L.R.2d 525.

Admissibility of evidence discovered in search of adult defendant's property or residence authorized by defendant's minor child - state cases, 99 A.L.R.3d 598.

Admissibility of evidence discovered in search of defendant's property or residence authorized by domestic employee or servant, 99 A.L.R.3d 1232.

Admissibility of evidence discovered in search of defendant's property or residence authorized by defendant's spouse (resident or nonresident) - state cases, 1 A.L.R.4th 673.

Odor of narcotics and providing probable cause for warrantless search, 5 A.L.R.4th 681.

Use of electronic sensing device to detect shoplifting as unconstitutional search and seizure, 10 A.L.R.4th 376.

Adequacy of defense counsel's representation of criminal client regarding search and seizure issues, 12 A.L.R.4th 318.

Sufficiency of showing of reasonable belief of danger to officers or others excusing compliance with "knock and announce" requirement - state criminal cases, 17 A.L.R.4th 301.

Disputation of truth of matters stated in affidavit in support of search warrant - modern cases, 24 A.L.R.4th 1266.

Search and seizure: necessity that police obtain warrant before taking possession of, examining or testing evidence discovered in search by private person, 47 A.L.R.4th 501.

Seizure of books, documents, or other papers under search warrant not describing such items, 54 A.L.R.4th 391.

Lawfulness of search of person or personal effects under medical emergency exception to warrant requirement, 11 A.L.R.5th 52.

State constitutional requirements as to exclusion of evidence unlawfully seized - post-Leon cases, 19 A.L.R.5th 470.

Propriety of execution of search warrant at nighttime, 41 A.L.R.5th 171.

Sufficiency of description in warrant of person to be searched, 43 A.L.R.5th 1.

Propriety of search of nonoccupant visitor's belongings pursuant to warrant issued for another's premises, 51 A.L.R.5th 375.

Admissibility of evidence discovered in search of adult defendant's property or residence authorized by defendant's minor child-state cases, 51 A.L.R.5th 425.

What constitutes compliance with knock-and-announce rule in search of private premises - state cases, 85 A.L.R.5th 1.

Sufficiency of description of business records under fourth amendment requirement of particularity in federal warrant authorizing search and seizure, 53 A.L.R. Fed. 679.

Admissibility of evidence obtained during nighttime search by federal officers where warrant does not contain "appropriate provision" authorizing execution at times other than daytime as required by Rule 41(c) of Federal Rules of Criminal Procedure, 41 A.L.R.5th 171.

When are facts offered in support of search warrant for evidence of sale or possession of cocaine so untimely as to be stale — state cases, 109 A.L.R.5th 99.

When are facts offered in support of search warrant for evidence of sexual offense so untimely as to be stale — state cases, 111 A.L.R.5th 239.

When are fact, relating to marijuana, provided by one other than police or other law enforcement officer, so untimely as to be stale when offered in support of search warrant for evidence of sale or possession of a controlled substance — state cases, 112 A.L.R.5th 429.

79 C.J.S. Searches and Seizures § 36 et seq.

II. ISSUANCE.

Facsimile applications for warrants. — Where a judge received applications for warrants by facsimile and returned the signed warrants by facsimile, the warrants were valid because Rule 5-211 NMRA does not mandate the physical presence of the affiant as a condition for the issuance of a warrant. *State v. Balenquah*, 2009-NMCA-055, 146 N.M. 267, 208 P.3d 912, cert. denied.

Where warrant issued by Zuni tribal court. — Because there is nothing in either the Zuni constitution or the Zuni tribal law and order code which authorizes the Zuni tribal court to issue a search warrant, the evidence seized from a house on the Zuni reservation pursuant to such a warrant is inadmissible at trial in a New Mexico court, and the motion to suppress the evidence obtained during the search should have been granted. *State v. Railey*, 1975-NMCA-019, 87 N.M. 275, 532 P.2d 204.

The metropolitan court does not lack authority to issue search warrants in cases indicted or bound over to the district court. — Where defendant was charged in the metropolitan court with various crimes and subsequently indicted on numerous charges, including shooting at or from a motor vehicle and great bodily harm by vehicle, and where, following the indictment, the charges proceeded in the district court, and where, while the case was pending in district court, the State obtained a search warrant from the metropolitan court authorizing the collection of a DNA sample and latent fingerprints, and where the district court granted defendant's motion to quash the search warrant and suppressed the evidence collected pursuant to the search warrant, concluding that the metropolitan court lost jurisdiction over the case when the indictment was filed and therefore lacked jurisdiction to authorize the search warrant, the district court erred in quashing the search warrant, because nothing in the plain language of Rule 5-211 NMRA or Rule 7-208 NMRA divests the metropolitan court of authority to issue search warrants in cases indicted or bound over to the district court for trial, and nothing in these rules divests the metropolitan court of authority to issue post-indictment warrants, provided all other requirements for the issuance of a search warrant are met. *State v. Chavez*, 2023-NMCA-071, cert. granted.

Due process does not protect individuals from a search warrant. — Where defendant was charged in the metropolitan court with various crimes and subsequently indicted on numerous charges, including shooting at or from a motor vehicle and great

bodily harm by vehicle, and where, following the indictment, the charges proceeded in the district court, and where, while the case was pending in district court, the State obtained a search warrant from the metropolitan court authorizing the collection of a DNA sample and latent fingerprints, and where the district court granted defendant's motion to quash the search warrant and suppressed the evidence collected pursuant to the search warrant, concluding that the warrant violated defendant's due process rights under the United States Constitution, the district court erred in finding that the issuance of the post-indictment warrant violated defendant's due process rights because due process does not protect individuals from a search warrant. *State v. Chavez*, 2023-NMCA-071, cert. granted.

Search warrant sufficiency standards. — The standards for the sufficiency of search warrants are: (1) only a probability of criminal conduct need be shown; (2) there need be less vigorous proof than the rules of evidence require to determine guilt of an offense; (3) common sense should control; (4) great deference should be shown by courts to a magistrate's determination of probable cause. *State v. Bowers*, 1974-NMCA-135, 87 N.M. 74, 529 P.2d 300.

A fundamental principle of search and seizure law is that, before a neutral and detached judge can issue a search warrant, two conclusions must be supported by substantial evidence: (1) the items sought to be seized are evidence of a crime; and (2) the criminal evidence will be located at the place to be searched. *State v. Baca*, 1982-NMSC-016, 97 N.M. 379, 640 P.2d 485.

When reviewing affidavits in support of search warrants, a magistrate and an appellate court must consider the affidavit as a whole. All direct and circumstantial evidence alleged, as well as all reasonable inferences to be drawn from those allegations should be considered. *State v. Snedeker*, 1982-NMSC-085, 99 N.M. 286, 657 P.2d 613.

Judicial alteration acceptable. — Although after reading the officer's supporting affidavit the judge altered the warrant and that portion of the affidavit listing the items to be searched and seized, these changes did not merit exclusion of the evidence seized by the warrant since defendant failed to introduce evidence showing that the judge relied on unrecorded or unsworn statements in making the probable cause determination. *United States v. Ramirez*, 63 F.3d 937 (10th Cir. 1995).

Affidavit held insufficient. — Affidavit did not establish a substantial basis for believing an informant's report was based on reliable information, where, although the informant reportedly stated that defendant had brought heroin into town and was selling it at the house in question, the affidavit was devoid of any indication of how the informant gathered this information. *State v. Cordova*, 1989-NMSC-083, 109 N.M. 211, 784 P.2d 30.

Citizen-informer rule. — In order to apply the citizen-informer rule, the affidavit must affirmatively set forth circumstances which would allow a neutral magistrate to

determine the informant's status as a citizen-informer. *State v. Hernandez*, 1990-NMCA-127, 111 N.M. 226, 804 P.2d 417.

Where warrant based upon informant insufficient. — Search warrant merely stating conclusions alleging distribution, possession and parcelling do not meet the test of providing a factual basis for the information furnished or the underlying circumstances from which the informant concluded that the controlled substances were where he claimed they were. *Hudson v. State*, 1976-NMSC-084, 89 N.M. 759, 557 P.2d 1108, cert. denied, 431 U.S. 924, 97 S. Ct. 2198, 53 L. Ed. 2d 238 (1977).

Handwriting exemplars may be compelled if the requirements for a search warrant are met. *Sanchez v. Attorney Gen.*, 1979-NMCA-081, 93 N.M. 210, 598 P.2d 1170.

District court lacks authority to compel handwriting exemplars from a person who has not been charged with a crime, has not been arrested and has not been directed to appear before an investigative agency pursuant to statutory authority. *Sanchez v. Attorney Gen.*, 1979-NMCA-081, 93 N.M. 210, 598 P.2d 1170.

Nighttime search. — A search warrant authorizing a nighttime search may be issued without positive proof that the property to be seized is on the person or in the place to be searched or a showing in the affidavit of reasonable cause for conducting the search at nighttime. *State v. Hausler*, 1984-NMSC-036, 101 N.M. 143, 679 P.2d 811.

Delay in issuance. — Despite the six week delay between the incident and the issuance of a search warrant, there was sufficient information that defendant would keep the gun at his home for future use to support the search warrant; thus, the district court's denial of the motion to suppress was upheld. *State v. Gonzales*, 2003-NMCA-008, 133 N.M. 158, 61 P.3d 867, cert. quashed, 134 N.M. 374, 77 P.3d 278.

III. CONTENTS.

Nighttime search. — Nothing in New Mexico jurisprudence precludes, in all cases, the after-the-fact testimony of a magistrate judge to support the reasonableness of a nighttime search by showing that the judge actually performed the required scrutiny and evaluation and authorized a nighttime search although the warrant itself failed to expressly show the authorization. *State v. Katrina G.*, 2008-NMCA-069, 144 N.M. 205, 185 P.3d 376.

When law enforcement officers lawfully enter and secure the premises during the day, including continuous surveillance to ensure its vacancy, and lawfully obtain a warrant to continue their search of the premises, all before 10:00 p.m., special permission for a nighttime search is not necessary under Rule 5-211(B) NMRA. *State v. Santiago*, 2010-NMSC-018, 148 N.M. 144, 231 P.3d 600.

Where police officers, who suspected defendant of murder, entered defendant’s home in the afternoon, performed a protective sweep, displaced defendant’s family from the

home, and kept the premises under constant surveillance to ensure that it would be unoccupied when a search warrant was served; defendant was in a hospital during the search; the district judge issued a warrant at 8:54 p.m. on the same day; the officers did not request and the district judge did not issue a warrant that could be executed after 10:00 p.m.; the officers reentered defendant's home after 10:00 p.m. that evening and seized evidence; and defendant's home was unoccupied during the search, the search based on the warrant did not violate Rule 5-211(B) NMRA because the search was a continuation of the initial search that began in the afternoon. *State v. Santiago*, 2010-NMSC-018, 148 N.M. 144, 231 P.3d 600.

Sufficiency of description of place. — A description in a search warrant is sufficient if the officer can, with reasonable effort, ascertain and identify the place intended to be searched; the description, however, must be such that the officer is enabled to locate the place to be searched with certainty. It should identify the premises in such manner as to leave the officer no doubt and no discretion as to the premises to be searched. *State v. Aragon*, 1976-NMCA-018, 89 N.M. 91, 547 P.2d 574, cert. denied, 89 N.M. 206, 549 P.2d 284, *overruled on other grounds by State v. Rickerson*, 1981-NMSC-036, 95 N.M. 666, 625 P.2d 1183.

Where heroin seized during a search pursuant to a warrant was physically located on property upon which there was an unoccupied house, and not within the curtilage as specified in the warrant, it was held that although the warrant did not authorize a search outside the curtilage, the can containing the heroin was viewed from a place the officer had a right to be under the warrant, and, consequently, it was not discovered as a result of an illegal search. *State v. Aragon*, 1976-NMCA-018, 89 N.M. 91, 547 P.2d 574, cert. denied, 89 N.M. 206, 549 P.2d 284, *overruled on other grounds by State v. Rickerson*, 1981-NMSC-036, 95 N.M. 666, 625 P.2d 1183.

Despite the fact that the warrant contained two errors, in that the color of the residence was wrong, and the street number of the residence was wrong, where the warrant properly described the roof of the residence, located the house with specificity and stated that the residence was the only one in the immediate area which had a chicken coop containing pigeons (plainly visible from the road), it was held that the requirements of a sufficient description were met. *State v. Aragon*, 1976-NMCA-018, 89 N.M. 91, 547 P.2d 574, cert. denied, 89 N.M. 206, 549 P.2d 284, *overruled on other grounds by State v. Rickerson*, 1981-NMSC-036, 95 N.M. 666, 625 P.2d 1183.

Sufficiency of description of items. — Where a search warrant specified the seizure of "controlled substances" kept contrary to law, the items to be searched for and seized were as precisely identified as the situation permitted considering the wide variety of drugs used by addicts. The words used in the warrant have a definite meaning in that they refer to certain and definite lists of drugs and their derivatives. Nothing was left to the discretion of the officers. Heroin is one of the drugs listed, and it was heroin that was seized. *State v. Quintana*, 1975-NMCA-034, 87 N.M. 414, 534 P.2d 1126, cert. denied, 88 N.M. 29, 536 P.2d 1085, cert. denied, 423 U.S. 832, 96 S. Ct. 54, 46 L. Ed. 2d 50 (1975).

Effect of particularity requirement. — The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant. *State v. Paul*, 1969-NMCA-074, 80 N.M. 521, 458 P.2d 596, cert. denied, 80 N.M. 746, 461 P.2d 228, 397 U.S. 1044, 90 S. Ct. 1354, 25 L. Ed. 2d 654 (1970) (decided under former law).

Return of property not described. — A person aggrieved by an unlawful search and seizure may move for the return of the property and to suppress for the use of evidence anything so obtained on the ground that the property seized is not that described in the warrant. *State v. Paul*, 1969-NMCA-074, 80 N.M. 521, 458 P.2d 596, cert. denied, 80 N.M. 746, 461 P.2d 228, 397 U.S. 1044, 90 S. Ct. 1354, 25 L. Ed. 2d 654 (1970) (decided under former law).

Contents of affidavit. — Where the search warrant affidavits issued to defendant contained redacted information the evidence seized was not to be suppressed, because the requirement, under Paragraph C was ministerial and did not arise out of U.S. Const. amend. IV. Additionally, defendant was not prejudiced as a result, and the State did not act in bad faith in obtaining and executing the search warrant. *State v. Malloy*, 2001-NMCA-067, 131 N.M. 222, 34 P.3d 611, cert denied, 130 N.M. 722, 31 P.3d 380.

Search warrant was not overbroad. — Where defendant pleaded guilty to multiple counts of sexual exploitation of a child (both possession and manufacturing) in 2013, and where, nearly seven years later, defendant was permitted to withdraw his plea, and where prior to trial on the remaining charges, defendant filed a motion to suppress evidence obtained pursuant to a search warrant, claiming that the search warrant was overbroad and nonparticularized because it did not list what content law enforcement was to search for, nor did it contain a date restriction for the search of the cell phone's contents, the district court did not err in denying defendant's motion, based on the facts that the warrant specifically authorized "a search of defendant's home and seizure of any and all recording devices to include cellular phones, computers, video cameras, digital cameras, mass storage devices, external/internal hard drives as well as the personal cellular phone belonging to defendant" and that the only item seized was defendant's cell phone. Based on the offenses described and the information set forth in the affidavit, the description in the search warrant was not overly broad. *State v. Castillo*, 2023-NMCA-063.

Forensic search of cell phone seized pursuant to a valid search warrant did not exceed the scope of the warrant. — Where defendant pleaded guilty to multiple counts of sexual exploitation of a child (both possession and manufacturing) in 2013, and where, nearly seven years later, defendant was permitted to withdraw his plea, and where prior to trial on the remaining charges, defendant filed a motion to suppress evidence obtained pursuant to a search warrant, claiming that the forensic search of his cell phone, which was seized pursuant to a valid search warrant, exceeded the scope of the warrant, the district court did not err in denying defendant's motion, based on the

facts that the affidavit specifically authorized "the complete search of defendant's cell phone" and stated that "it may be necessary to view, listen to, and/or manipulate the herein-described items to be searched in order to copy, transcribe, transfer and/or otherwise document the data because people involved in the commission of crime(s) often attempt to conceal, tamper with and or dispose of evidence." *State v. Castillo*, 2023-NMCA-063.

Falsehoods and omissions in search warrant affidavit. — To suppress evidence based on alleged falsehoods and omissions in a search warrant affidavit, the defendant must show either deliberate falsehood or a reckless disregard for the truth as to a material fact; a merely material misrepresentation or omission is insufficient. *State v. Garnenez*, 2015-NMCA-022, cert. denied, 2015-NMCERT-001.

Where the affidavit to support a search warrant contained a false statement that defendant was under arrest, and where the officer testified that he used a standard form affidavit and did not remove the stock language that the defendant was under arrest, and that he did not intend to mislead the issuing judge by the mistaken inclusion of this language, the district court, being in the best position to resolve questions of fact and to evaluate the credibility of witnesses, did not err in upholding the search warrant following a finding that the misstatement was not deliberate or reckless. *State v. Garnenez*, 2015-NMCA-022, cert. denied, 2015-NMCERT-001.

Omissions in the affidavit supporting the search warrant were not reckless or deliberate. — Where defendant was charged in the metropolitan court with various crimes and subsequently indicted on numerous charges, including shooting at or from a motor vehicle and great bodily harm by vehicle, and where, following the indictment, the charges proceeded in the district court, and where, while the case was pending in district court, the State obtained a search warrant from the metropolitan court authorizing the collection of a DNA sample and latent fingerprints, and where the district court granted defendant's motion to quash the search warrant and suppressed the evidence collected pursuant to the search warrant, concluding that law enforcement left out critical information in the affidavit supporting the search warrant, rendering the search warrant invalid, the district court erred in granting the motion to quash, because characterizing defendant as a "suspect" rather than a defendant and the omission of the pending felony case in the district court did not affect the material facts establishing probable cause in support of the issuance of the search warrant. Defendant failed to show either a deliberate falsehood or reckless disregard for the truth as to a material fact in the affidavit. *State v. Chavez*, 2023-NMCA-071, cert. granted.

IV. EXECUTION.

Generally, as to forcible entry. — The general standard for executing a search is that prior to forcible entry, an officer must give notice of authority and purpose and be denied admittance, but noncompliance with the standard may be justified by exigent circumstances known to the officer beforehand, as for example when the officer, in good

faith, believes that a person is attempting to destroy evidence. *State v. Anaya*, 1976-NMCA-055, 89 N.M. 302, 551 P.2d 992.

Officer executing search warrant may enter by force. — An officer armed with a search warrant that authorizes the search of a house is well within his rights to enter by force if no one is present in the house of whom he may demand entrance. *State v. Gutierrez*, 1978-NMCA-026, 91 N.M. 542, 577 P.2d 440.

"No knock" search warrant. — There is nothing in this rule suggesting that a magistrate or judge may predetermine the existence of exigent circumstances and authorize execution of a warrant without knocking. The prevailing view appears to be that such warrants are invalid absent statutory authorization. *State v. Gutierrez*, 1991-NMCA-059, 112 N.M. 774, 819 P.2d 1332, *aff'd*, 1993-NMSC-062, 116 N.M. 431, 863 P.2d 1052.

Owner or occupant need not be present. — At the time of execution of a warrant, the fourth amendment does not require the presence of the person from whose premises the property is taken. *State v. Gutierrez*, 1978-NMCA-026, 91 N.M. 542, 577 P.2d 440.

Exigent circumstance exists if, prior to entry, officers in good faith believe that the contraband, or other evidence, for which search is to be made is about to be destroyed, and the question of exigent circumstances is one of fact. *State v. Anaya*, 1976-NMCA-055, 89 N.M. 302, 551 P.2d 992.

Constitutionality of preparations prior to execution of warrant. — Entry under defendant's trailer and severing of a sewer pipe before executing a search warrant for narcotics did not amount to an unconstitutional search under the circumstances since testimony indicated that heroin is often disposed of by flushing and that upon a prior arrest, one of the defendants attempted to dispose of heroin in this fashion. *State v. Anaya*, 1976-NMCA-055, 89 N.M. 302, 551 P.2d 992.

Executing a warrant in the context of electronically stored information. — A search warrant for information stored on an electronic device is executed for the purposes of Rule 5-211(C) NMRA when the device is seized or when the data stored on that device is copied on-site. *State v. Sanchez*, 2020-NMSC-017.

A warrant issued to search a cell phone is executed when the device is seized, not when the contents are extracted. — Where, during an investigation of defendant's involvement in a murder, police seized, pursuant to a warrant, a cell phone from defendant's residence, but were not able to extract data from the cell phone until eleven months following the issuance of the warrant, and where the district court granted defendant's motion to suppress the cell phone and its contents on the grounds that law enforcement extracted the contents of the cell phone after the ten-day time limitation set forth in Subsection C of this rule, the district court erred in granting the motion to suppress, because a warrant issued to search an electronic device is executed when the device is seized or the data is copied on-site, not when the contents of the electronic

device are extracted. Because defendant's cell phone had already been seized by the police when the police obtained the warrant to search the phone, it was not a violation of this rule for the police to successfully unlock the phone and extract its contents after the ten-day time limitation in the rule. *State v. Sanchez*, 2020-NMSC-017.

Subdivision (d) (*see now* Paragraph C) differentiates between giving and leaving a warrant: if the occupant or owner is present during the search the officer shall personally hand the receipt to him, but if the occupant or owner is absent during the search, the officer shall leave the receipt at the location of the search and seizure. *State v. Gutierrez*, 1978-NMCA-026, 91 N.M. 542, 577 P.2d 440.

V. RETURN.

Effect of defects. — Absent a showing of prejudice an appellate court will not set aside an otherwise valid search warrant because of defects in the return of the warrant. Those matters of procedure relating to the return of a search warrant have consistently been held to be ministerial acts which, even if defective or erroneous, do not require a search warrant to be held invalid unless prejudice is shown; therefore, absent a showing of prejudice, that specific officers were not named as authorized to execute the warrant or that no copy of an inventory was delivered by the court to the defendant will not invalidate the warrant. *State v. Perea*, 1973-NMCA-123, 85 N.M. 505, 513 P.2d 1287; *State v. Montoya*, 1974-NMCA-017, 86 N.M. 119, 520 P.2d 275.

Absent a showing of prejudice, the appellate court will not set aside an otherwise valid search warrant because of defects in the return. Where the defendant did not allege nor did the record indicate that he was prejudiced in any way by a return with contradictory recitations that property had and had not been found was not error for the trial court to admit the evidence seized pursuant to this warrant. *State v. Baca*, 1974-NMCA-098, 87 N.M. 12, 528 P.2d 656, cert. denied, 87 N.M. 5, 528 P.2d 649.

VI. PROBABLE CAUSE.

De novo review by appellate court. — An issuing court’s determination of probable cause to issue a search warrant should not be reviewed de novo, but, rather, must be upheld if the affidavit provides a substantial basis to support a finding of probable cause. *State v. Williamson*, 2009-NMSC-039, 146 N.M. 488, 212 P.3d 376, *rev’g* 2008-NMCA-096, 144 N.M. 522, 188 P.3d 1273.

Probable cause found. — Where an affidavit for a search warrant alleged that the defendant brought a package into a UPS Store; the defendant appeared to be nervous; the defendant did not know what was inside the package; when the store manager told the defendant that the package would have to be opened to ascertain its contents, the defendant stated that the package contained a book; although the defendant had mailed packages before, this was the first time the defendant appeared nervous and did not know what was in the package; after the defendant left, the store manager opened the package and discovered a clear plastic bag, which appeared to be vacuum sealed,

containing a Crystal Light cylinder and a Ferrero candy box, both wrapped in duct tape; a narcotics detection dog sniffed the package but failed to indicate a positive response to narcotics; and a law enforcement officer with eleven years of law enforcement experience who was assigned to the narcotics task force division of the police department averred that often times narcotics are packaged in unusual containers, wrapped in duct tape and vacuum sealed to make the narcotics less detectable by narcotic detection dogs, the facts alleged in the affidavit were sufficient to explain the narcotic detection dog's failure to alert to the presence of narcotics and to support a reasonable inference that the package contained narcotics. *State v. Williamson*, 2009-NMSC-039, 146 N.M. 488, 212 P.3d 376, *rev'g* 2008-NMCA-096, 144 N.M. 522, 188 P.3d 1273.

Substantial basis for determining that there was probable cause to believe that cell phone records contained evidence of a crime. — Where defendant was charged with felony murder after police investigators discovered that the victim had both dialed and received a phone call from a particular cell phone number within thirty minutes of his murder, and where police officers obtained from the cell phone provider of the unknown subscriber, pursuant to a search warrant, subscriber information consisting of defendant's name, date of birth, social security number, and address, cell-site location information (CSLI) and a list of calls and text messages to and from defendant's cell phone, the district court erred in suppressing the CSLI and the call and text records because the calls linked to the cell phone number of the unknown subscriber were relevant to the victim's shooting, and the affidavit for search warrant, together with reasonable inferences to be drawn therefrom, provided the issuing judge with a substantial basis for determining that there was probable cause to believe that defendant's subscriber information contained evidence of a crime. *State v. Price*, 2020-NMSC-014.

Generally. — Under Subdivision (f) (*see now* Paragraph E) the issue is whether there is a substantial basis for determining credibility and for determining that a factual basis exists. These tests are to be applied regardless of whether the affidavit identifies double hearsay, and the presence of double hearsay, in itself, does not render the affidavit legally insufficient as a magistrate is to evaluate this information as well as all other information in the affidavit in order to determine whether it can be reasonably inferred that the informant had gained his information in a reliable way. The magistrate must canvass the affidavit and the informer's tip as a whole to assess its probative value. *State v. Perea*, 1973-NMCA-123, 85 N.M. 505, 513 P.2d 1287.

Substance of all definitions of probable cause is a reasonable ground for belief of guilt. *State v. Hilliard*, 1970-NMCA-039, 81 N.M. 407, 467 P.2d 733 (decided under former law).

Probable cause determination to be made by judge, not police officer. — It is for a neutral and detached judge to determine from the affidavit whether probable cause exists. A police officer is not vested with that authority. *State v. Baca*, 1982-NMSC-016, 97 N.M. 379, 640 P.2d 485.

Probable cause cannot be established or justified by what is revealed by the search. *State v. Baca*, 1982-NMSC-016, 97 N.M. 379, 640 P.2d 485.

The warrant is not rendered invalid by the inclusion in the affidavit of some information that is not supported by probable cause. The warrant may nevertheless stand if the remaining allegations demonstrate probable cause. *State v. Snedeker*, 1982-NMSC-085, 99 N.M. 286, 657 P.2d 613.

Mere suspicion or expectation that item may prove incriminating to a defendant is not sufficient justification for the seizure of the item. *State v. Turkal*, 1979-NMSC-071, 93 N.M. 248, 599 P.2d 1045.

Use of hearsay. — Affidavits will be tested by much less rigorous standards than those governing admissibility of evidence at trial. Probable cause may be determined on the basis of evidence which at trial would not be legally competent. Thus, hearsay information, even from an undisclosed informant may form the basis for a probable cause determination so long as there is some reason for believing such information. *State v. Perea*, 1973-NMCA-123, 85 N.M. 505, 513 P.2d 1287.

Probable cause must be based on substantial evidence. The evidence used may be hearsay, provided: (1) there is a substantial basis for believing the source of the hearsay to be credible, and (2) there is a substantial basis for believing that there is a factual basis for the information furnished. *State v. Snedeker*, 1982-NMSC-085, 99 N.M. 286, 657 P.2d 613.

Where the only allegations of criminality in an affidavit for a search warrant were hearsay from persons who were not law-enforcement officers, the affidavit did not establish probable cause because it did not establish either (1) that the informants were truthful persons, (2) that the informants had particular motives to be truthful about their specific allegations, or (3) that the allegations of criminality had been sufficiently corroborated. *State v. Therrien*, 1990-NMCA-060, 110 N.M. 261, 794 P.2d 735, *overruled in part on other grounds by State v. Barker*, 1992-NMCA-117, 114 N.M. 589, 844 P.2d 839.

Affidavit failed to establish the veracity and reliability of informants. — Where the victim, whose decomposed body was found in a remote area, was killed by violent blunt-force trauma to the head; the victim was a local transient and drug user who had a history of stealing from those who invited the victim into their homes; the search warrant affidavit that the police submitted to obtain a warrant to search defendant's property stated that the police had received tips from a confidential source and two concerned citizens that defendant had admitted to at least one person that defendant killed the victim for stealing and that defendant admitted to the killing prior to the discovery of the victim's body; the affidavit did not allege that the sources heard defendant's admission directly and did not indicate why the sources believed defendant's admission; the affidavit did not indicate that any of the sources had provided reliable information to police in the past or made the statements against their interest; the affidavit did not

provide information to discount the possibility that the sources might have been involved in the killing or had a reason to fabricate the story; and the sources provided only the independently corroborated fact that the victim stole from defendant, the affidavit did not establish probable cause because it failed to provide any basis upon which the veracity of the sources or the reliability of their information could be determined. *State v. Haidle,* 2012-NMSC-033, 285 P.3d 668.

Non-hearsay allegations in affidavit failed to establish probable cause. — Where the victim, whose decomposed body was found in a remote area, was killed by violent blunt-force trauma to the head; the victim was a local transient and drug user who had a history of stealing from those who invited the victim into their homes; the search warrant affidavit that the police submitted to obtain a warrant to search defendant's property stated that defendant admitted that defendant had sex with the victim, that the victim's blood would be found in defendant's bathroom, that the victim stole from defendant, and that defendant owned a baseball bat for protection; and the affidavit stated that defendant's home was near the place where the victim's body was discovered, the affidavit did not establish probable cause. *State v. Haidle,* 2012-NMSC-033, 285 P.3d 668.

Personal observation of informant satisfies probable cause. — Although, under the *Aguilar-Spinelli* test, an affidavit based on an informant's hearsay will constitute probable cause for a search warrant only if the affidavit establishes both the credibility and the basis of knowledge of the informant, a detective's personal observations of an unwitting informant buying cocaine constituted sufficient facts and circumstance to satisfy probable cause for the issuance of the warrant. The *Aguilar-Spinelli* analysis applies only to hearsay. The unwitting informant, who did not realize that he or she was buying cocaine for a law enforcement officer, did not intend his or her conduct as an "assertion"; consequently, that conduct was not hearsay. *State v. Lovato*, 1993-NMCA-163, 117 N.M. 68, 868 P.2d 1293.

An informant's first-hand knowledge of heroin trafficking as a result of his controlled purchase established the informant's "basis of knowledge" for purposes of establishing probable cause. *State v. Lujan*, 1998-NMCA-032, 124 N.M. 494, 953 P.2d 29, cert. denied, 124 N.M. 589, 953 P.2d 1087.

Victim's first-hand observations satisfied the basis of knowledge prong for evaluating information from hearsay sources. — Where defendant pleaded guilty to multiple counts of sexual exploitation of a child (both possession and manufacturing) in 2013, and where, nearly seven years later, defendant was permitted to withdraw his plea, and where prior to trial on the remaining charges, defendant filed a motion to suppress evidence obtained pursuant to a search warrant because the warrant affidavit contained unreliable hearsay and lacked a factual basis, the district court did not err in denying defendant's motion to suppress, because the vast majority of the hearsay in the warrant affidavit consisted of one of the female victim's first-hand observations, and it is well-settled that first-hand observations satisfy the basis of knowledge prong for evaluating information from hearsay sources. Defendant has not met his burden of

demonstrating error in the issuing court's probable cause determination. *State v. Castillo*, 2023-NMCA-063.

Use of evidence gathered from lengthy surveillance. — Where affidavit alleged police officer had defendant's premises under surveillance for months, had seen several known narcotics users come and go, had observed fresh needle marks on some whom he stopped, and that some of those whom he stopped had admitted purchasing narcotics from the defendant, there was probable cause for issuance of a search warrant. *State v. Perea*, 1973-NMCA-123, 85 N.M. 505, 513 P.2d 1287.

Where the affidavits presented to the magistrate indicated that the affiants personally inspected two cars rented previously by the defendants and found significant traces of marijuana, that the defendants lived together, spent large amounts of cash for purchases, had no visible means of support, rented numerous automobiles for trips and flew on airplanes during the period of surveillance, the magistrate could assure himself that the affidavits were not based on rumors or merely on the defendants' reputation; there was sufficient information for him to be satisfied that the circumstances by which the affiants came by their information demonstrated probability for the issuance of a search warrant. *State v. Bowers*, 1974-NMCA-135, 87 N.M. 74, 529 P.2d 300.

Observations of fellow officers of the government engaged in a common investigation are plainly a reliable basis for a warrant applied for by one of their number. *State v. Perea*, 1973-NMCA-123, 85 N.M. 505, 513 P.2d 1287.

Use of evidence inculpating informant. — When an informant gives information that not only provides the basis for an accusation against a third party but also indicates that the informant himself is guilty of some misconduct, this admission carries its own indicia of credibility - sufficient at least to support a finding of probable cause to search. *State v. Perea*, 1973-NMCA-123, 85 N.M. 505, 513 P.2d 1287.

Substantiality of informant's information. — An unsupported statement by an affiant that he believed an informant to be truthful will not, in itself, provide a factual basis for believing the report of an unnamed informant. The affidavit must set forth some of the underlying circumstances supporting the affiants' conclusions and beliefs that the information is credible or that his information is reliable. *State v. Perea*, 1973-NMCA-123, 85 N.M. 505, 513 P.2d 1287.

Information from a reliable informant constitutes probable cause for search, particularly when the information is detailed and accurate. *State v. McAdams*, 1972-NMCA-029, 83 N.M. 544, 494 P.2d 622 (decided under former law).

In determining whether probable cause existed, it is of vital importance that a reliable confidential informant or affiant describe the criminal activity in sufficient detail so that the magistrate has something substantial to rely on and not a casual rumor circulating in the underworld. Affidavit containing nothing more than conclusionary statements without

factual predicate was deficient. *State v. Duran*, 1977-NMCA-087, 90 N.M. 741, 568 P.2d 267.

In the absence of underlying circumstances establishing the basis of an informant's conclusion, the affidavit will sufficiently establish probable cause if the informant describes the criminal activity in such detail that a judge will know the informant relies on more than a casual rumor or reputation of the defendant. *State v. Baca*, 1982-NMSC-016, 97 N.M. 379, 640 P.2d 485.

A conclusory statement that the informant has personal knowledge negates the validity of the affidavit and the facts advanced in support of a showing of probable cause. *State v. Baca*, 1982-NMSC-016, 97 N.M. 379, 640 P.2d 485.

The fact that an informant states that the defendant was known by the informant to be involved in narcotic transactions is but a bald and unilluminating assertion of suspicion that is entitled to no weight in appraising the judge's decision. *State v. Baca*, 1982-NMSC-016, 97 N.M. 379, 640 P.2d 485.

Magistrate not required to make independent investigation of informant's reliability. — There is no requirement that a magistrate make an independent investigation to determine whether an informant is reliable; rather, from the verified facts presented to him, the magistrate must believe that the source is credible and that a factual basis exists for the information furnished. *State v. Gutierrez*, 1978-NMCA-026, 91 N.M. 542, 577 P.2d 440.

Nor must past tips have resulted in conviction. — To establish a record of reliability of an informant sufficient for probable cause, it is unnecessary for the affidavit to state that the informer's past tips had resulted in a conviction. *State v. Gutierrez*, 1978-NMCA-026, 91 N.M. 542, 577 P.2d 440.

Veracity may be established by informant's reliability and corroboration. — Where, because of knowledge personal to a juvenile informant, and by reading of an affidavit as a whole, a juvenile informant's veracity is shown by the reliability of the information which she provided, which is partly corroborated by information supplied by a confidential informant, probable cause existed for issuing a search warrant. *State v. Turkal*, 1979-NMSC-071, 93 N.M. 248, 599 P.2d 1045.

Corroboration or verification necessary to show informant's credibility. — Information furnished by an informant for the issuance of a search warrant must be sufficiently corroborated or verified to an extent sufficient to establish the informant's credibility. *State v. Donaldson*, 1983-NMCA-064, 100 N.M. 111, 666 P.2d 1258.

Where informant unreliable, and information not based on personal knowledge, no probable cause. — Where an informant supplies information not based on personal knowledge, and the affiant's reasons for believing the informant to be reliable do not meet the traditional test of the indicia of reliability, probable cause does not exist. *State*

v. Brown, 1981-NMCA-039, 96 N.M. 10, 626 P.2d 1312, remanded, 1980-NMCA-131, 95 N.M. 454, 623 P.2d 574.

Affidavit based on statements of undisclosed informants. — Affidavit in support of search warrant, which was based primarily upon information provided by undisclosed informants but which failed to set out sufficient facts to determine the reliability of such informants, was insufficient to establish probable cause, and thus a search predicated on such warrant violated Article II of the New Mexico Constitution and the Fourth Amendment to the United States Constitution. *In re Shon Daniel K.*, 1998-NMCA-069, 125 N.M. 219, 959 P.2d 553, cert. denied, 125 N.M. 147, 958 P.2d 105.

Reasonable inference from probable cause showing. — A showing of probable cause that a person has committed a crime will permit a reasonable inference that evidence of the crime will be found in his house. *State v. Baca*, 1982-NMSC-016, 97 N.M. 379, 640 P.2d 485.

If stolen property is not inherently incriminating and there is probable cause to believe a suspect has committed the theft, the magistrate can assume that the property will be found at the suspect's residence. *State v. Snedeker*, 1982-NMSC-085, 99 N.M. 286, 657 P.2d 613.

Probable cause to search defendant and automobile for controlled substances found lacking. *State v. Van De Valde*, 1982-NMCA-049, 97 N.M. 680, 642 P.2d 1139.

Defective affidavit based on unnamed police informant. — The trial court erred in refusing to suppress evidence because of a facially defective affidavit which merely reiterated the allegations of an unnamed police informant without providing specific, corroborating details regarding drug transaction times, frequency, amounts or kinds, sufficient to subject informant himself to a reasonable fear of prosecution. *State v. Barker*, 1992-NMCA-117, 114 N.M. 589, 844 P.2d 839.

5-212. Motion to suppress.

A. **Property.** A person aggrieved by a search and seizure may move for the return of the property and to suppress its use as evidence.

B. **Suppression of other evidence.** A person aggrieved by a confession, admission or other evidence may move to suppress such evidence.

C. **Time for filing.** A motion to suppress shall be filed no less than sixty (60) days prior to trial, unless, upon good cause shown, the trial court waives the time requirement. Any motion to suppress filed prior to trial shall be decided prior to trial to preserve the state’s right to appeal any order suppressing evidence.

D. **Hearing.** The court shall receive evidence on any issue of fact necessary to the decision of the motion. If a motion pursuant to Paragraph A of this rule is granted, the property shall be returned, unless otherwise subject to lawful detention.

[As amended by Supreme Court Order No. 13-8300-016, effective for all cases pending or filed on or after December 31, 2013.]

Committee commentary. — For the general rule governing motions, *see* Rule 5-601 NMRA.

The aggrieved person under Paragraphs A and B of this rule is the person who has standing to raise the issue. *See State v. Nemrod*, 85 N.M. 118, 509 P.2d 885 (Ct. App. 1973), and *State v. Torres*, 81 N.M. 521, 469 P.2d 166 (Ct. App. 1970).

The motion under Paragraph B of this rule is used to suppress or exclude evidence obtained in violation of any constitutional rights, not only that obtained by an unlawful search and seizure. *See e.g.*, *State v. Harrison*, 81 N.M. 324, 466 P.2d 890 (Ct. App. 1970) (motion to exclude lineup identification).

Paragraph B was amended in 2012 in response to *City of Santa Fe v. Marquez*, 2012-NMSC-031, 285 P.3d 637. Marquez held prospectively "that Rule 5-212(C) requires that motions to suppress be filed before trial and that the district court must adjudicate suppression issues before trial, absent good cause." *Id.* ¶ 28. If a suppression issue is untimely raised, the trial judge may order a continuance in order to ascertain whether there is good cause for the late filing. Examples of good cause may include, but are not limited to, failure of the prosecution to disclose evidence relevant to the motion to suppress to the defense prior to trial, failure of either party to provide discovery, or the discovery of allegedly suppressable evidence during the course of the trial. If good cause is shown, the judge may excuse the late filing and hold a hearing pursuant to Paragraph D. Absent good cause shown, the judge may deny the motion for failure to comply with the rule. If the motion to suppress is granted, the court may declare a mistrial.

At a hearing on a motion to suppress, the Rules of Evidence, except for the rules on privileges, do not apply. *See* Paragraph A of Rule 11-104 NMRA and Subparagraph (1) of Paragraph D of Rule 11-1101 NMRA. For example, hearsay evidence is admissible. *United States v. Matlock*, 415 U.S. 164, 94 Sup. Ct. 988, 39 L. Ed. 2d 242 (1974).

[As amended by Supreme Court Order No. 13-8300-016, effective for all cases pending or filed on or after December 31, 2013.]

ANNOTATIONS

The 2013 amendment, approved by Supreme Court Order No. 13-8300-016, effective December 31, 2013, changed the time for filing and deciding motions to suppress, and in Paragraph C, in the first sentence, after "suppress shall be", deleted "made within

twenty (20) days after the entry of a plea" and added "filed no less than sixty (60) days prior to trial", and added the second sentence.

Compiler's notes. — Paragraph A of this rule is similar to Rule 41(e) of the Federal Rules of Criminal Procedure.

Cross references. — For pretrial motions, defenses and objections, *see* Rule 5-601 NMRA.

I. GENERAL CONSIDERATION.

Deterrent purpose of exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right, and by refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused, but where the official action was pursued in complete good faith, the deterrence rationale loses much of its force. *State v. Ramirez*, 1976-NMCA-101, 89 N.M. 635, 556 P.2d 43, *overruled on other grounds by City of Albuquerque v. Haywood*, 1998-NMCA-029, 954 P.2d 93.

Role of trial court in admissibility hearing. — It is always open to an accused to subjectively deny that he understood the precautionary warning and advice with respect to assistance of counsel, and when the issue is raised in an admissibility hearing it is for the court to objectively determine whether in the circumstances of the case the words used were sufficient to convey the required warning. *State v. Ramirez*, 1976-NMCA-101, 89 N.M. 635, 556 P.2d 43, *overruled on other grounds by City of Albuquerque v. Haywood*, 1998-NMCA-029, 954 P.2d 93.

Role of appellate court. — Where the judge, on record, passed on the voluntariness and admissibility of defendant's statements at a suppression hearing, and submitted the statements to the jury with a charge which complied with UJI Crim. 40.40 (*see now* UJI 14-5040 NMRA), regarding voluntariness of confessions, the defendant's argument that his statements were the product of promises and inducements was to be considered with all the conflicting evidence, and it was not for the appellate court to substitute its own judgment for that of the trier of fact and the trial judge. *State v. Ramirez*, 1976-NMCA-101, 89 N.M. 635, 556 P.2d 43, *overruled on other grounds by City of Albuquerque v. Haywood*, 1998-NMCA-029, 954 P.2d 93.

Effect of not objecting to voluntariness of confession. — Where confession is received in evidence without objection, no motion was made to strike nor to invoke the ruling of the court on this matter, it is not subject to consideration on appeal. *State v. Soliz*, 1968-NMSC-101, 79 N.M. 263, 442 P.2d 575 (decided under former law).

II. PROPERTY.

A. IN GENERAL.

Purpose of prohibition against unreasonable searches and seizures. — The constitutional prohibition against unreasonable searches and seizures is so that people may be secure in their persons, houses, papers and effects, and does not apply to items viewed in an open field. *State v. Aragon*, 1976-NMCA-018, 89 N.M. 91, 547 P.2d 574, cert. denied, 89 N.M. 206, 549 P.2d 284, *overruled on other grounds by State v. Rickerson*, 1981-NMSC-036, 95 N.M. 666, 625 P.2d 1183.

In the search and seizure context the prime purpose of an exclusionary rule is to deter future unlawful police conduct, and this rationale may be applicable to the right against compulsory self-incrimination. *State v. Ramirez*, 1976-NMCA-101, 89 N.M. 635, 556 P.2d 43, *overruled on other grounds by City of Albuquerque v. Haywood*, 1998-NMCA-029, 954 P.2d 93.

B. SEIZED FROM BUILDINGS OR GROUNDS.

Seizure of evidence from location not specified in warrant. — Where heroin seized during a search pursuant to a warrant was physically located on property upon which there was an unoccupied house, and not within the curtilage as specified in the warrant, it was held that although the warrant did not authorize a search outside the curtilage, the can containing the heroin was viewed from a place the officer had a right to be under the warrant, and, consequently, it was not discovered as a result of an illegal search. *State v. Aragon*, 1976-NMCA-018, 89 N.M. 91, 547 P.2d 574, cert. denied, 89 N.M. 206, 549 P.2d 284 (1976), *overruled on other grounds by State v. Rickerson*, 1981-NMSC-036, 95 N.M. 666, 625 P.2d 1183.

Evidence seized on reservation. — Because there is nothing in either the Zuni constitution or the Zuni tribal law and order code which authorizes the Zuni tribal court to issue a search warrant, the evidence seized from a house on the Zuni reservation pursuant to such a warrant is inadmissible at trial in a New Mexico court, and the motion to suppress the evidence obtained during the search should have been granted. *State v. Railey*, 1975-NMCA-019, 87 N.M. 275, 532 P.2d 204.

Search immediately after crime. — Where police followed robbery suspects to a house immediately after the crime, the fact that additional delay would have allowed time for disposing of clothing and contraband was an exigent circumstance and forcible entry by the police officers was a valid intrusion. *State v. Hansen*, 1974-NMCA-131, 87 N.M. 16, 528 P.2d 660.

Simultaneous announcement and entering. — Where police officers armed with a search warrant had probable cause to believe and in good faith did believe that defendant was selling heroin from his home and that there was heroin therein, they had received information from an informant who had assisted in the investigation leading to the issuance of the warrant, that defendant kept a weapon in the house and that the officers would have to move rapidly or defendant would flush the heroin down the toilet,

the officers were all experienced and knew that normally there is an attempt to get rid of heroin before police officers get into a house, and after knocking on the door and announcing that they were police officers, they could see people moving and hear the sound of voices coming from inside the house, one of which was yelling or screaming as if someone was calling to another for the purpose of getting attention, the circumstances justified the officers in entering after knocking and announcing that they were police officers without waiting to be invited or denied entry. *State v. Sanchez*, 1975-NMSC-059, 88 N.M. 402, 540 P.2d 1291, *overruled on other grounds by State v. Attaway*, 1994-NMSC-011, 117 N.M. 141, 870 P.2d 103.

Other evidence observed in course of lawful search. — Where contraband was discovered when officers opened a cedar chest, a metal pill box in a purse and an overnight case while searching for heroin, the "plain view" doctrine did not justify its seizure of the contraband in this case. However, seizure of the contraband was permissible under the facts of this case because where permission has been given to search for a particular object, the ensuing search remains valid as long as its scope is consistent with an effort to locate that object and other evidence observed in the course of such a lawful search may also be seized. *State v. Alderete*, 1976-NMCA-001, 88 N.M. 619, 544 P.2d 1184.

Where the presence of possibly hazardous chemicals provided the exigent circumstances necessary for a warrantless entry of defendant's residence, seizure of glassware and handguns was lawful because they were in plain view, and the exigencies of the situation permitted the opening of a briefcase without a warrant to search for other weapons or explosives. *State v. Calloway*, 1990-NMCA-110, 111 N.M. 47, 801 P.2d 117.

Search of undercover agent's home. — The finding of the marijuana and LSD in the undercover agent's home after the officers were informed by the undercover agent was hardly a search, but if it was a search it was by permission of the owner of the house and a search after permission is given by one who has authority is valid. *State v. Mosier*, 1971-NMCA-138, 83 N.M. 213, 490 P.2d 471 (decided under former law).

Effect of third-party consent. — Stolen items found in duffel bag in defendant's room were inadmissible where defendant occupied room in house rented by brother-in-law who gave police permission to search "my place of residence". A third party cannot consent to a search of a part of the premises within defendant's exclusive use and control. *State v. Johnson*, 1973-NMCA-119, 85 N.M. 465, 513 P.2d 399.

Standing of visitor to challenge search and seizure. – To establish his standing to challenge a search and seizure, a visitor must show subjectively, by his conduct, that he had an expectation of privacy, and objectively that his expectation was reasonable; defendant did not make any specific showing concerning his expectation of privacy where he was among a group of people in the living room in the presence of marijuana. *State v. Fairres*, 2003-NMCA-152, 134 N.M. 668, 81 P.3d 611, cert. denied, 2003-NMCERT-003.

C. SEIZED FROM MOTOR VEHICLE, ETC.

General license and registration check. — Where defendant's car was stopped during a general license and registration check, and after a police request defendant opened the trunk, at which point the officer smelled marijuana, and subsequently opened a suitcase (also at the officer's request), it was held that the seizure of the marijuana residue found in the suitcase was not unlawfully accomplished. *State v. Bloom*, 1977-NMSC-016, 90 N.M. 192, 561 P.2d 465.

Suppression of evidence was not warranted where officers stopped motorist for routine registration and license check, found Arizona driver's license and Connecticut registration in another's name, and upon asking driver what was in trunk, had right to ask if they could look in the trunk, and upon being given consent by the driver who opened the trunk, and upon smelling marijuana, had the right to ask for keys to footlockers and open them. *State v. Bidegain*, 1975-NMSC-060, 88 N.M. 466, 541 P.2d 971.

Where no plain view or exigent circumstances. — The plain view doctrine did not apply to marijuana found in defendant's car, which was enclosed in a burlap-like sack, since neither of the police officers involved could testify that he was able to see inside the bag nor did exigent circumstances justifying a warrantless search exist where defendant's car was parked outside the sheriff's office, and the defendant and the other two occupants were in the sheriff's office under arrest. *State v. Coleman*, 1974-NMCA-147, 87 N.M. 153, 530 P.2d 947.

Insufficient proof alcoholic beverages in possession of minors. — Where two officers who had stopped defendant's car for carelessly leaving the curb, saw alcoholic beverages therein (not a crime in and of itself) and neither officer ever explained why either of them believed any of the three occupants (all of whom had reached their majority) were under 21 (so as to, at that time, make possession of the alcohol illegal), the officers had no probable cause to search the car and defendant's motion to suppress should have been granted. *State v. Ledbetter*, 1975-NMCA-107, 88 N.M. 344, 540 P.2d 824.

Inventory search. — An inventory search of an automobile does not violate U.S. Const., amend. IV when that automobile is in the lawful custody of the police in a reasonable exercise of its caretaking function; however, an inventory search is not constitutionally permissible absent a search warrant after police have relinquished possession, custody and control to a third party who has the legal right to possession, custody and control, and the trial court should have granted defendant's motion to suppress. *State v. Clark*, 1976-NMCA-109, 89 N.M. 695, 556 P.2d 851.

Marijuana found in closed paper bag in locked trunk was admissible as police are not limited to plain view items when doing inventory of personal items left in arrested and jailed person's car. *State v. Vigil*, 1974-NMCA-065, 86 N.M. 388, 524 P.2d 1004, cert.

denied, 86 N.M. 372, 524 P.2d 988, 420 U.S. 955, 95 S. Ct. 1339, 43 L. Ed. 2d 432 (1975).

Search of overdue rental vehicle. — When police stopped car which appeared reluctant to pass police vehicle and which turned out to be an overdue rental vehicle, there was no justification in making a warrantless search of the car, and seizure of the marijuana seeds and marijuana was unlawful because consent was not given, the search was not pursuant to an arrest, and there was no probable cause to warrant a search; therefore, the trial court correctly granted defendant's motion to suppress. *State v. Brubaker*, 1973-NMCA-152, 85 N.M. 773, 517 P.2d 908.

Search two hours after arrest. — A search that occurred around two hours after the arrest when the evidence is sufficient to show that the police officers had reasonable or probable cause to search the automobile at the place of arrest was valid, as this right continued to a search at the police station shortly thereafter. The search was not remote; therefore, the evidence seized from the car was properly admitted. *State v. Courtright*, 1972-NMCA-009, 83 N.M. 474, 493 P.2d 959 (decided under former law).

Airplane alert bulletin not probable cause. — Where superior officer was notified that there was an alert bulletin out on a certain airplane, radioed to another officer to arrest pilot and search airplane, resulting in statements being made and the discovery of marijuana, there was no probable cause, and the statements and marijuana were an exploitation of an illegal arrest and inadmissible. *State v. Gorsuch*, 1974-NMCA-143, 87 N.M. 135, 529 P.2d 1256.

D. SEIZED FROM PERSON.

Reasonable suspicion that the defendant was armed and dangerous. — Where police officers asked the defendant to step outside his residence; the defendant kept his hand in his pocket as he opened the door; the defendant twice refused to comply with the officers' orders to take his hand out of his pocket; one officer grabbed the wrist of the defendant's hand that was in the pocket; the defendant removed his hand from his pocket while the officer continued to hold on to the defendant's wrist; the defendant had past interactions with the officers; the officers were aware that the defendant was known to carry a pocketknife; and the officers were nervous about their safety because the defendant had complied with their requests in the past, but was not compliant in this instance, the officers had a reasonable suspicion that the defendant was armed and dangerous which justified the officer's seizure of the defendant's hand. *State v. Talley*, 2008-NMCA-148, 145 N.M. 127, 194 P.3d 742.

Observations by experienced officer. — A police officer who testified he had been working in narcotics for approximately four years, had made numerous arrests in the area, for the year prior to defendant's arrest had spent almost every day in the area, was acquainted with many addicts and had discussed methods of carrying and hiding small quantities of narcotics, had reasonable grounds for belief that defendant, based on the officer's observance of his conduct, was in possession of heroin and, therefore,

had probable cause for the detention and search and seizure which disclosed the heroin. *State v. Blea*, 1975-NMCA-129, 88 N.M. 538, 543 P.2d 831, cert. denied, 89 N.M. 5, 546 P.2d 70.

Search and seizure incident to lawful arrest. — Where there is probable cause for the arrest, the search and seizure, contemporaneous with the arrest, was valid as an incident of the arrest; therefore, the trial court did not err in denying the motion to suppress or in admitting the heroin at trial. *State v. Garcia*, 1971-NMCA-186, 83 N.M. 490, 493 P.2d 975, cert. denied, 83 N.M. 473, 493 P.2d 958 (1972) (decided under former law).

The trial court properly denied defendant's motion to suppress evidence seized from his person, where defendant was arrested for public drunkenness (prior to repeal of the offense of drunkenness), and the police officer searched defendant finding a marijuana cigarette and a glasses case which contained heroin, since the full search of the person of the suspect made incident to a lawful custodial arrest does not violate the U.S. Const., amends. IV and XIV, and having authority to search the glasses case, the right to open it naturally followed. *State v. Barela*, 1975-NMCA-117, 88 N.M. 446, 541 P.2d 435.

Officer who could see cigarette with rolled up end in see-through shirt pocket of child, and who had previously seen traces of tobacco and marijuana nearby, had probable cause to grab cigarette out of pocket, and subsequent emptying of pockets, producing more marijuana, and arrest, were contemporaneous events and suppression of evidence was not warranted. *In re Doe*, 1976-NMCA-011, 89 N.M. 83, 547 P.2d 566, cert. denied, 89 N.M. 206, 549 P.2d 284.

III. SUPPRESSION OF OTHER EVIDENCE.

Requirements for valid statement. — For defendant to make a valid statement the defendant must have had sufficient mental capacity at the time he made the statement, to be conscious of the physical acts performed by him, to retain them in his memory, and to state them with reasonable accuracy, and where there was evidence which met this standard, the trial court did not err in refusing to suppress the consent to search. *State v. Chavez*, 1975-NMCA-119, 88 N.M. 451, 541 P.2d 631.

Constitutionality of confession taken in violation of statutory provision. — The supreme court, although not reaching the question of suppression of confession, indicated that, in case where confession was given by indigent during forcible detention after twice being given and waiving the Miranda warnings, before public defender was notified of detention, in violation of Section 31-15-12 NMSA 1978 of the Public Defender Act, the U.S. Const., amends. V and VI rights were not violated, entirely apart from whether they were waived, that prejudice was not shown, that for suppression to be warranted both would be required, and reversed the trial court and court of appeals who had suppressed evidence on basis that confessions violated U.S. Const., amends. V and VI. *State v. Rascon*, 1976-NMSC-016, 89 N.M. 254, 550 P.2d 266.

Coercion necessary. — The right against self-incrimination must involve an element of coercion since the clause provides that a person shall not be compelled to give evidence against himself; where defendant twice insisted on making a confession, twice was given Miranda warnings and still insisted on making statements, defendant's statements were obtained in a manner indicating that they were given voluntarily within the meaning of fundamental fairness, and the deterrence of overzealous and unlawful police activity would not be served by their exclusion. *State v. Ramirez*, 1976-NMCA-101, 89 N.M. 635, 556 P.2d 43, *overruled on other grounds by City of Albuquerque v. Haywood*, 1998-NMCA-029, 954 P.2d 93.

Effect of noncompliance with Miranda procedures. — Any statement given without compliance with the Miranda procedures cannot be admitted in evidence against the accused over his objection, even if it is wholly voluntary. *State v. Ramirez*, 1976-NMCA-101, 89 N.M. 635, 556 P.2d 43, *overruled on other grounds by City of Albuquerque v. Haywood*, 1998-NMCA-029, 954 P.2d 93.

Where defendant made confession before being advised of his rights, motion to suppress was properly denied where defendant testified at trial that he shot decedent in self-defense and jury was instructed on issue of voluntariness. *State v. Romero*, 1974-NMCA-090, 86 N.M. 674, 526 P.2d 816, cert. denied, 86 N.M. 656, 526 P.2d 798.

Where petitioner had no attorney when the statement was given and claims that he had not been advised that he did not have to make any statement at all, and that if he did make a statement it could be used against him on a trial, no prejudice is shown where it was typed on the form that he did not have to make any statement. *Pece v. Cox*, 1964-NMSC-237, 74 N.M. 591, 396 P.2d 422 (decided under former law).

Exploitation of prior illegal statement. — The fact that defendant may have understood his rights at the time of a later statement did not discharge state's burden of showing that later statement was not exploitation of prior illegal statement, and it was improper to admit the later incriminating statement at trial for armed robbery. *State v. Dickson*, 1971-NMCA-020, 82 N.M. 408, 482 P.2d 916 (decided under former law).

Effect of photograph on in-court identification of defendant. — Where victim was robbed by two men, went to police headquarters and looked at more than 10 mug shots with no officer in the room, made no identification, returned the next day, was shown five mug shots, identified one robber, not defendant, returned a few days later, was shown five more mug shots, identifying defendant, the record was void of any indication that in-court identification of defendant was tainted. *State v. Beal*, 1974-NMCA-054, 86 N.M. 335, 524 P.2d 198.

Suppression of in-court identification of defendant was denied where identification was independent and unhesitating. Here, prosecutrix was shown, during the course of the investigation, a group of photographs, including one of defendant, which were not introduced at trial nor alluded to in the presence of the jury; the in-court identification of defendant was permissible where the individuals in the photographs were similar in

appearance and were not so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. *State v. Armstrong*, 1973-NMCA-081, 85 N.M. 234, 511 P.2d 560, cert. denied, 85 N.M. 228, 511 P.2d 554, *overruled on other grounds by State v. Elliott*, 1975-NMCA-087, 88 N.M. 187, 539 P.2d 210.

Where victim's testimony was to the effect that intruder was in her presence for approximately an hour and 40 minutes, and at the police station she described the intruder by height, style of haircut and "big lips", showing the victim the driver's license photograph when victim knew the driver's license came from the wallet she had taken from the rapist's pocket, it was not error to admit evidence of the out-of-court identification of defendant from the photographs, and the in-court identification was not inadmissible because of taint by an illegal pretrial identification. *State v. Baldonado*, 1971-NMCA-068, 82 N.M. 581, 484 P.2d 1291 (decided under former law).

Improper inducement. — Where 18-year-old defendant had been advised by his mother to go to a former district attorney if he ever needed help, went, made confession and produced evidence believing the charges would be dropped, the confession and evidence were entitled to be suppressed. *State v. Benavidez*, 1975-NMCA-013, 87 N.M. 223, 531 P.2d 957.

Involuntary confession. — Promises of leniency on the part of police can be coercive and may render a defendant’s subsequent statement involuntary. *State v. Talayumptewa*, 2015-NMCA-008.

Burden on the State. — On a claim that the police coerced a statement from defendant, the prosecution bears the burden of proving by a preponderance of the evidence that a defendant’s statement was voluntary, that it was not extracted from an accused through fear, coercion, hope of reward, or other improper inducements, and an appellate court reviews the entire record and the circumstances under which the statement or confession was made in order to make an independent determination of whether a defendant’s confession was voluntary. *State v. Talayumptewa*, 2015-NMCA-008.

Test for implied promise of leniency. — An implied promise of leniency occurs when the accused could reasonably infer a promise going to the punishment for the crime to be confessed. *State v. Talayumptewa*, 2015-NMCA-008.

Promises of leniency. — Where officers made numerous implied promises of leniency to defendant, including promises of reduced charges and less prison time, inducing defendant to make incriminatory statements, the district court did not err in finding the statements involuntary and in suppressing the evidence. *State v. Talayumptewa*, 2015-NMCA-008.

District court erred in suppressing voluntary statements. — Where defendant was charged with two counts of second-degree criminal sexual penetration, and where he moved to suppress all written and oral statements made after he invoked his right to

counsel, the district court erred in suppressing defendant's written statements, because in the present case defendant made his written statements after the police interview had ended, and the statements were therefore not made in response to interrogation; the federal constitution does not preclude the use of incriminating statements against the accused if those statements can be characterized as volunteered. Moreover, there was no indicia of police efforts designed to wear down defendant's resistance or induce defendant to make incriminating statements. *State v. Alvarado*, 2019-NMCA-051, cert. denied.

Suggestive elements not invalidating on-the-scene confrontation. — During a showup, the facts that defendant was either the sole occupant of the police car or was standing alongside the police car and was in the presence of police officers during the confrontation with the witness were simply the usual elements in any police conducted on-the-scene confrontation, and while these elements are suggestive, they were not unnecessarily so and were to be considered by the trial court in evaluating the totality of the circumstances; in themselves they do not require exclusion of the evidence. *State v. Torres*, 1975-NMCA-148, 88 N.M. 574, 544 P.2d 289.

The district court properly denied defendant's pretrial motion to suppress. — Where defendant was charged with possession of a controlled substance and concealing identity after a restaurant manager called police to report that a group of people, which included defendant, was engaged in possible drug activity at the restaurant, and where, prior to trial, defendant moved to suppress evidence seized from him following his arrest, claiming that the evidence known to the officer at the time of the police encounter was insufficient to establish that the officer had reasonable suspicion to detain and question him, the district court properly denied defendant's pretrial motion to suppress, because the officer testified at the pretrial hearing that he was told by the restaurant manager that defendant had neither purchased nor eaten food, and had refused to leave when asked to do so by the manager, the district court properly denied defendant's pretrial motion to suppress, because although the information that the officer received at the time of the detention proved to be false, the information the officer received at the time of the detention was sufficient, objective evidence to support the district court's ruling that the officer had a reasonable suspicion of criminal trespass. *State v. Aguilar*, 2021-NMCA-018, cert. denied.

Traffic stop was supported by reasonable suspicion. — Where defendant was charged with trafficking a controlled substance, tampering with evidence, resisting, evading, or obstructing an officer, and possession of drug paraphernalia after law enforcement officers obtained a search warrant to search defendant's residence for narcotics, but due to safety concerns, chose to wait until defendant exited his home and subsequently conducted a traffic stop, during which defendant was found with a large amount of money and sixty three small baggies of crack cocaine, and where officers subsequently searched defendant's home, pursuant to the warrant, finding a .380 caliber semi-automatic pistol, several small zip-lock baggies, several digital scales, and a brown bag with small zip-lock baggies inside, and where, at trial, defendant moved to suppress the drug evidence found during the traffic stop because the warrant authorized

only a search of his residence, the district court did not err in denying defendant's motion to suppress, because based on the totality of the circumstances, specific and articulable facts supported the officers' suspicion that defendant was engaged in illegal activity based on evidence that an informant had relayed information regarding drug activity at defendant's residence, that the informant had made three controlled purchases of controlled substances at defendant's residence, that the informant had seen defendant conceal cocaine on his person, and that defendant was observed leaving his house in a vehicle that later stopped at another house that was known to be involved in narcotic dealings. *State v. Jackson*, 2021-NMCA-059, *cert. denied*.

Effect of arrest and confession in another state. — The Philadelphia police were entitled to act on the Phoenix police department's telephone request and to assume that Phoenix had probable cause for making it, and since defendant did not contend that the Phoenix police lacked probable cause to arrest him for crimes committed in Arizona, defendant's arrest by the Philadelphia police was lawful, and the confession thereafter obtained from him was admissible. *State v. Carter*, 1975-NMCA-115, 88 N.M. 435, 540 P.2d 1324.

Admission of blood test. — Absent a valid warrant or consent by the defendant, an arrest prior to the taking of a blood alcohol test is an essential element in order to constitute a reasonable search and seizure. Admission into evidence of the results of a blood test which does not meet this standard is reversible error. *State v. Richerson*, 1975-NMCA-027, 87 N.M. 437, 535 P.2d 644, cert. denied, 87 N.M. 450, 535 P.2d 657.

IV. TIME FOR FILING.

Paragraph C of Rule 5-212 NMRA requires that motions to suppress be filed before trial and that the district court adjudicate any suppression issues prior to trial, absent good cause for delaying such rulings until trial. *City of Santa Fe v. Marquez*, 2012-NMSC-031, 285 P.3d 637, *overruling in part County of Los Alamos v. Tapia,* 1990-NMSC-038, 109 N.M. 736, 790 P.2d 1017 and *State v. Katrina G.*, 2008-NMCA-069, 144 N.M. 205, 185 P.3d 376 .

Adverse consequences of failure to adjudicate suppression issues prior to trial. — Where the municipal court found defendant guilty of driving while intoxicated in violation of a municipal ordinance; defendant appealed to the district court for a de novo trial; defendant did not assert at any point prior to the close of the municipality's case that the arresting officer lacked reasonable suspicion to initiate the DWI investigation and did not move to suppress the evidence flowing from the investigation; and after the municipality rested its case, the district court ruled that the arresting officer's DWI investigation was unlawful, suppressed all evidence from the investigation, and dismissed the DWI charges against defendant, implicitly holding that the evidence was insufficient to support defendant's conviction of DWI, the municipality's appeal was barred by double jeopardy because the municipality had presented evidence against defendant to the district court and was barred from retrying defendant. *City of Santa Fe v. Marquez*, 2012-NMSC-031, 285 P.3d 637, *overruling in part County of Los Alamos v.*

Tapia, 1990-NMSC-038, 109 N.M. 736, 790 P.2d 1017 and *State v. Katrina G.*, 2008-NMCA-069, 144 N.M. 205, 185 P.3d 376 .

As a general rule, a motion to suppress evidence is not required to be made before trial and may be made at trial. *State v. Katrina G.*, 2008-NMCA-069, 144 N.M. 205, 185 P.3d 376, *overruled by City of Santa Fe v. Marquez*, 2012-NMSC-031, 285 P.3d 637.

Time limitation of Subdivision (c) (*see now* Paragraph C) does not violate defendant's constitutional right to be heard on the voluntariness of a confession. *State v. Gallegos*, 1978-NMCA-121, 92 N.M. 336, 587 P.2d 1347.

Issue not thereby foreclosed. — Defendant's right to be heard on whether the prosecutor had laid a sufficient foundation for the admission of inculpatory statements was not barred by the fact that he had not sought to suppress the statements under Subdivision (c) (*see now* Paragraph C). *State v. Gallegos*, 1978-NMCA-121, 92 N.M. 336, 587 P.2d 1347.

Defendant's duty to move for suppression of evidence before trial is discretionary. *State v. Doe*, 1979-NMCA-032, 93 N.M. 143, 597 P.2d 1183 (motion for rehearing).

Effect of not suppressing evidence before or during trial. — Where defendant asserted his arrest had been illegal and the subsequent finding of heroin "arose" from the claimed illegal arrest so that he was deprived of his fundamental rights by the admission into evidence of the heroin, but did not attempt to suppress this evidence prior to trial nor object to testimony relative thereto at trial, and, despite defendant's claim that under the "harmless error" rule no error is harmless if it is inconsistent with substantial justice, and his reliance on the "plain error" rule, the court of appeals could not hold there was an illegal arrest as a matter of law. *State v. Bauske*, 1974-NMCA-078, 86 N.M. 484, 525 P.2d 411.

Where defendant waited until trial to object to admission of confession, the failure of defendant to file a timely motion to suppress statement, made directly after seizure of heroin, on grounds rights not given, resulted in prejudice to the state, and since in such circumstances it would be contrary to the ends of public justice to carry the first trial to a final verdict, the trial court did not abuse its discretion in declaring a mistrial; there was no double jeopardy. *State v. Aragon*, 1976-NMCA-018, 89 N.M. 91, 547 P.2d 574, cert. denied, 89 N.M. 206, 549 P.2d 284, *overruled on other grounds by State v. Rickerson*, 1981-NMSC-036, 95 N.M. 666, 625 P.2d 1183.

Objection waived. — In the absence of an objection from the state to consideration of a motion to suppress evidence, and its affirmatively arguing its merits to the district court, the state waived its objection to the motion. *State v. Gutierrez*, 2005-NMCA-015, 136 N.M. 779, 105 P.3d 332, cert. denied, 2005-NMCERT-001.

V. HEARING.

Challenge to veracity of statements made in affidavit underlying warrant. — At a hearing under this rule, the person aggrieved has the right to challenge the veracity of statements made in an affidavit underlying a search warrant. The defendant is entitled to a hearing which delves below the surface of a facially sufficient affidavit if he has made an initial showing of either (1) any misrepresentation by the government agent of a material fact or (2) an intentional misrepresentation by the government agent, whether or not material. Once a hearing is granted, however, more must be shown to suppress the evidence, i.e., the trial court must find that the government agent was either recklessly or intentionally untruthful. *State v. Gutierrez*, 1978-NMCA-026, 91 N.M. 542, 577 P.2d 440.

Effect of failure to request hearing. — Where no request was made at the trial for a hearing on the voluntariness of a confession, and the explanation of rights form and the confession were admitted in evidence without objection, no foundation was laid by the defense which required the trial court to give UJI Crim. 40.40 (*see now* UJI 14-5040 NMRA). *State v. McCarter*, 1980-NMSC-003, 93 N.M. 708, 604 P.2d 1242.

Admission of confession without hearing. — An evidentiary hearing on the issue of involuntariness to confess due to insanity is constitutionally required when a defendant requests it or when the defendant attempts to offer proof that he was not mentally competent to make the confession. However, a confession is presumed to be given by a mentally competent person and the burden is on the defendant to show some evidence to the contrary. Where defendant failed to demand an evidentiary hearing and did not show that he had evidence to submit on his incompetence to confess, nor was there evidence in the record of coercion, prolonged interrogation or anything which might make the confession involuntary, it was proper for the court to admit the evidence of the confession, along with evidence of the defendant's state of mind at the time of the confession, to allow the jury to decide the weight to be accorded the confession. *State v. Lujan*, 1975-NMSC-017, 87 N.M. 400, 534 P.2d 1112, cert. denied, 423 U.S. 1025, 96 S. Ct. 469, 46 L. Ed. 2d 400.

Where failure to conduct hearing not error. — The trial court did not err in failing to conduct a hearing on a pretrial motion to suppress statements made by defendants when the motion was never brought to its attention. *State v. Dosier*, 1975-NMCA-031, 88 N.M. 32, 536 P.2d 1088, cert. denied, 88 N.M. 28, 536 P.2d 1084.

Effect of failure to rule on pretrial motion to suppress. — Defendant has a constitutional right to have a fair hearing and a reliable determination as to the voluntariness of his confession. The failure of the trial court to rule on pretrial motion to suppress confession was error and necessitated vacation of conviction and sentence pending trial court determination on issue of voluntariness of confession. *State v. Gurule*, 1972-NMCA-104, 84 N.M. 142, 500 P.2d 427.

Use of evidence adduced at hearing. — Evidence adduced at a hearing on a motion to suppress could not be used to augment an otherwise defective affidavit. *State v. Baca*, 1973-NMCA-001, 84 N.M. 513, 505 P.2d 856.

Defendants were prejudiced by the unconstitutional denial of their motion to suppress testimony used at hearing to suppress confession, when the trial court refused to guarantee that none of the testimony elicited from them therein would be admitted at their subsequent trial; a defendant cannot be required to elect between a valid fourth amendment claim or, in legal effect, a waiver of his fifth amendment privilege against self-incrimination. *State v. Volkman*, 1974-NMCA-079, 86 N.M. 529, 525 P.2d 889.

Acceptance of evidence rights given and waived in Spanish. — Where the defendant spoke Spanish and the record reflected defendant's waiver in Spanish of his constitutional rights which were written in Spanish, the court of appeals took judicial notice of its English interpretation, and agreed with the trial court that the language of the waiver satisfied the requirements of due process. *State v. Ramirez*, 1976-NMCA-101, 89 N.M. 635, 556 P.2d 43, *overruled on other grounds by City of Albuquerque v. Haywood*, 1998-NMCA-029, 954 P.2d 93.

Law reviews. — For article, "Survey of New Mexico Law, 1979-80: Criminal Law and Procedure," see 11 N.M.L. Rev. 85 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Admissibility of evidence discovered in search of adult defendant's property or residence authorized by defendant's minor child - state cases, 99 A.L.R.3d 598.

Admissibility of evidence discovered in search of defendant's property or residence authorized by domestic employee or servant, 99 A.L.R.3d 1232.

Admissibility of evidence discovered in search of defendant's property or residence authorized by defendant's spouse (resident or nonresident) - state cases, 1 A.L.R.4th 673.

Admissibility of evidence discovered in search of defendant's property or residence authorized by defendant's adult relative other than spouse - state cases, 4 A.L.R.4th 196.

Admissibility of evidence discovered in search of defendant's property or residence authorized by one, other than relative, who is cotenant or common resident with defendant - state cases, 4 A.L.R.4th 1050.

Adequacy of defense counsel's representation of criminal client regarding confessions and related matters, 7 A.L.R.4th 180.

Adequacy of defense counsel's representation of criminal client regarding search and seizure issues, 12 A.L.R.4th 318.

Sufficiency of showing that voluntariness of confession or admission was affected by alcohol or other drugs, 25 A.L.R.4th 419.

Admissibility of confession or other statement made by defendant as affected by delay in arraignment - modern state cases, 28 A.L.R.4th 1121.

Propriety in state prosecution of severance of partially valid search warrant and limitation of suppression to items seized under invalid portions of warrant, 32 A.L.R.4th 378.

Voluntariness of confession as affected by police statements that suspect's relatives will benefit by the confession, 51 A.L.R.4th 495.

Coercive conduct by private person as affecting admissibility of confession under state statutes or constitutional provisions-post-connelly cases, 48 A.L.R.5th 555.

Propriety of search of nonoccupant visitor's belongings pursuant to warrant issued for another's premises, 51 A.L.R.5th 375.

Admissibility of evidence discovered in search of adult defendant's property or residence authorized by defendant's minor child-state cases, 51 A.L.R.5th 425.

Admissibility of evidence discovered in search of defendant's property or residence authorized by defendant's adult relative other than spouse-state cases, 55 A.L.R. 5th 125.

What is "oral statement" of accused subject to disclosure by government under Rule 16(a)(1)(A), Federal Rules of Criminal Procedure, 39 A.L.R. Fed. 432.

Admissibility of evidence discovered in search of defendant's property or residence authorized by defendant's relative, 48 A.L.R. Fed. 131.

Admissibility of evidence discovered in warrantless search of property or premises authorized by one having ownership interest in property or premises other than relative, 49 A.L.R. Fed. 511.

Propriety in federal prosecution of severance of partially valid search warrant and limitation of suppression to items seized under invalid portions of warrant, 69 A.L.R. Fed. 522.

Admissibility of evidence not related to air travel security, disclosed by airport security procedures, 108 A.L.R. Fed. 658.

23A C.J.S. Criminal Law § 1224 et seq.

ARTICLE 3
Pretrial Proceedings

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. 20-8300-013, effective for all cases pending or filed on or after November 23, 2020.]

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.]

ANNOTATIONS

The 2020 amendment, approved by Supreme Court Order No. 20-8300-013, effective for all cases pending or filed on or after November 23, 2020, required the district court to inform a defendant, making his or her first appearance in response to a summons, warrant, or arrest, of the possibility of pretrial detention; and in Subparagraph D(3), after "the right to bail", added "or the possibility of pretrial detention".

The 2018 amendment, approved by Supreme Court Order No. 18-8300-024, effective February 1, 2019, authorized the court to set conditions of release immediately upon finding probable cause that the defendant committed an offense; in Subparagraph C(2), added the first sentence, after "If the court finds probable cause", deleted "that the defendant committed an offense", after "bailable offense, the court", deleted "shall" and added "may", and after "may set conditions of release", deleted "in accordance with" and added "immediately or within the time required under", and deleted "If the court finds that there is probable cause the court shall make such finding in writing.".

The 2014 amendment, approved by Supreme Court Order No. 14-8300-016, effective December 31, 2014, prohibited the court from extending the time for making a probable cause determination beyond forty-eight hours, including Saturdays, Sundays and legal holidays; and in Paragraph A, added the third sentence.

The 2013 amendment, approved by Supreme Court Order No. 13-8300-042, effective December 31, 2013, required the personal recognizance release of the defendant from custody pending trial if no probable cause is found; in Paragraph C, Subparagraph (1), added the title, after "the court shall", deleted "dismiss the complaint without prejudice and", after "order the immediate", added "personal recognizance", and after "release of the defendant", added the remainder of the sentence; and in Subparagraph (2), added the title.

The 1991 amendment, effective for cases filed in the district courts on or after November 1, 1991, in Paragraph A, substituted "promptly but in any event within forty-

eight (48) hours" for "within a reasonable time but in any event within twenty-four (24) hours" in the second sentence and deleted the former last sentence, relating to expiration of the prescribed period on a Saturday, Sunday, or legal holiday.

Cross references. — For explanation of rights at first appearance in the magistrate court, *see* Rule 6-501 NMRA.

For waiver of counsel form, *see* Rule 9-401 NMRA.

Arrest and release on same day. — Where a defendant is arrested without a warrant and released from custody on the same day as the arrest, the Rules of Criminal Procedure do not contemplate a probable cause determination by either the district court under Paragraph A of this rule or the magistrate court under Rule 6-203(A) NMRA 2003. *State v. Gomez*, 2003-NMSC-012, 133 N.M. 763, 70 P.3d 753.

Setting of bail before counsel appointed. — Where, at defendant's first appearance in court, the court set bond "at the present time", before counsel was appointed, but with the condition that if counsel wanted to bring bail to the court's attention, a hearing would be held, and no request was subsequently made, the defendant, who was out on bail, was in no position to complain of trial court setting bond at first appearance rather than waiting until counsel appeared. *State v. Quintana*, 1974-NMCA-095, 86 N.M. 666, 526 P.2d 808, cert. denied, 86 N.M. 656, 526 P.2d 798.

Rights of assistance and representation by counsel required. — Rights which are required to be explained to a defendant at his first appearance include the right to the assistance of counsel, and the possible right to representation by an attorney at state expense. *State v. Warner*, 1974-NMCA-034, 86 N.M. 219, 521 P.2d 1168.

Scope of duty to advise. — The statutes do not make it a duty to advise of the charges on which an arrest is based, prior to his being brought before a magistrate. *State v. Gibby*, 1967-NMSC-219, 78 N.M. 414, 78 N.M. 414, 432 P.2d 258 (decided under former law).

The rules promulgated by the supreme court do not require that waiver of the right to a jury in a trial de novo in district court on appeal from a metropolitan court conviction must be accompanied by advice to the defendant on the record in district court of his right to a jury trial. *State v. Ciarlotta*, 1990-NMCA-050, 110 N.M. 197, 793 P.2d 1350.

Repeated warnings of Miranda rights are not necessary as a matter of law. *State v. Carlton*, 1972-NMCA-015, 83 N.M. 644, 495 P.2d 1091, cert. denied, 83 N.M. 631, 495 P.2d 1078 (decided under former law).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 589 to 599.

Delay in taking before magistrate or denial of opportunity to give bail as supporting action for false imprisonment, 98 A.L.R.2d 966, 3 A.L.R.4th 1057.

Accused's right to assistance of counsel at or prior to arraignment, 5 A.L.R.3d 1269.

Admissibility of confession or other statement made by defendant as affected by delay in arraignment - modern state cases, 28 A.L.R.4th 1121.

22 C.J.S. Criminal Law § 357 et seq.

5-302. Preliminary examination.

A. **Time.**

(1) ***Time limits.*** A preliminary examination shall be scheduled and held with a disposition entered, unless an extension under Subparagraph (A)(2) of this rule is granted, within a reasonable time but in any event no later than ten (10) days if the defendant is in custody, and no later than sixty (60) days if the defendant is not in custody, of whichever of the following events occurs latest:

(a) the first appearance;

(b) the first appearance after the refiling of a case previously dismissed by the prosecutor;

(c) if an evaluation of competency has been ordered, the date an order is filed finding the defendant competent to stand trial;

(d) if the defendant is arrested or surrenders on any warrant, the date the defendant is returned to the court;

(e) if the defendant has been placed in a preprosecution diversion program, the date a notice is filed in the district court stating that the preprosecution diversion program has been terminated for failure to comply with the terms, conditions, or requirements of the program; or

(f) if the defendant is not arrested on a bench warrant, the date the conditions of release are revoked under Rule 5-403 NMRA, which results in the defendant’s continued detention.

(2) ***Extensions.*** On a showing of good cause, the court may extend the time limits for holding a preliminary examination for up to sixty (60) days. If the defendant does not consent, the court may extend the time limits in Subparagraph (A)(1) of this rule only on a showing on the record that exceptional circumstances beyond the control of the state or the court exist and justice requires the delay. An extension for

exceptional circumstances shall not exceed sixty (60) days. The time enlargement provisions in Rule 5-104 NMRA do not apply to a preliminary examination.

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

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

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

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

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

(4) ***Cross-examination.*** The witnesses shall be examined in the defendant's presence, and both the prosecution and the defendant shall be afforded the right to cross-examine adverse witnesses. The court may allow witnesses to appear by two-way audio-visual attendance provided that the witness is able to see, and can be seen by, the defendant, counsel for the prosecution and the defendant, and the judge.

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

C. **Record of examination.** A record shall be made of the preliminary examination. If requested, the record shall be filed with the clerk of the district court within ten (10) days after it is requested.

D. **Findings of court.**

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

(2) If the court finds that there is probable cause to believe that the defendant committed an offense, it shall bind the defendant over for trial.

E. **Remand for preliminary examination.** The court may remand the case to the magistrate or metropolitan court for a preliminary examination unless a motion for pretrial detention has been filed or a preliminary examination has been previously conducted in the magistrate or metropolitan court.

[As amended, effective June 1, 1999; as amended by Supreme Court Order No. 14-8300-020, effective for all cases pending or filed on or after December 31, 2014; as amended by Supreme Court Order No. 17-8300-016, effective for all cases pending or filed on or after December 31, 2017; as amended by Supreme Court Order No. 20-8300-021, effective for all cases pending or filed on or after November 23, 2020; as amended by Supreme Court Order No. 22-8300-022, effective for all cases pending or filed on or after December 31, 2022.]

Committee commentary. — This rule governs preliminary examinations held in the district court. Most preliminary examinations will be held by the magistrate or metropolitan court and will be governed by Rule 6-202 NMRA or Rule 7-202 NMRA. The magistrate and metropolitan court rules are substantially identical to this rule.

If a preliminary examination is commenced within the time limits of Subparagraph (A)(1) of this rule, but completion of the hearing requires extension into a second day that falls outside the time limits, the district court may grant an extension to complete the disposition of the preliminary examination under Subparagraph (A)(2) of this rule. The district court may extend the time limits for commencing and holding a preliminary examination if the defendant does not consent only on a showing of exceptional circumstances beyond the control of the state or the court. "'Exceptional circumstances,' . . . would include conditions that are unusual or extraordinary, such as death or illness of the judge, prosecutor, or defense attorney immediately preceding the commencement of the trial; or other circumstances that ordinary experience or prudence would not foresee, anticipate, or provide for." *See* Committee commentary to Rules 6-506 and 7-506 NMRA.

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

If the court dismisses a criminal charge for failure to comply with the time limits in Paragraph A of this rule or for lack of probable cause under Paragraph D of this rule, the dismissal is without prejudice, and the state may later prosecute the defendant for the same offense by filing either an indictment or an information. *See State v. Chavez*, 1979-NMCA-075, ¶ 23, 93 N.M. 270, 599 P.2d 1067; *see also State v. Peavler*, 1975-NMSC-035, ¶ 8, 88 N.M. 125, 537 P.2d 1387 (explaining that, following dismissal of an

indictment, “the State can choose whether to proceed by indictment or information”); *State v. Isaac M.*, 2001-NMCA-088, ¶ 14, 131 N.M. 235, 34 P.3d 624 (concluding that the right to be free from double jeopardy does not preclude “multiple attempts to show probable cause” because “it is settled law that jeopardy does not attach pretrial”). *Cf.* Fed. R. Crim. P. 5.1(f) (“If the magistrate judge finds no probable cause to believe an offense has been committed or the defendant committed it, the magistrate judge must dismiss the complaint and discharge the defendant. A discharge does not preclude the government from later prosecuting the defendant for the same offense.”).

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

In *State v. Lopez*, 2013-NMSC-047, ¶ 26, 314 P.3d 236, the Supreme Court held that a defendant does not have a constitutional right of confrontation at the preliminary examination, overruling *Mascarenas v. State*, 1969-NMSC-116, 80 N.M. 537, 458 P.2d 789, to the extent *Mascarenas* held otherwise. Paragraph B of this rule was amended in 2014 to clarify that *Lopez* did not affect the other rights and procedures that apply to preliminary examinations. *See Lopez*, 2013-NMSC-047, ¶ 26. The list of procedures and rights in Paragraph B of this rule is not intended to be a comprehensive list of the defendant’s rights at the preliminary examination.

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

Additionally, the Rules of Evidence remain generally applicable to preliminary examinations, subject to specific exceptions for certain types of evidence not admissible at trial. *See Lopez*, 2013-NMSC-047, ¶ 4 (noting that the “Rules of Evidence generally govern proceedings in preliminary examinations,” but explaining that Rule 6-608(A) NMRA, which was amended and recompiled as Rule 6-202.1 NMRA in 2022, “provides a specific exception to our hearsay rule for admissibility” of certain types of written laboratory reports).

The defendant also retains the right to call and obtain subpoenas for witnesses and to cross-examine the state’s witnesses. Thus, although Rules 5-302.1, 6-202.1, and 7-202.1 NMRA may permit the state to use a laboratory report at a preliminary examination without calling the laboratory analyst as a witness, the defendant retains the right “to call witnesses to testify as to the matters covered in the report.” Rule 6-

202.1(F) NMRA; accord Rule 7-202.1(F) NMRA. And the preliminary examination remains “a critical stage of a criminal proceeding” at which “counsel must be made available to the accused.” *State v. Sanchez*, 1984-NMCA-068, ¶ 10, 101 N.M. 509, 684 P.2d 1174.

Paragraph E of this rule was added in 1980. The contents of this paragraph were formerly found in Rule 5-601(C) NMRA.

Subparagraph (B)(4) of this rule allows for witnesses to appear by audio-visual communication under compelling circumstances. For the purposes of this subparagraph, compelling circumstance may include a witness who resides out of state or is too ill or injured to appear in person. The judge in these proceedings will have the discretion to decide what rises to the level of compelling circumstances for witnesses requesting to appear by audio-visual communication.

[Amended by Supreme Court Order No. 14-8300-020, effective for all cases pending or filed on or after December 31, 2014; amended by Supreme Court Order No. 17-8300-016, effective for all cases pending or filed on or after December 31, 2017; as amended by Supreme Court Order No. 22-8300-022, effective for all cases pending or filed on or after December 31, 2022.]

ANNOTATIONS

The 2022 amendment, approved by Supreme Court Order No. 22-8300-022, effective December 31, 2022, amended an existing provision that set time limits for scheduling and holding a preliminary examination to include the requirement that the court’s disposition also be entered within the existing time limits, unless an extension is granted, amended the list of events that trigger the time limits for scheduling and holding a preliminary examination to include the date of defendant’s first appearance after the refiling of a case previously dismissed by the prosecutor, the date defendant is returned to the court after defendant is arrested on any warrant, and the date conditions of release are revoked, not as a result of an arrest on a bench warrant, which results in the defendant’s continued detention, provided that an extension of time for exceptional circumstances shall not exceed sixty days, provided that the district court may allow witnesses to appear by audio-visual communication under certain conditions, provided an exception to the provision allowing the district court to remand the case to the magistrate or metropolitan court for a preliminary examination, made certain technical amendments, and revised the committee commentary; in Paragraph A, Subparagraph A(1), in the introductory clause, after “scheduled and held”, added “with a disposition entered, unless an extension under Subparagraph (A)(2) of this rule is granted”, added new Subparagraph A(1)(b) and redesignated former Subparagraphs A(1)(b) and A(1)(c) as Subparagraphs A(1)(c) and A(1)(d), respectively, in Subparagraph A(1)(d), after “arrested”, deleted “for failure to appear”, after “or surrenders”, deleted “in this state for failure to appear” and added “on any warrant”, and after “the date the”, deleted “arrest warrant” and added “defendant”, deleted former Subparagraph A(1)(d), which provided “if the defendant is arrested for failure to appear or surrenders in another state or

country for failure to appear, the date the defendant is returned to this state", in Subparagraph A(1)(f), added "not" preceding "arrested", after "bench warrant", deleted "for failure to comply with" and added "the date the", after "conditions of release", deleted "or if the defendant's pretrial release is" and added "are", after "revoked under Rule 5-403 NMRA", deleted "the date the defendant is remanded into custody, provided that in no event a preliminary examination shall occur later than required by any of the events in Subparagraph (A)(1) of this rule" and added "which results in the defendant's continued detention", and in Subparagraph A(2), added "An extension for exceptional circumstances shall not exceed sixty (60) days."; in Paragraph B, Subparagraph B(4), added "The court may allow witnesses to appear by two-way audio-visual attendance provided that the witness is able to see, and can be seen by, the defendant, counsel for the prosecution and the defendant, and the judge."; and in Paragraph E, deleted "Unless a motion for pretrial detention has been filed, upon motion and for cause shown, the", and added "The", and after "preliminary examination", added "unless a motion for pretrial detention has been filed or a preliminary examination has been previously conducted in the magistrate or metropolitan court."

The 2020 amendment, approved by Supreme Court Order No. 20-8300-021, effective November 23, 2020, provided an exception to the provision authorizing the district court to remand the case to the magistrate or metropolitan court for a preliminary examination; and in Paragraph E, added "Unless a motion for pretrial detention has been filed".

The 2017 amendment, approved by Supreme Court Order No. 17-8300-016, effective December 31, 2017, revised the time limits for scheduling and holding a preliminary examination, revised the rule regarding when a district court may extend the time limits for holding a preliminary examination if the defendant does not consent, and revised the committee commentary; in Paragraph A, Subparagraph A(1), in the introductory clause, after "shall be", added "scheduled and", after "in any event", deleted "not" and added "no", after "(10) days", deleted "after the first appearance", after "(60) days", deleted "after the first appearance", and after "not in custody", added "of whichever of the following events occurs latest", added Subparagraphs A(1)(a) through A(1)(f), and in Subparagraph A(2), after "upon a showing", added "on the record", after "that", deleted "extraordinary" and added "exceptional", and after "circumstances", added "beyond the control of the state or the court".

The 2014 amendment, approved by Supreme Court Order No. 14-8300-020, effective December 31, 2014, provided for extensions of time for holding a preliminary hearing beyond the ten day time limit; provided for appointment of counsel and discovery; provided for the application of the Rules of Evidence; added Paragraph A; in Paragraph B, deleted the former title "Subpoena of witnesses" and added the current title and in the introductory sentence, after "must be conducted", added "the following procedures shall apply"; added Paragraphs B (1) and (2); in Paragraph B (3), after "required by the", deleted "district attorney" and added "prosecution"; in Paragraph B (4), added the title, after "the defendant's presence", deleted "and may be cross-examined" and added the remainder of the sentence; and added Paragraph B (5); in Paragraph C, in the title, after

“Record of”, deleted “hearing”; in Paragraph D (1), after “of the examination”, deleted “it appears to”, after “appears to the court”, added “finds”, after “defendant has committed”, deleted “an” and added “a felony”, after “the court shall”, added “dismiss without prejudice all felony charges for which probable cause does not exist and”, and after “discharge the defendant”, deleted “as to those offenses”; and deleted former Paragraph D which is restated in Paragraph A (1).

The 1999 amendment, effective on and after June 1, 1999, substituted "sixty (60)" for "twenty (20)" in Paragraph D.

Compiler's notes. — Paragraph C is similar to Rule 5.1(b) of the Federal Rules of Criminal Procedure.

Cross references. — For constitutional rights to preliminary examination and to confrontation of witnesses, *see* N.M. Const., art. II, § 14.

For magistrate court rule relating to preliminary examination, *see* Rule 6-202 NMRA.

For bindover order form, *see* Rule 9-207 NMRA.

I. GENERAL CONSIDERATION.

Preliminary examination waived by plea. — Under former law, defendant's plea in district court constituted a waiver of his right to a preliminary examination. *State v. Sexton*, 1968-NMCA-003, 78 N.M. 694, 437 P.2d 155; *see also State v. Paul*, 1971-NMCA-040, 82 N.M. 619, 485 P.2d 375, cert. denied, 82 N.M. 601, 485 P.2d 357; *State v. Darrah*, 1966-NMSC-171, 76 N.M. 671, 417 P.2d 805; *State v. Deltenre*, 1966-NMSC-187, 77 N.M. 497, 424 P.2d 782, cert. denied, 386 U.S. 976, 87 S. Ct. 1171, 18 L. Ed. 2d 136 (1967); *State v. Gibby*, 1967-NMSC-219, 78 N.M. 414, 432 P.2d 258; *State v. Tanner*, 1967-NMSC-253, 78 N.M. 519, 433 P.2d 498; *State v. Henry*, 1967-NMSC-265, 78 N.M. 573, 434 P.2d 692; *State v. Olguin*, 1968-NMSC-012, 78 N.M. 661, 437 P.2d 122; *State v. Sisk*, 1968-NMSC-087, 79 N.M. 167, 441 P.2d 207; *State v. Sanders*, 1968-NMSC-169, 79 N.M. 587, 446 P.2d 639; *State v. Leyba*, 1969-NMCA-030, 80 N.M. 190, 453 P.2d 211, cert. denied, 80 N.M. 198, 453 P.2d 219; *State v. Maimona*, 1969-NMCA-081, 80 N.M. 562, 458 P.2d 814.

Plea of nolo contendere waives right to preliminary examination. *State v. Raburn*, 1966-NMSC-174, 76 N.M. 681, 417 P.2d 813 (decided under former law).

Exception to waiver by plea. — Where defendant waived right to preliminary hearing without benefit of counsel, and later self-employed counsel requested remand for hearing on grounds it was essential to preparation of case, the entry of a plea upon arraignment in the district court did not operate as a waiver of defendant's right to a preliminary examination. *State ex rel. Hanagan v. Armijo*, 1963-NMSC-057, 72 N.M. 50, 380 P.2d 196; *State v. Vega*, 1967-NMSC-255, 78 N.M. 525, 433 P.2d 504.

Determination of probable cause based on judicially-noticed testimony. — Where no witnesses testified at defendant's preliminary hearing; the State offered testimony that the victim and a detective had given at a previous hearing before the magistrate pertaining to a different charge; the magistrate took judicial notice of the testimony and based solely on the judicially-noticed testimony, issued a determination of probable cause; defendant proceeded to a jury trial without challenging the preliminary hearing; and defendant claimed that defendant was deprived of the right to a preliminary hearing, defendant had no remedy for the error in the preliminary hearing. *State v. Perez*, 2014-NMCA-023, cert. denied, 2014-NMCERT-001.

Losing of jurisdiction. — Under former law, even though the district court acquires jurisdiction of a criminal case upon the filing of the information, that jurisdiction originally acquired "may be lost 'in the course of the proceeding' by failure of the court to remand for a preliminary examination when its absence is timely brought to the attention of the district court". *Mascarenas v. State*, 1969-NMSC-116, 80 N.M. 537, 458 P.2d 789, *overruled by State v. Lopez*, 2013-NMSC-047; *State v. Vasquez*, 1969-NMCA-082, 80 N.M. 586, 458 P.2d 838.

Right to examination where charge by information. — When the charge is by criminal information, defendant had a right to a preliminary examination. *State v. Vasquez*, 80 N.M. 586, 1969-NMCA-082, 458 P.2d 838 (decided under former law).

Right to preliminary hearing not absolute. — There exists no absolute right to a preliminary hearing and N.M. Const., art. II, § 14, leaves it in the discretion of the prosecutor to proceed by indictment and thus to obviate the requirement of preliminary examination. The constitutional alternatives protect an accused from being charged except upon probable cause. *State v. Peavler*, 1975-NMSC-035, 88 N.M. 125, 537 P.2d 1387.

Does not exist where grand jury indictment. — When charged by criminal information, a defendant has a right to a preliminary examination. No such right exists if the defendant is indicted by a grand jury. *State v. Burk*, 1971-NMCA-018, 82 N.M. 466, 483 P.2d 940, cert. denied, 404 U.S. 955, 92 S. Ct. 309, 30 L. Ed. 2d 271 (1971) (decided under former law).

Discovery not object of hearing. — Because there was a grand jury indictment, defendant's claim that he was deprived of the discovery he could have obtained at a preliminary hearing is no ground for error as discovery is not the object of a preliminary hearing. *State v. Burk*, 1971-NMCA-018, 82 N.M. 466, 483 P.2d 940, cert. denied, 404 U.S. 955, 92 S. Ct. 309, 30 L. Ed. 2d 271 (1971) (decided under former law).

Effect of postarrest irregularities on hearing. — If the manner of arrest of an accused will not affect the jurisdiction of the court where the charge of which he is accused is pending, the irregularities which occur subsequent to the arrest but prior to preliminary hearing should likewise have no effect on the jurisdiction of the court. *State v. Barreras*, 1958-NMSC-085, 64 N.M. 300, 328 P.2d 74 (decided under former law).

Preliminary hearing critical stage. — Where complaint and information are utilized in lieu of indictment, the preliminary hearing has been held to be a critical stage of the criminal process for purposes of applying the right-to-counsel provision of U.S. Const., amend. VI. *State v. Burk*, 1971-NMCA-018, 82 N.M. 466, 483 P.2d 940, cert. denied, 404 U.S. 955, 92 S. Ct. 309, 30 L. Ed. 2d 271 (1971) (decided under former law).

The preliminary examination is a critical stage in criminal proceedings, because a defendant needs the advice and assistance of counsel at the time of his arraignment, at the entry of plea and his announcement as to whether he desires or waives a preliminary examination, and because he needs the assistance of counsel in cross-examining the state's witnesses at the preliminary examination. *Pearce v. Cox*, 354 F.2d 884 (10th Cir. 1965), cert. denied, 384 U.S. 976, 86 S. Ct. 1869, 16 L. Ed. 2d 685 (1966) (decided under former law).

Generally, as to right to counsel. — Under state law the preliminary hearing is a critical stage of a criminal proceeding. It has been held that counsel must be made available at all critical stages of a criminal proceeding. Nevertheless, if represented by counsel when arraigned in district court, if no objection is made to a lack of counsel at the preliminary hearing stage, or even of the total absence of a preliminary, without a showing of prejudice, there is a waiver of the right to counsel at the earlier stages. *Neller v. State*, 1968-NMSC-130, 79 N.M. 528, 445 P.2d 949 (decided under former law).

Claim that defendant was entitled to counsel when he appeared before the magistrate states no basis for post-conviction relief where defendant was represented by counsel at preliminary hearing. *State v. Apodaca*, 1967-NMSC-218, 78 N.M. 412, 432 P.2d 256 (decided under former law).

The determination of the question of indigency must often be made before the otherwise normal appearance of the accused before the district court. To hold a preliminary hearing without counsel present, unless the right to counsel has been competently, intelligently and voluntarily waived, vitiates the hearing. *State ex rel. Peters v. McIntosh*, 1969-NMSC-103, 80 N.M. 496, 458 P.2d 222 (decided under former law).

Necessity for prejudice resulting from absence of counsel. — Failure to assign counsel prior to preliminary examination of an indigent defendant in a noncapital case is not ground for vacating a conviction or sentence based upon a plea of guilty, at least without a showing that prejudice resulted therefrom. *Sanders v. Cox*, 1964-NMSC-214, 74 N.M. 524, 395 P.2d 353, cert. denied, 379 U.S. 978, 85 S. Ct. 680, 13 L. Ed. 2d 569 (1965) (decided under former law).

Failure to assign counsel to represent defendant before the magistrate or at his arraignment did not abridge defendant's constitutional rights where no prejudice was shown. *Gantar v. Cox*, 1964-NMSC-215, 74 N.M. 526, 395 P.2d 354 (decided under former law).

Where the failure to assign counsel prior to preliminary examination did not prejudice petitioner's position in any manner in the district court, such failure does not require vacating the plea of guilty. *French v. Cox*, 1964-NMSC-236, 74 N.M. 593, 396 P.2d 423 (decided under former law).

Failure to appeal forecloses question of error in preliminary hearing. — Under former Rule 93, R. Civ. P. (Dist. Cts.) (now former Rule 1-093), the question of error in a preliminary hearing is foreclosed by failure to take an appeal from original conviction. *State v. Anderson*, 1973-NMCA-078, 84 N.M. 786, 508 P.2d 1019 (decided prior to Rule 5-802 NMRA).

Second hearing not afforded by amended information. — Having been afforded a preliminary hearing on the original information, the defendant was not entitled to another on the amended information. *State v. Wesson*, 1972-NMCA-013, 83 N.M. 480, 493 P.2d 965 (decided under former law).

Preliminary hearing is no essential prerequisite to guilt-determining process which comports with fundamental fairness and due process and state may proceed by indictment rather than information. *State v. Burk*, 1971-NMCA-018, 82 N.M. 466, 483 P.2d 940, cert. denied, 404 U.S. 955, 92 S. Ct. 309, 30 L. Ed. 2d 271 (1971) (decided under former law).

Probable cause the only issue. — The preliminary hearing is not a trial on the merits with a view of determining the defendant's guilt or innocence of the crime "failure to appear"; at a preliminary hearing the only issue is whether there exists probable cause to believe defendant committed the offense. *State v. Masters*, 1982-NMCA-166,99 N.M. 58, 653 P.2d 889.

District courts lack the power to decide at a preliminary hearing whether evidence was obtained illegally. — The district court is without authority to determine at a preliminary hearing whether evidence was obtained from an unconstitutional search or seizure. *State v. Ayon*, 2023-NMSC-025, ***aff'g*** 2022-NMCA-003, 503 P.3d 405.

Where the district court refused to bind defendant over for trial on the charge of heroin possession after determining, at defendant's preliminary hearing, that the stop that led to the search incident to defendant's arrest was unconstitutional, the district court erred in excluding evidence in defendant's case, because the district court is without authority at the preliminary hearing stage of a criminal proceeding to rule on whether evidence was obtained from an unconstitutional search or seizure. *State v. Ayon*, 2023-NMSC-025, ***aff'g*** 2022-NMCA-003, 503 P.3d 405.

A district court's authority at a preliminary hearing does not include the authority to determine the illegality of evidence. — Where defendant was charged by criminal information with possession of a controlled substance, and where, at his preliminary hearing, the district court dismissed the case, determining that the police officer who arrested defendant did not have reasonable suspicion to detain him, the district court

erred in dismissing the case, because the district court's authority at a preliminary hearing does not include the authority to rule on the illegality of the evidence presented. *State v. Ayon*, 2022-NMCA-003, *cert. granted*.

Magistrate court jurisdiction over aggravated battery. — Magistrate courts have no trial jurisdiction over aggravated battery, which is a third-degree felony, but do have authority to conduct preliminary examinations upon charges therefor. *State ex rel. Moreno v. Floyd*, 1973-NMSC-117, 85 N.M. 699, 516 P.2d 670.

Purpose of procedures prescribing preliminary hearing conduct. — Statutory procedures prescribing the conduct of a preliminary hearing are designed to protect the rights of the accused, and it is only upon a full examination that probable cause may be found to exist and a defendant be bound over to the district court for trial. *State ex rel. Hanagan v. Armijo*, 1963-NMSC-057, 72 N.M. 50, 380 P.2d 196 (decided under former law).

No provision for reopening of preliminary hearing. — There is no provision under the statutes allowing for the reopening of a preliminary hearing. *State ex rel. Hanagan v. Armijo*, 1963-NMSC-057, 72 N.M. 50, 380 P.2d 196 (decided under former law).

Law reviews. — For survey, "Children's Court Practice in Delinquency and Need of Supervision Cases Under the New Rules," see 6 N.M.L. Rev. 331 (1976).

For comment, "The Use of an Information Following the Return of a Grand Jury No Bill: State v. Joe Nestor Chavez," see 10 N.M.L. Rev. 217 (1979-80).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 575 to 588.

Right of indigent defendant under Rule 17(b) of the Federal Rules of Criminal Procedure to appearance of witnesses necessary to adequate defense, 42 A.L.R. Fed. 233.

Civil liability of witness in action under 42 USCS § 1983 for deprivation of civil rights, based on testimony given at pretrial criminal proceeding, 94 A.L.R. Fed. 892.

22 C.J.S. Criminal Law § 357 et seq.

II. SUBPOENA OF WITNESSES.

Scope of right to confront witnesses. — When the constitution grants to an accused the right to be confronted by the witness against him, it grants that right at all of the criminal proceedings, including the preliminary examination. *Mascarenas v. State*, 1969-NMSC-116, 80 N.M. 537, 458 P.2d 789, overruled by *State v. Lopez*, 2013-NMSC-047.

Effect of denial of right to confront witnesses. — As the preliminary examination is a part of the criminal prosecution, denial of that right to be confronted with the witnesses

against defendant amounts to the denial of a preliminary examination and the court was without jurisdiction to proceed with the trial based upon an information. *Mascarenas v. State*, 1969-NMSC-116, 80 N.M. 537, 458 P.2d 789, overruled by *State v. Lopez*, 2013-NMSC-047.

Production of prior statements or records. — When it is made to appear that when a witness called to testify by the state in a preliminary examination has made a prior written statement concerning the matter about which he is called to testify, the accused is entitled to an order directing the prosecution to produce for inspection all statements or reports of such witness in its possession touching the events about which the witness will testify. Any other result would be to deny the accused his constitutional right to confront the witnesses against him and would have the same effect as though he were denied a preliminary examination. *Mascarenas v. State*, 1969-NMSC-116, 80 N.M. 537, 458 P.2d 789, overruled by *State v. Lopez*, 2013-NMSC-047.

Defendant may call witnesses in his defense at a preliminary hearing, and the magistrate must, if necessary, issue subpoenas to compel their appearance. *State ex rel. Hanagan v. Armijo*, 1963-NMSC-057, 72 N.M. 50, 380 P.2d 196 (decided under former law).

Denial of defendant's right to call witnesses in his behalf, at a preliminary examination, was error which required the trial judge to sustain a plea in abatement for a full and complete preliminary examination. *Mascarenas v. State*, 1969-NMSC-116, 80 N.M. 537, 458 P.2d 789, overruled by *State v. Lopez*, 2013-NMSC-047.

III. RECORD OF HEARING.

Scope of rule defining "record". — Rule 55 (*see now* Rule 5-111 NMRA) is merely a definition of a "record" and pertains equally to proceedings in district court and to preliminary examinations pursuant to this rule in magistrate courts. *State ex rel. Moreno v. Floyd*, 1973-NMSC-117, 85 N.M. 699, 516 P.2d 670.

Tape recording constitutes an adequate record of the preliminary hearings in a magistrate court regardless of the fact that defendant's attorneys prefer a stenographic copy of these proceedings. *State ex rel. Moreno v. Floyd*, 1973-NMSC-117, 85 N.M. 699, 516 P.2d 670.

Two alternatives where witness' testimony at hearing lost. — Where the loss of the testimony of a witness at the preliminary hearing because of equipment failure is known prior to trial, there are two alternatives: (1) exclusion of all evidence which the lost evidence might have impeached; or (2) admission, with full disclosure of the loss and its relevance and import, and the choice between these alternatives must be made by the trial court, depending on its assessment of materiality and prejudice. *State v. Pedroncelli*, 1981-NMCA-142, 97 N.M. 190, 637 P.2d 1245.

IV. FINDINGS OF COURT.

District judge in preliminary hearing has authority to decide probable cause. *State v. Chavez*, 1979-NMCA-075, 93 N.M. 270, 599 P.2d 1067, cert. denied, 93 N.M. 172, 598 P.2d 215.

The district court must determine whether probable cause exists based on all the evidence. — Where Defendant was charged with second-degree murder and the lesser included offense of voluntary manslaughter, and where the district court judge found that there was no probable cause to bind Defendant over for trial on second-degree murder and entered an order binding Defendant over for trial on voluntary manslaughter alone, and where the State argued on appeal that the court conducting the preliminary examination must "view all evidence and draw all inferences in favor of the prosecution," the State's claim was rejected, because Rule 5-302(B) NMRA requires the district court to hear both the state's evidence and the evidence submitted by the defendant and determine probable cause from all the evidence. *State v. Benedict*, 2022-NMCA-030, *cert. granted*.

There was probable cause to charge second-degree murder where the evidence was sufficient to support a reasonable belief that defendant committed the crime. — Where Defendant was charged with second-degree murder and the lesser included offense of voluntary manslaughter, and where the district court judge found that there was no probable cause to bind Defendant over for trial on second-degree murder and entered an order binding Defendant over for trial on voluntary manslaughter alone, the district court erred in failing to find probable cause where the evidence presented at the preliminary hearing showed that Defendant pointed a gun at the victim based on little provocation other than an argument about the charge for cleaning up the vomit in the back seat of Defendant's car, that Defendant opened his car door to reprimand the victim for slamming the door, got out of his car to pull out his gun, and pointed it at the unarmed victim, who was walking around the car from the rear passenger's side door at the time, that Defendant failed to drive away from the victim when Defendant had the opportunity to do so, and that although the victim threatened to run Defendant over with Defendant's own car, Defendant, without a verbal warning, opened fire before the victim stepped into the vehicle and before the victim assumed control over the vehicle The undisputed evidence supports a reasonable belief that an ordinary person of average disposition in Defendant's position would not have been provoked to the point of utilizing lethal force, but would instead have taken available opportunities to attain a position of safety from an unarmed man in no immediate position to pose a threat to Defendant's safety. *State v. Benedict*, 2022-NMCA-030, *cert. granted*.

Effect of magistrate court findings on subsequent indictment. — Subsequent indictment is not barred when the magistrate conducts a preliminary hearing and decides that insufficient probable cause exists for binding the accused over for trial in district court. *State v. Peavler*, 1975-NMSC-035, 88 N.M. 125, 537 P.2d 1387.

Effect where punishment not within magistrate court jurisdiction. — If it appears that an offense has been committed, the punishment of which is not within the jurisdiction of the magistrate as a trial judge, and there is probable cause to believe the

prisoner guilty thereof, the magistrate, without the necessity of further complaint, or further preliminary examination, shall commit or bail the accused to appear at the next term of the district court. *State v. Vasquez*, 1969-NMCA-082, 80 N.M. 586, 458 P.2d 838 (decided under former law).

V. TIME.

Due process not denied by delay where no prejudice. — Where there is nothing in the record indicating that appellant was prejudiced in the delay in arraignment, then absent a showing of prejudice, the delay in holding a preliminary hearing is not a denial of due process. *State v. Olguin*, 1968-NMSC-012, 78 N.M. 661, 437 P.2d 122 (decided under former law).

When defendant has been denied timely preliminary examination, the court is to proceed in its discretion in fashioning relief to an aggrieved defendant; however, neither dismissal of the charge nor reversal of a conviction is an appropriate remedy if there is no showing of prejudice. *State v. Warner*, 1974-NMCA-034, 86 N.M. 219, 521 P.2d 1168.

VI. REMAND FOR PRELIMINARY EXAMINATION.

Subdivision (e) (*see now* Paragraph E) of this rule is not limited only to cases which originate in district court. *State v. Tollardo*, 1982-NMCA-156, 99 N.M. 115, 654 P.2d 568.

Jurisdiction of magistrate court expanded beyond usual time limit. — Nothing in either the district court rules or the magistrate court rules limits the jurisdiction of the magistrate court to the time limits specified in Rule 15, N.M.R. Crim. P. (Magis. Ct.) (*see now* Rule 6-202 NMRA); rather, they specifically grant limited jurisdiction to the magistrate court, by Rule 3, N.M.R. Crim. P. (Magis. Ct.) (*see now* Rule 6-104 NMRA) and Subdivision (e) (*see now* Paragraph E) of this rule, beyond the time limits prescribed in Magistrate Court Rule 15 (*see now* Rule 6-202 NMRA). *State v. Tollardo*, 1982-NMCA-156, 99 N.M. 115, 654 P.2d 568 (Ct. App. 1982).

5-302.1. Exceptions to rules of evidence for preliminary examinations.

A. **Exceptions to hearsay rule.** In any preliminary examination, the following categories of evidence are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

(1) a recording or transcript of a forensic interview of a minor or incompetent victim conducted at a safe house; or

(2) a written report of the conduct and results of a laboratory analysis of a human specimen or a controlled substance enumerated in Sections 30-31-6 to -10

NMSA 1978, for determining the presence and quantity or absence of a controlled substance and the circumstances surrounding receipt and custody of the test sample, or a written report of the conduct and results of an autopsy for determining the fact and cause of death and the circumstances surrounding receipt and custody of the decedent, if the report is of an analysis conducted by

(a) the New Mexico State Police crime laboratory;

(b) the scientific laboratory division of the Department of Health;

(c) the Office of the Medical Investigator; or

(d) a laboratory certified to accept human specimens for the purpose of performing laboratory examinations under the federal Clinical Laboratory Improvement Act of 1988.

B. **Exception to authentication rule.** In any preliminary examination, a proffer by counsel is sufficient to meet the authentication and identification requirements of Rule 11-901(A) NMRA with regard to a recording or transcript of a 911 emergency call or a transcript of the computer-aided dispatch (CAD) incident report.

C. **Exception for controlled substance field tests.** In any preliminary examination, the results of a field test conducted for the detection of controlled illegal substances shall not be excluded based on objections to the scientific accuracy or reliability of the field test.

D. **Certification.** Evidence admitted under the exceptions established by Subparagraph (A)(2) of this rule must include a certification form approved by the Supreme Court.

E. **Copies.** A legible copy of the certification form and report must be mailed to the defendant or the defendant's counsel at least four (4) days before the preliminary examination if the defendant is in custody and at least ten (10) days before the preliminary hearing if the defendant is not in custody.

F. **Admissibility of other evidence.** Nothing in this rule shall limit the right of a party to call witnesses to testify as to the matters covered in this report, nor affect the admissibility of any evidence other than this report.

[Adopted by Supreme Court Order No. 22-8300-023, effective for all cases pending or filed on or after December 31, 2022.]

Committee commentary. — Rule 11-803(4) NMRA excepts statements made for and reasonably pertinent to medical diagnosis or treatment from the rule against hearsay, regardless of whether the declarant is available as a witness. This exception includes statements made to a Sexual Assault Nurse Examiner (SANE) for medical diagnosis or

treatment. The committee did not include statements made to a SANE or other medical professional in the exceptions established by this rule because those statements are already addressed by Rule 11-803(4) NMRA.

Additionally, Rule 11-803(2) NMRA excepts statements considered excited utterances from the rule against hearsay, regardless of whether the declarant is available as a witness. The committee did not include those statements in the exceptions established by this rule because those statements are already addressed by Rule 11-803(2) NMRA. The exception in Paragraph B of this rule allows for authentication of the 911 recording or CAD transcript without calling a dispatcher or other police employee to testify to lay that foundation.

[Adopted by Supreme Court Order No. 22-8300-023, effective for all cases pending or filed on or after December 31, 2022.]

5-302.2. Grand jury proceedings.

A. **Timing upon filing of criminal complaint.**

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

(a) the first appearance;

(b) the first appearance after the refiling of a case previously dismissed by the prosecutor;

(c) if an evaluation of competency has been ordered, the date an order is filed finding the defendant competent to stand trial;

(d) if the defendant is arrested or surrenders on any warrant, the date the defendant is returned to the court;

(e) if the defendant has been placed in a preprosecution diversion program, the date a notice is filed in the district court stating that the preprosecution diversion program has been terminated for failure to comply with the terms, conditions, or requirements of the program; or

(f) the date the conditions of release are revoked or modified under Rule 5-403 NMRA, that result in the defendant's continued detention or release.

(2) ***Extensions*.** On a showing of good cause, the court may extend the time limits for holding a grand jury proceeding or preliminary examination for up to sixty (60) days. If the defendant does not consent, the court may extend the time limits in

Subparagraph (A)(1) of this rule only on a showing on the record that exceptional circumstances beyond the control of the state or the court exist and justice requires the delay. An extension for exceptional circumstances shall not exceed sixty (60) days. The time enlargement provisions in Rule 5-104 NMRA do not apply to a preliminary examination or grand jury proceeding.

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

B. **Notice to target; timing.**

(1) ***Content.*** The prosecuting attorney assisting the grand jury shall notify the target of a grand jury investigation in writing that the person is the target of an investigation. The writing shall notify the target of

(a) the nature of the alleged crime being investigated;

(b) the date of the alleged crime;

(c) any applicable statutory citations;

(d) the target's right to testify;

(e) the target's right not to testify;

(f) the target's right to submit exculpatory evidence to the district attorney for presentation to the grand jury; and

(g) the target's right to the assistance of counsel during the grand jury investigation.

Target notices shall be substantially in the form approved by the Supreme Court.

(2) ***Notice and time.*** A prosecuting attorney shall use reasonable diligence to notify a person in writing that the person is a target of a grand jury investigation. The target and the target's attorney shall be notified in writing no later than four (4) business days before the scheduled grand jury proceeding if the target is incarcerated. The target and the target's attorney shall be notified in writing no later than ten (10) business days before the scheduled proceeding if the target is not incarcerated.

(3) ***Notice not required.*** Notice shall not be required if, before the grand jury proceeding, the prosecuting attorney secures a written order of the grand jury judge determining by clear and convincing evidence that notification may result in flight by the target, result in obstruction of justice, or pose a danger to another person, other than the general public.

C. **Evidence.**

(1) ***Lawful, competent, and relevant evidence.*** All evidence presented shall be lawful, competent, and relevant, but the Rules of Evidence shall not apply.

(2) ***Exculpatory evidence.*** The prosecuting attorney shall alert the grand jury to all lawful, competent, and relevant evidence that disproves or reduces a charge or accusation or that makes an indictment unjustified and that is within the knowledge, possession, or control of the prosecuting attorney.

(3) ***Evidence and defenses submitted by target.*** If the target submits written notice to the prosecuting attorney of exculpatory evidence as defined in Subparagraph (2) of this paragraph, or a relevant defense, the prosecuting attorney shall alert the grand jury to the existence of the evidence.

(a) *Form of submission.* The target's submission shall consist of a factual and non-argumentative description of the nature of any tangible evidence and the potential testimony of any witnesses, along with the names and contact information of any witnesses necessary to provide the evidence. The target shall provide its submission to the prosecuting attorney by letter substantially in accordance with Form 9-219 NMRA ("Grand Jury Evidence Alert Letter").

(b) *Cover letter.* The target's submission to the prosecuting attorney shall be accompanied by a cover letter, which will not go to the grand jury. The cover letter may include proposed questions and should include any contextual information, any arguments about the propriety or significance of the requested evidence and defenses, and any other matters that may be helpful to the prosecutor or the grand jury judge.

(c) *Timing.* The target's written notice of evidence shall be provided to the prosecuting attorney no less than forty-eight (48) hours in advance of the scheduled grand jury proceeding.

(4) ***Review of prosecutor's decision not to alert grand jury to target's evidence or defenses.*** The prosecuting attorney assisting the grand jury may only be relieved of the duty to alert the grand jury to the target's evidence or defenses by obtaining a court order before the grand jury proceeding. The prosecuting attorney shall file a motion under seal with the grand jury judge, with written notice to the target, stating why the target's submitted evidence is not exculpatory as defined in Subparagraph (2) of this paragraph or stating why the grand jury should not be instructed on the target's requested defenses. A copy of the target's grand jury evidence alert letter and cover letter shall be attached to the motion. The target may file under seal a response to the motion, and, if no response is filed, the grand jury judge may ask the target for a written response, to be filed under seal, and may convene a hearing. The burden is on the prosecuting attorney to show that the proposed evidence is not exculpatory as defined in Subparagraph (2) of this paragraph. The grand jury judge will

give the prosecuting attorney clear direction on how to proceed before the grand jury, making a record of the decision.

D. **Instructions to grand jury.**

(1) ***Elements and defenses.*** The prosecuting attorney who is assisting the grand jury shall provide the grand jurors with instructions setting forth the elements of each offense being investigated and the definitions of any defenses raised by the evidence.

(2) ***Other instructions.*** The prosecuting attorney shall provide the grand jury with other instructions which are necessary to the fair consideration by the grand jury of the issues presented.

E. **Record.** All proceedings in the grand jury room shall be recorded, but the deliberations of the grand jury shall not be recorded. Copies of any documentary evidence and any target's Grand Jury Evidence Alert Letter which was presented to the grand jury shall be made part of the record.

F. **Review by the district court.**

(1) ***Supervisory authority.*** The district court has supervisory authority over all grand jury proceedings.

(2) ***Scope of review.*** Failure to follow the procedures set forth in this rule shall be reviewable in the district court. The weight of the evidence on which an indictment is returned shall not be subject to review absent a showing of bad faith on the part of the prosecuting attorney assisting the grand jury.

[Adopted by Supreme Court Order No. 10-8300-015, effective for target notices filed on or after May 14, 2010; as amended by Supreme Court Order No. 18-8300-004, effective April 23, 2018; 5-302A recompiled and amended as 5-302.2 by Supreme Court Order No. 22-8300-023, effective December 31, 2022; as amended by Supreme Court Order No. S-1-RCR-2023-00024, effective for all cases pending or filed on or after December 31, 2023.]

Committee commentary. — The district court may extend the time limits for commencing and holding a grand jury proceeding if the defendant does not consent only on a showing of exceptional circumstances beyond the control of the state or the court. "'Exceptional circumstances,' . . . would include conditions that are unusual or extraordinary, such as death or illness of the judge, prosecutor, or defense attorney immediately preceding the commencement of the [proceeding]; or other circumstances that ordinary experience or prudence would not foresee, anticipate, or provide for." Rules 6-506 and 7-506 NMRA comm. cmt.

Under Subparagraph (C)(4) of this rule, the grand jury judge must carefully consider any filings in the case and consider the options before ruling on a prosecutor's request to be relieved of the duty to alert the grand jury to the target's evidence or defenses. The options available to the grand jury judge in considering a request under Paragraph (C)(4) include requesting a response from the defense, holding a hearing on the prosecutor's request or ruling on the request without a hearing.

There is no pre-indictment right of appeal from a decision of the grand jury judge under NMSA 1978, § 31-6-11(B) (2003). *See Jones v. Murdoch*, 2009-NMSC-002, ¶¶ 40-41, 145 N.M. 473, 200 P.3d 523. Nevertheless, "in an extreme case, a party may still seek review in [the Supreme] Court through an extraordinary writ proceeding." *Id*. ¶ 41. A party seeking an extraordinary writ should be aware of "the high standard and discretionary nature associated with granting such relief" and the writ petition should be filed without undue delay. *See id.*

[Adopted by Supreme Court Order No. 13-8300-016, effective for all cases pending or filed on or after December 31, 2013; 5-302A recompiled and amended as 5-302.2 by Supreme Court Order No. 22-8300-023, effective December 31, 2022; as amended by Supreme Court Order No. S-1-RCR-2023-00024, effective for all cases pending or filed on or after December 31, 2023.]

ANNOTATIONS

Recompilations. — Pursuant to Supreme Court Order No. 22-8300-023, former Rule 5-302A NMRA was recompiled and amended as Rule 5-302.2 NMRA, effective December 31, 2022.

The 2023 amendment, approved by Supreme Court No. S-1-RCR-2023-00024, effective December 31, 2023, added a provision related to time limits for grand jury proceedings, revised the standard for extending the time limits for holding a grand jury proceeding, and mandated that if a grand jury proceeding or preliminary examination is not held within the time limits in this rule, the court shall dismiss the case without prejudice, and revised the committee commentary; added a new Paragraph A and redesignated former Paragraphs A through C as Paragraphs B through D, respectively; and deleted former Paragraph D, which provided "The times set forth in this rule may be changed by the grand jury judge upon written motion demonstrating that an extension is necessary in order to assure compliance with the requirements of this rule.".

The 2022 amendment, approved by Supreme Court Order No. 22-8300-023, effective December 31, 2022, made certain technical amendments, and revised the committee commentary; in Paragraph B, Subparagraph B(2), after "unjustified and", deleted "which" and added "that"; in Paragraph C, Subparagraph C(2), after "other instructions", deleted "which" and added "that"; and in Paragraph D, after "grand jury judge", deleted "upon" and added "on".

The 2018 amendment, approved by Supreme Court Order No. 18-8300-004, effective April 23, 2018, amended the district court's scope of review of grand jury proceedings; and in Subparagraph F(2), after "assisting the grand jury", deleted "but the grand jury proceedings, the indictment, and the lawfulness, competency, and relevancy of the evidence shall be reviewable by the district court".

Selection of a grand jury must be under the control of the district court. — The district court is the constitutionally and statutorily designated neutral entity that is assigned the responsibility for determining which grand jurors sit in any particular case to decide the question of indictment. The district court may not delegate its core statutory responsibilities over grand jury proceedings. *De Leon v. Hartley*, 2014-NMSC-005.

Where, after the orientation and swearing of the grand jurors, the district court transferred the process of selecting and excusing jurors to the district attorney's office without further apparent involvement by the district court; the list of grand jurors used by the district attorney's office contained notations that suggested that someone in the district attorney's office excused several grand jurors; and the district court found that there was no fraud or prejudice to defendant in the conduct of the grand jury proceeding and denied defendant's pretrial motion to quash the indictment, the district court should have quashed the indictment irrespective of whether any actual fraud or prejudice was established when the improper involvement of the district attorney in the excusal of grand jurors was brought to the attention of the district court. *De Leon v. Hartley*, 2014-NMSC-005.

Remedy for irregularities in the grand jury selection process. — When undeniable irregularities in the grand jury process are brought to the court's attention in advance of trial, a grand jury indictment resulting from that process must be quashed. *De Leon v. Hartley*, 2014-NMSC-005.

Courts are without power to review the sufficiency of the evidence upon which an indictment is returned absent a showing of bad faith. — Where a grand jury indicted defendants for armed robbery based on information developed as a result of subpoenas that represented on their face that they were issued in the name of the Eighth Judicial District Court, but were actually prepared by a deputy district attorney in the Eighth Judicial District at a time where there was no pending prosecution, court action, or grand jury proceeding, and where defendants moved to quash the indictments or alternatively to suppress all evidence obtained through the use of the contested subpoenas, the district court erred in granting the motion and quashing the indictments based on the unlawful subpoenas, because the sufficiency of the evidence upon which an indictment is returned is not subject to review absent a showing of bad faith on the part of the prosecuting attorney assisting the grand jury. *State v. Martinez*, 2018-NMSC-031.

Language in rule purporting to give New Mexico courts the authority to review grand jury proceedings is withdrawn. — A broad reading of certain language in Rule

5-302A(F)(2) [recompiled] could be argued as authorizing postindictment evidentiary review beyond statutory authorization and was not intended when the rule was adopted. The language "but the grand jury proceedings, the indictment, and the lawfulness, competency, and relevancy of the evidence shall be reviewable by the district court" in the promulgated version of Rule 5-302A(F)(2) [recompiled] was withdrawn immediately. *State v. Martinez*, 2018-NMSC-031.

Grand jury target has a statutory right to testify before a grand jury. — Where defendants were indicted on multiple counts of fraud, conspiracy to commit fraud, forgery, racketeering, and conspiracy to commit racketeering, and where, prior to the grand jury proceeding, defendants informed the prosecutor assisting the grand jury of their desire to testify and appeared for the grand jury investigation prepared to testify, and where the prosecutor informed the grand jury of defendants' presence and desire to testify, but failed to tell the grand jury that defendants had a right to testify, resulting in the grand jury informing the prosecutor that it did not wish to hear defendants' testimony and that it was ready to begin its deliberations, the district court did not err in quashing the indictment, because the prosecutor's failure to provide correct and complete advice to the grand jury resulted in defendants being deprived of their right to testify. *State v. Pareo*, 2018-NMCA-040.

Failure to allow grand jury target to testify is a structural error in the grand jury process. — Where defendants were indicted on multiple counts of fraud, conspiracy to commit fraud, forgery, racketeering, and conspiracy to commit racketeering, but were not permitted to exercise their right to testify, the district court did not err in quashing the indictment without requiring defendants to demonstrate prosecutorial bad faith or prejudice, because the failure to allow defendants to testify before the grand jury was a structural defect in the grand jury process that required no showing of prejudice or of prosecutorial bad faith. *State v. Pareo*, 2018-NMCA-040.

5-302.3. Citizen grand jury proceedings.

A. **Citizen petition to convene a grand jury.** Under Article II, Section 14 of the New Mexico Constitution, the district court shall order a grand jury to convene on the filing of a petition to investigate criminal conduct or malfeasance proscribed by state law that is signed by not less than the greater of two-hundred (200) registered voters or two percent of the registered voters of the county. A petitioner may use Form 9-200 NMRA.

B. **Duties of the district court.** The district court must make both a factual determination that a citizen petition to convene a grand jury meets the procedural requirements of Article II, Section 14 and a legal determination that the petition seeks a legitimate inquiry into alleged criminal conduct or malfeasance proscribed by state law

(1) ***Verification of petition.*** The district court must verify the signatures contained in the petition. The district court may verify the signatures by any number of methods, including but not limited to:

(a) requiring each signatory to provide an address of record;

(b) verifying other identifying information such as dates of birth and social security numbers;

(c) a handwriting comparison by a qualified witness; or

(d) obtaining testimony from questionable signatories.

(2) ***Validity of petition.*** The petition to convene a grand jury must identify with reasonable specificity the alleged criminal conduct or unlawful malfeasance to be investigated. The district court must determine whether the petition seeks to investigate conduct that lies within the permissible scope of grand jury inquiry. If the petition does not reasonably specify alleged conduct that, if true, would warrant a true bill of indictment, the district court must deny the petition.

C. **Assistance of prosecuting attorney.** On the filing of the petition, the district court shall assign the district attorney or the district attorney's assistants, unless otherwise disqualified, to assist the district court in notifying the target of the grand jury petition and, if the grand jury is convened, in carrying out the duties of the grand jury.

D. **Notice to target; timing.** If a target of the potential grand jury investigation is identifiable in the citizen petition, the prosecuting attorney assisting the district court shall use reasonable diligence to notify the target in writing no later than thirty (30) days before the scheduled hearing on the validity of the petition. Target notices shall be substantially in the form approved by the Supreme Court. The writing shall notify the target of

(1) the existence of a citizen petition to convene a grand jury to investigate the target for an alleged crime;

(2) the nature of the crime alleged in the petition;

(3) the date of the alleged crime;

(4) any applicable statutory citations;

(5) the target's right to intervene;

(6) the target's right to testify in a subsequent grand jury proceeding;

(7) the target's right not to testify in a subsequent grand jury proceeding;

(8) the target's right to submit exculpatory evidence to the district attorney for presentation to the grand jury in a subsequent grand jury proceeding; and

(9) the target's right to the assistance of counsel during a subsequent grand jury investigation.

E. **Opportunity to intervene.** Before ruling on the validity of the grand jury petition, the district court shall permit any identifiable target of a grand jury investigation initiated by petition to intervene in the matter.

F. **Convening a citizen-petition grand jury.** If the district court determines both that the petition meets the procedural requirements of Article II, Section 14 and seeks to investigate reasonably specific alleged criminal conduct or unlawful malfeasance, the court shall convene a grand jury in accordance with Sections 31-6-1 to -15 NMSA 1978, unless the district court elects to submit the matter to a grand jury that has already been convened, and shall direct the grand jury to make inquiry into all potential violations of law described in the petition that the judge determines are proper subjects of grand jury investigation, under Section 31-6-9 NMSA 1978.

[Adopted by Supreme Court Order No. 15-8300-010, effective for all cases pending or filed on or after December 31, 2015; as amended by Supreme Court Order No. S-1-RCR-2023-00023, effective for all cases pending or filed on or after December 31, 2023.]

Committee commentary. — In *Convisser v. Ecoversity*, 2013-NMSC-039, ¶ 1, 308 P.3d 125, the New Mexico Supreme Court held that "determining whether a grand jury petition is supported by the requisite number of 'registered voters' is a judicial function calling for the exercise of judicial discretion." Under Article II, Section 14 of the New Mexico Constitution, "a grand jury shall be ordered to convene by such judge upon the filing of a petition therefor signed by not less than the greater of two hundred registered voters or two percent of the registered voters of the county." The easiest way to verify whether a petition meets this requirement is to require signatories to provide an address. *See Convisser*, 2013-NMSC-039, ¶ 26 (stating that other states with citizen-initiated grand jury provisions most commonly verify signatories through the use of voter addresses). However, voters' addresses are not required. The district court may use other verification aids such as dates of birth, social security numbers, handwriting comparisons by qualified witnesses, or testimony from questionable signatories. *See id*. ¶ 27.

Paragraph B of this rule is consistent with New Mexico case law that requires a district court to determine whether a grand jury inquiry fits within the jurisdiction and scope of the grand jury regarding the substance of the allegation. *See Dist. Ct. of Second Jud. Dist. v. McKenna*, 1994-NMSC-102, ¶ 9, 118 N.M. 402, 881 P.2d 1387 ("[T]he petition to convene a grand jury must contain sufficient information to enable the court to determine whether the petitioners seek a legitimate inquiry into alleged criminal conduct or malfeasance of a public official or whether the petitioners seek nothing more than a witch hunt."); *Cook v. Smith*, 1992-NMSC-041, ¶ 14, 114 N.M. 41, 834 P.2d 418 ("[T]he district court must make, in the first instance, a determination of the legality of the proposed grand jury inquisition. . . . [I]t is sufficient that the petition on its face delimit an

area of inquiry that colorably lies within the permissible scope of grand jury inquiry."). Subparagraph (B)(2) of this rule provides additional guidance to the district court on how to conduct that analysis under current case law.

On the filing of the petition to convene a grand jury, the district court shall assign the district attorney or the district attorney's assistants, unless otherwise disqualified, to assist the district court in notifying the target of the grand jury petition and, if the grand jury is convened, in carrying out the duties of the grand jury. *See* NMSA 1978, § 31-6-7(C) (2003). If a district attorney is disqualified for ethical reasons or other good cause under Paragraph C of this rule, the district attorney may appoint a practicing member of the state bar to act as special assistant district attorney who shall have authority to act only in the specific case or matter for which the appointment was made. *See* NMSA 1978, § 36-1-23.1 (1984). If the district attorney's office fails or refuses to act under Paragraph C of this rule, the attorney general is authorized to act on behalf of the state. *See* NMSA 1978, § 8-5-3 (1933).

[Adopted by Supreme Court Order No. 15-8300-010, effective for all cases pending or filed on or after December 31, 2015; as amended by Supreme Court Order No. S-1-RCR-2023-00023, effective for all cases pending or filed on or after December 31, 2023.]

ANNOTATIONS

Recompilations. — Pursuant to Supreme Court Order No. 22-8300-023, former Rule 5-302B NMRA was recompiled and amended as Rule 5-302.3 NMRA, effective December 31, 2022.

The 2023 amendment, approved by Supreme Court No. S-1-RCR-2023-00023, effective December 31, 2023, clarified that a petition to convene a grand jury must be for the purpose of investigating criminal conduct or malfeasance proscribed by law, revised the duties of the district court related to citizen grand jury proceedings, and revised the requirements of a citizen petition to convene a grand jury, provided certain responsibilities for the prosecuting attorney in assisting the district court in carrying out the duties of the grand jury, provided certain requirements regarding notice to the target of a potential grand jury investigation, and allowed the target of a grand jury investigation to intervene in the matter before a district court rules on the validity of the grand jury petition, and revised the committee commentary; in Paragraph A, after "filing of a petition", added "to investigate criminal conduct or malfeasance proscribed by state law that is"; in Paragraph B, changed the heading of the paragraph from "Verification of petition" to "Duties of the district court", after "The district court", deleted "has the responsibility to" and added "must", after "make", added "both", after "meets the", added "procedural", after "Article II, Section 14", deleted "by verifying the signatures contained in the petition. The district court may verify the signatures by any number of methods, including but not limited to" and added "and a legal determination that the petition seeks a legitimate inquiry into alleged criminal conduct or malfeasance proscribed by state law", added new subparagraph designation (1) and redesignated former Subparagraphs

“B(1) through B(4)” as Subparagraphs B(1)(a) through B(1)(d), respectively, in Subparagraph B(1), added the subparagraph heading “Verification of petition”, added “The district court must verify the signatures contained in the petition. The district court may verify the signatures by any number of methods, including but not limited to”, and added new Subparagraph B(2); added new Paragraphs C through E and redesignated former Paragraph C as Paragraph F; and in Paragraph F, after “If the district court determines”, added “both”, after “petition meets the”, added “procedural”, after “Article II, Section 14”, deleted “of the New Mexico Constitution” and added “and seeks to investigate reasonably specific alleged criminal conduct or unlawful malfeasance”.

The 2022 amendment, approved by Supreme Court Order No. 22-8300-023, effective December 31, 2022, made certain technical amendments, and revised the committee commentary; in Paragraph A, after “convene”, deleted “upon” and added “on”, and after “two percent”, added “(2%)”; and in Paragraph C, after “Article II, Section 14”, added “of the New Mexico Constitution”, and after “grand jury investigation”, deleted “pursuant to” and added “under”.

5-302A. Recompiled.

ANNOTATIONS

Recompilations. — Pursuant to Supreme Court Order No. 22-8300-023, former Rule 5-302A NMRA was recompiled and amended as Rule 5-302.2 NMRA, effective December 31, 2022.

5-302B. Recompiled.

ANNOTATIONS

Recompilations. — Pursuant to Supreme Court Order No. 22-8300-023, former Rule 5-302B NMRA was recompiled and amended as Rule 5-302.3 NMRA, effective December 31, 2022.

5-303. Arraignment.

A. **Arraignment.** The defendant shall be arraigned on the information or indictment within fifteen (15) days after the date of the filing of the information or indictment or the date of arrest, whichever is later. The defendant may appear at arraignment as follows:

(1) through a two way audio-visual communication in accordance with Paragraph I of this rule; or

(2) in open court.

If the defendant appears without counsel, the court shall advise the defendant of the defendant's right to counsel.

B. **Reading of indictment or information.** The district attorney shall deliver to the defendant a copy of the indictment or information and shall then read the complaint, indictment or information to the defendant unless the defendant waives such reading. Thereupon the court shall ask the defendant to plead.

C. **Bail review.** At arraignment, upon request of the defendant, the court shall evaluate conditions of release considering the factors stated in Rule 5-401 NMRA. If conditions of release have not been set, the court shall set conditions of release.

D. **Pleas.** A defendant charged with a criminal offense may plead as follows:

(1) guilty;

(2) not guilty; or

(3) no contest, subject to the approval of the court.

E. **Refusal to plead.** If a defendant refuses to plead or stands mute, the court shall direct the entry of a plea of not guilty on the defendant's behalf.

F. **Advice to defendant.** The court shall not accept a plea of guilty or no contest without first, by addressing the defendant personally in open court, informing the defendant of and determining that the defendant understands the following:

(1) the nature of the charge to which the plea is offered;

(2) the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law for the offense to which the plea is offered, including any possible sentence enhancements;

(3) that the defendant has the right to plead not guilty, or to persist in that plea if it has already been made;

(4) that if the defendant pleads guilty or no contest there will not be a further trial of any kind, so that by pleading guilty or no contest the defendant waives the right to a trial;

(5) 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;

(6) 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

(7) 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.

G. **Ensuring that the plea is voluntary.** The court shall not accept a plea of guilty or no contest without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire of the defendant, defense counsel and the attorney for the government as to whether the defendant's willingness to plead guilty or no contest results from prior discussions between the attorney for the government and the defendant or the defendant's attorney.

H. **Record of proceedings.** A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or no contest, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of a guilty plea.

I. **Audio-visual appearance.** The arraignment or first appearance of the defendant before the court may be through the use of a two-way audio-video communication if the following conditions are met:

(1) the defendant and the defendant's counsel are together in one room at the time of the first appearance before the court;

(2) the judge, legal counsel and defendant are able to communicate and see each other through a two-way audio-video system which may also be heard and viewed in the courtroom by members of the public; and

(3) no plea is entered by the court except a plea of not guilty.

J. **Waiver of arraignment.** With the consent of the court, a defendant may waive arraignment by filing a written waiver of arraignment and plea of not guilty with the court and serving a copy on the state in time to give notice to interested persons. A waiver of arraignment shall not be filed and is not effective unless signed by the district court judge. A waiver of arraignment and entry of a plea of not guilty shall be substantially in the form approved by the Supreme Court.

[As amended, effective October 1, 1974; October 1, 1976; July 1, 1980; May 19, 1982; October 1, 1983; March 1, 1987; September 1, 1990; August 1, 1992; as amended by Supreme Court Order No. 06-8300-010, effective April 15, 2006; by Supreme Court

Order No. 07-8300-029, effective December 10, 2007; by Supreme Court Order No. 10-8300-028, effective December 3, 2010.]

Committee commentary. — Paragraphs A, B, D and E of this rule were included in this rule as originally adopted in 1972. Paragraphs A, B and E of this rule conformed to the then existing practice for New Mexico arraignments. By referring only to indictments and informations in Paragraph B of this rule, the rule tacitly acknowledges that misdemeanors will rarely be prosecuted on a complaint in the district court. However, the same procedure would be used for arraignment on a complaint.

Paragraph D of this rule, by eliminating the plea of not guilty by reason of insanity, introduced a change in New Mexico procedure. *See, e.g., State v. Wilson*, 85 N.M. 552, 514 P.2d 603 (1973). The elimination of this plea brought the New Mexico practice into line with the federal practice. *See generally* 1 Wright, Federal Practice and Procedure, § 176 (1969). However, under Rule 5-602 NMRA, the defendant must give notice of the defense of insanity at the arraignment or within twenty (20) days thereafter. *See also* Rule 12.2 of the Federal Rules of Criminal Procedure. 62 F.R.D. 271, 295-98 (1974).

Paragraph G of Rule 5-304 NMRA provides for an inquiry to determine the factual basis of any guilty plea.

Paragraph D of this rule also specifically allows the plea of no contest with the approval of the court. The provision was taken from Rule 11 of the Federal Rules of Criminal Procedure. *See generally* 1 Wright, Federal Practice and Procedure, § 177 (1969). Rule 11(b) of the Federal Rules of Criminal Procedure would add a provision that the court consider the views of the parties and the interests of the public before accepting a plea of no contest. *See* 62 F.R.D. 271, 275 (1974).

A plea of no contest is, for the purposes of punishment, the same as a plea of guilty. *North Carolina v. Alford*, 400 U.S. 25, 35-36 (1970); *cf. State v. Raburn*, 76 N.M. 681, 417 P.2d 813 (1966); *see generally* 62 F.R.D. 271, 277-78 (1974). Consequently, Paragraphs F and G of this rule require the court to give the defendant the same advice given when a plea of guilty is entered and also insure that the plea is voluntary. However, unlike the case in which the defendant pleads guilty, a court need not inquire into whether or not there is a factual basis for the no contest plea. *See* Paragraph G of Rule 5-304 NMRA.

Elimination of the inquiry into the factual basis for the no contest plea is consistent with the use of the plea where the defendant does not want to admit any wrongdoing. A defendant may want to avoid pleading guilty because a guilty plea can be introduced in subsequent litigation. Under Rule 11-410 NMRA, a plea of no contest is not admissible. (The Rules of Evidence contain an inconsistency, however, in that the no contest plea, declared inadmissible under Rule 11-410 NMRA, is declared to be not excluded by the hearsay rule under Paragraph V of Rule 11-803 NMRA.) The fact that the plea of no contest will not be admissible in subsequent litigation should be considered in the court's decision to approve the plea. *See generally*, 63 F.R.D. 271, 277-78, 286 (1974).

Paragraphs F, G and J, governing plea procedures, were added in 1974. They were taken from Rules 11(c), (d) and (g) of the Federal Rules of Criminal Procedure. *See* 62 F.R.D. 271, 275-86 (1974).

Paragraph F of this rule prescribes the advice the court must give to the defendant as a prerequisite to the acceptance of a plea of guilty. Except for Subparagraphs (5), (6) and (7), added in 1990 and 2007, the rule codifies the constitutional requirements set forth in *Boykin v. Alabama*, 395 U.S. 238 (1969). *See also Henderson v. Morgan*, 426 U.S. 637 (1976), holding that the trial judge must explain the nature of the charge of murder, i.e., the court must explain intent to kill to the defendant if intent to kill is an element of the offense, prior to acceptance of a plea of guilty. The trial judge may want to refer to essential elements in UJI Criminal, particularly when they have not been set forth in the accusatory pleading. Although it has been a common practice in New Mexico to also advise the defendant that he is giving up a right to appeal, that advice is not included in either the rule or in the approved form for a guilty plea proceeding. A guilty plea does not prevent an appeal in New Mexico. *Cf. State v. Vigil*, 85 N.M. 328, 512 P.2d 88 (Ct. App. 1973). Subparagraph (5), requiring the court to "warn" the defendant that a conviction could affect the defendant's immigration or naturalization status, was added in 1990. Subparagraphs (6) and (7), added in 2007, require the court to advise the defendant of certain limitations on the right to bear arms and sex offender registration requirements that might result depending on the crimes that are the subject of the plea. In 2009, Subparagraph (2) was amended to make clear that, when advising the defendant of the mandatory minimum and maximum possible penalties, the court must also advise the defendant of any possible sentence enhancements that may result based on any prior convictions the defendant may have. *See Marquez v. Hatch*, 2009-NMSC-040, ¶ 13 (providing that "if the district court is aware of the defendant's prior convictions that would require a sentence enhancement if subsequently requested by the State, the court should inform the defendant of the maximum potential sentence, including enhancements. If the defendant enters a guilty or no contest plea without being advised of possible sentence enhancements and then the possible existence of prior convictions comes to light when the State files a subsequent supplemental information seeking to enhance the defendant's sentence based on those prior convictions, the court should conduct a supplemental plea proceeding to advise the defendant of the likely sentencing enhancements that will result, and determine whether the defendant wants to withdraw the plea in light of the new sentencing enhancement information").

Paragraph G of this rule requires the court to determine that a plea of guilty or no contest is voluntary before accepting either plea. As noted above, Paragraph G of Rule 5-304 NMRA also requires that the court satisfy itself that there is a factual basis for a plea of guilty. Both of these requirements have been in the federal rules since 1966, and also have a basis in constitutional law. *See Santobello v. New York*, 404 U.S. 257 (1971). The court must not only inquire of the defendant, but must, "make a separate and distinct inquiry" of defense counsel and counsel for the government as to the existence of any agreement or discussions relative to the plea. *State v. Lucero*, 97 N.M. 346, 639 P.2d 1200 (Ct. App. 1981).

Finally, it should be noted that Paragraph H of this rule makes it clear that plea proceedings before the court must be on the record. *See Santobello*, 404 U.S. 257.

AUDIO-VISUAL ARRAIGNMENTS.

Paragraph I provides that a defendant may be arraigned by way of a two-way closed circuit audio-video communication between the defendant, his legal counsel and the court and the prosecutor. The committee assumes that proper equipment will be installed prior to conducting an audio-video arraignment pursuant to Paragraph I. Proper equipment includes a direct cable connection to the court's audio recording system to assure that a "record" is made of the arraignment.

Right of Confrontation.

Both the United States Constitution and the New Mexico Constitution guarantee a defendant the right to be present in the courtroom to confront his accusers. *See Illinois v. Allen*, 397 U.S. 337, 90 S. Ct. 1057, 25 L.Ed 2d 353 (1970).

Actual presence in the courtroom, however, is not always necessary. The right can be waived in misdemeanor cases by the accused's counsel. The defendant's presence is not required during a pretrial detention hearing. *See United States v. Zuccaro*, 645 F.2d 104, 106 (2d Cir. 1981) (*cert. denied*, 454 U.S. 823, 102 S. Ct. 110, 70 L.Ed2d 96 (1981)). The continued presence of an accused is not required if the accused voluntarily absents himself after the trial has commenced or if the accused engages in conduct which justifies his being excluded from the courtroom. *See* Rule 5-112 NMRA.

Although the general rule is that the accused has a right to a face to face confrontation, this rule is subject to policy or necessity considerations. *See State v. Tafoya*, 105 N.M. 117, 729 P.2d 1371 (Ct. App. 1986), finding that the right to face to face confrontation must give way when necessary to protect a child who is a victim of a sex offense from further mental or emotional harm. In *Tafoya*, the New Mexico Court of Appeals held that a defendant is "present" during a deposition when the defendant is in a control booth in constant contact with his attorney and can view all of the proceedings.

Use of Audio-Video System during Arraignment Proceedings.

The use of a two-way audio-video system to arraign a defendant while in jail is apparently becoming fairly common in many areas. Although the use of an audio-video system in which the defendant would participate in the trial from a hospital by use of a single television and a telephone by which he could communicate with counsel may be insufficient, *People v. Piazza*, 92 Misc.2d 813, 401 N.Y.S.2d 371 (1977), the conducting of an arraignment on felony charges via a closed circuit two-way audio-video system has been upheld. *Commonwealth of Pennsylvania v. Terebieniec*, 408 A.2d 1120 (1979).

Guilty Plea.

It is clear that a guilty plea cannot be accepted without a record showing that the defendant intelligently and voluntarily entered the plea. *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 170, 23 L. Ed. 2d 274 (1969). Paragraph I limits audio-video arraignments to those proceedings in which the defendant will have his rights explained and enter a plea of not guilty.

[As amended by Supreme Court Order No. 10-8300-028, effective December 3, 2010.]

ANNOTATIONS

The 2010 amendment, approved by Supreme Court Order No. 10-8300-028, effective December 3, 2010, in Paragraph A, added the first sentence, and in the second sentence, after "appear at arraignment", added "as follows"; in Paragraph D, deleted Subparagraph (4) which stated "guilty but mentally ill, subject to approval of the court"; in Paragraph F, in the introductory sentence, after "plea of guilty or no contest", deleted "or guilty but mentally ill"; in Subparagraph (2) of Paragraph F, after "plea is offered", added "including any possible sentence enhancements", in Subparagraph (4) of Paragraph F, after "defendant pleads guilty or no contest", deleted "or guilty but mentally ill", and after "by pleading guilty or no contest", deleted "or guilty but mentally ill"; in Paragraph G, in the first sentence, after "accept a plea or guilty or no contest", deleted "or guilty but mentally ill", and in the second sentence, after "willingness to plead guilty or no contest", deleted "or guilty but mentally ill"; and in Paragraph H, after "if there is a plea of guilty or no contest", deleted "or guilty but mentally ill".

The 2007 amendment, effective December 10, 2007, revised Subparagraph (5) and added Subparagraphs (6) and (7) of Paragraph F to require that a defendant who pleads guilty or no contest be advised of the consequences of a plea on immigration status, under the domestic violence laws and under the Sex Offender Registration Notification Act, 29-11A-1 NMSA 1978 and to require in Paragraph J that a waiver of arraignment be approved by the district court judge.

The 2006 amendment, effective April 15, 2006, added Paragraph C relating to bail review, relettered the succeeding paragraphs and revised relettered Paragraph J to permit a waiver of arraignment without consent of the court.

The 1992 amendment, effective for cases filed in the district courts on or after August 1, 1992, substituted "defendant" or "defendant's" for "he" or "his" throughout the rule and added Paragraph I.

Compiler's notes. — This rule is similar to Rule 10 of the Federal Rules of Criminal Procedure.

Paragraph D is deemed to supersede 41-6-52, 1953 Comp., which was substantially the same.

Cross references. — For form on waiver of arraignment entry of plea of not guilty, *see* Rule 9-405 NMRA.

For forms on guilty plea proceeding and certificate by defendant, *see* Rule 9-406 NMRA.

For the Supreme Court approved waiver of arraignment form, *see* Criminal Form 9-405 NMRA.

For a discussion of the consequences of a conviction under the Family Violence Protection Act, 40-13-1 NMSA 1978, and the so-called "Brady Bill", 18 U.S.C. Section 922, *see* Civil Form 4-970 NMRA.

I. GENERAL CONSIDERATION.

Right to counsel. — Resolution of an accused's claim of indigency is an integral aspect of a defendant's right to counsel. *State v. Watchman*, 1991-NMCA-010, 111 N.M. 727, 809 P.2d 641, *overruled in part on other grounds by State v. Hosteen*, 1996-NMCA-084, 122 N.M. 228, 923 P.2d 595.

Purposes of arraignment. — The purposes of an arraignment are to establish the identity of defendant, to inform him of the charge against him, and to give him an opportunity to plead to the charge and where, as here, there is no question that defendant is the person charged in the information and he was served with a copy of the information, engaged two competent attorneys to represent him, and the court, in the presence of defendant and his counsel, at the very outset of the trial explained to the entire jury panel the nature of the charge. Defendant was personally present with his attorneys when the case was called for trial, and he announced, through one of his attorneys, that he was ready to proceed with the trial. Defendant was resisting the charge against him as this was further confirmed by his attorney when the court inquired as to his plea; therefore defendant was not prejudiced by his failure to plead "not guilty" at an arraignment proceeding. *State v. Parker*, 1969-NMCA-056, 80 N.M. 551, 458 P.2d 803, cert. denied, 80 N.M. 607, 458 P.2d 859 (decided under former law).

Validity of prearraignment findings at later competency hearings. — Where the witnesses at a later hearing were the psychiatrists who examined petitioner prior to his plea of guilty, the court could not say that mere lapse of time before a competency hearing invalidated the findings made as a result of that hearing, where the mere lapse was three and one-half years. *Barefield v. New Mexico*, 434 F.2d 307 (10th Cir. 1970), cert. denied, 401 U.S. 959, 91 S. Ct. 969, 28 L. Ed. 2d 244 (1971) (decided under former law).

Effect of failing to object at arraignment of prior defects. — Failure to be represented by counsel during juvenile court investigation may be waived by not objecting upon arraignment with counsel in district court. *State v. Gallegos*, 1971-

NMCA-067, 82 N.M. 618, 485 P.2d 374, cert. denied, 82 N.M. 601, 485 P.2d 357 (decided under former law).

Effect of plea on prior defects. — Any irregularities or defects which may have occurred prior to his plea of guilty were waived when he entered his plea of guilty. *Christie v. Ninth Jud. Dist.*, 1967-NMSC-236, 78 N.M. 469, 432 P.2d 825 (decided under former law).

Absent a showing of prejudice, the plea at arraignment waived prior defects in the proceedings. *State v. Robinson*, 1967-NMSC-220, 78 N.M. 420, 432 P.2d 264, *aff'd*, 1971-NMCA-080, 82 N.M. 660, 486 P.2d 69 (decided under former law).

Such as motion to quash indictment. — A motion to quash an indictment must be made before arraignment and plea. *State v. Paul*, 1971-NMCA-040, 82 N.M. 619, 485 P.2d 375, cert. denied, 82 N.M. 601, 485 P.2d 357 (decided under former law).

Illegality of arrest. — The submission of the appellant to jurisdiction of his person by entry of a plea of not guilty and proceeding to trial in municipal court was an effective waiver of any claim of illegality as to the arrest. An appearance limited solely to a challenge to jurisdiction of the person is necessary to preserve this question. Similarly, the submission of appellant to jurisdiction of his person, both in the city court and in the district court by proceeding to trial, was an effective waiver of any challenge to the original complaint. *City of Roswell v. Leonard*, 1963-NMSC-139, 73 N.M. 186, 386 P.2d 707 (decided under former law).

Where defendant pleaded not guilty and proceeded to trial, claim of illegal arrest was waived. *State v. Ramirez*, 1967-NMSC-210, 78 N.M. 418, 432 P.2d 262, *aff'd*, 1970-NMCA-010, 81 N.M. 150, 464 P.2d 569 (decided under former law).

Absence of counsel. — Absent a showing of prejudice, complaint of absence of counsel during interrogation by authorities and at preliminary hearing is waived by guilty plea. *State v. Archie*, 1967-NMSC-227, 78 N.M. 443, 432 P.2d 408 (decided under former law).

Right to preliminary examination. — Former statutes concerning preliminary examinations did not provide for a plea in justice (now magistrate) court when the justice of the peace (magistrate) was sitting as an examining magistrate. Although no plea was provided for, if the accused voluntarily pleads guilty before the magistrate, this voluntary action constituted a waiver of the right to a preliminary examination. *State v. Sexton*, 1968-NMCA-003, 78 N.M. 694, 437 P.2d 155 (decided under former law).

An entry of a plea in the district court, after consulting with and being advised by counsel, in itself accomplishes a waiver to a preliminary hearing. *State v. Olguin*, 1968-NMSC-012, 78 N.M. 661, 437 P.2d 122 (decided under former law).

Entry of a plea of guilty in the district court after consulting with and being advised by counsel, in itself, accomplished a waiver of right to a preliminary hearing. *State v. Gibby*, 1967-NMSC-219, 78 N.M. 414, 432 P.2d 258 (decided under former law).

Right to be furnished copy of information. — Appellant's contention that his constitutional rights were violated in that he was not furnished a copy of the information more than 24 hours prior to pleading to the charges of which he was convicted contrary to Section 41-6-46, 1953 Comp. (now repealed), was waived by the plea of guilty which he entered. *State v. McCain*, 1968-NMCA-029, 79 N.M. 197, 441 P.2d 237 (decided under former law).

Effect of prior absence of attorney on plea. — Since guilty plea was voluntary, defendant was not prejudiced by the absence of counsel at the preliminary hearing though the result of the preliminary hearing may have influenced his guilty plea. *State v. Archie*, 1967-NMSC-227, 78 N.M. 443, 432 P.2d 408 (decided under former law).

Allegation plea unjust and unfair insufficient to raise involuntariness question. — Allegation that the plea was unjust and unfair is too general to raise a question as to involuntariness. *State v. Archie*, 1967-NMSC-227, 78 N.M. 443, 432 P.2d 408 (decided under former law).

Law reviews. — For article, "Defending the Criminal Alien in New Mexico: Tactics and Strategy to Avoid Deportation," see 9 N.M.L. Rev. 45 (1978-79).

For note, "Eller v. State: Plea Bargaining in New Mexico," see 9 N.M.L. Rev. 167 (1978-79).

For comment, "Definitive Sentencing in New Mexico: The 1977 Criminal Sentencing Act," see 9 N.M.L. Rev. 131 (1978-79).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 589 to 599.

Delay in taking before magistrate or denial of opportunity to give bail as supporting action for false imprisonment, 79 A.L.R. 13.

Delay in taking before magistrate or denial of opportunity to give bail as supporting action for false imprisonment, 98 A.L.R.2d 966, 3 A.L.R.4th 1057.

Accused's right to assistance of counsel at or prior to arraignment, 5 A.L.R.3d 1269.

Intoxication as ground for police postponing arrestee's appearance before magistrate, 3 A.L.R.4th 1057.

Adequacy of defense counsel's representation of criminal client regarding post-plea remedies, 13 A.L.R.4th 533.

Retrial on greater offense following reversal of plea-based conviction of lesser offense, 14 A.L.R.4th 970.

Guilty plea safeguards as applicable to stipulation allegedly amounting to guilty plea in state criminal trial, 17 A.L.R.4th 61.

Admissibility of confession or other statement made by defendant as affected by delay in arraignment - modern state cases, 28 A.L.R.4th 1121.

Compliance with federal constitutional requirement that guilty pleas be made voluntarily and with understanding, in federal cases involving allegedly mentally incompetent state convicts, 38 A.L.R. Fed. 238.

Construction and application of Rule 11(c) of Federal Rules of Criminal Procedure, as amended in 1975, requiring court to give certain advice to defendant before accepting plea of guilty or nolo contendere, 41 A.L.R. Fed. 874.

22 C.J.S. Criminal Law § 357 et seq.

II. ARRAIGNMENT.

Generally. — Where defendant appeared before the district court and admitted that he was the defendant in the case and was informed as to the nature of the charge and given an opportunity to plead, this was an arraignment. *State v. Sexton*, 1968-NMCA-003, 78 N.M. 694, 437 P.2d 155 (decided under former law).

Where waiver of counsel effective. — Where at arraignment appellant signed a written waiver of his right to be represented by court-appointed counsel and elected to proceed without counsel, appellant had knowledge of and understood his right to be represented by counsel and he voluntarily waived such right. Waiver of counsel was knowledgeably and understandingly made. *State v. Baughman*, 1968-NMCA-067, 79 N.M. 442, 444 P.2d 769 (decided under former law).

Effect of failure to assign counsel. — Failure to assign counsel to represent defendant before the magistrate or at his arraignment did not abridge defendant's constitutional rights where no prejudice was shown. *Gantar v. Cox*, 1964-NMSC-215, 74 N.M. 526, 395 P.2d 354 (decided under former law).

Where failure to inform waived by not guilty plea. — Any defect which may have occurred in the manner in which defendant was informed of the charge against her, or any failure by the justice of the peace to inform her of her right to counsel, is waived by plea of not guilty. *State v. Knight*, 1967-NMSC-241, 78 N.M. 482, 432 P.2d 838 (decided under former law).

No obligation for sheriff or warden to schedule arraignment. — Where detainees filed a federal civil rights action against county officials, including the county sheriff and

the county jail warden, alleging that the detainees' arraignment delays in county jail violated their due process rights, and where the district court granted defendants' motion to dismiss for failure to state a valid claim, the district court did not err in granting defendants' motion because compliance with the requirement to arraign detainees within fifteen days lay solely with the court, because an arraignment is a court proceeding that takes place only when scheduled by the court. Rule 5-303 NMRA does not impose any duties on the sheriff or warden to bring an arrestee to court in the absence of a scheduled arraignment. *Moya v. Garcia*, 895 F.3d 1229 (10th Cir. 2018).

III. READING OF INDICTMENT OR INFORMATION.

Collateral attack on failure to timely provide copy prohibited. — Failure to timely provide defendant with a copy of the information cannot be collaterally attacked. *State v. Knight*, 1967-NMSC-241, 78 N.M. 482, 432 P.2d 838 (decided under former law).

IV. PLEAS.

Advice about possible sentence enhancements. — The district court is obligated to explain the mandatory minimum and maximum possible penalties to the defendant, including advice about sentence enhancements that could result if the defendant has prior convictions. If the court is aware of the defendant's prior convictions that would require a sentence enhancement if subsequently requested by the state, the court should inform the defendant of the maximum potential sentence, including enhancements. If the defendant enters a guilty or no contest plea without being advised of possible sentence enhancements and then the possible existence of prior convictions comes to light when the state files a subsequent supplemental information seeking to enhance the defendant's sentence based on those prior convictions, the court should conduct a supplemental plea proceeding to advise the defendant of the likely sentencing enhancements that will result, and determine whether the defendant wants to withdraw the plea in light of the new sentencing enhancement information. *Marquez v. Hatch*, 2009-NMSC-040, 146 N.M. 556, 212 P.3d 1110.

Where the defendant entered a no contest plea to trafficking cocaine; the district court informed the defendant that the trafficking charge would be a second degree felony with a maximum basic sentence of nine years and that the basic sentence could be enhanced under the habitual offender statute if the defendant had any undisclosed prior felony convictions; the state filed a supplemental criminal information alleging that the defendant had three prior felony convictions, two of which were trafficking offenses; there was no indication in the record that before the defendant entered a plea of no contest to the three prior convictions that the defendant was advised about a potential enhancement under the trafficking statute or that the trafficking charge could be treated as a first-degree felony with a basic sentence of eighteen years, the court did not adequately and accurately advise the defendant of the possible sentencing enhancements the defendant faced by pleading no contest. *Marquez v. Hatch*, 2009-NMSC-040, 146 N.M. 556, 212 P.3d 1110.

Change of plea. — There is no constitutional barrier to a pro se defendant changing his plea when he recognizes he made a bad decision to represent himself. *State v. Vincent*, 2005-NMCA-064, 137 N.M. 462, 112 P.3d 1119, cert. granted, 2005-NMCERT-005.

Generally, as to guilty plea. — A guilty plea must be voluntarily made. If it is not voluntarily made, but is, in fact, induced by promises or threats, then it is void and subject to collateral attack. *State v. Robbins*, 1967-NMSC-091, 77 N.M. 644, 427 P.2d 10, cert. denied, 389 U.S. 865, 88 S. Ct. 130, 19 L. Ed. 2d 137 (1967) (decided under former law).

Effect of plea. — An involuntary plea is inconsistent with the constitutional guarantee of due process. But when a plea of guilty is made voluntarily after proper advice of counsel and with a full understanding of the consequences, the plea is binding. *State v. Robbins*, 1967-NMSC-091, 77 N.M. 644, 427 P.2d 10, cert. denied, 389 U.S. 865, 88 S. Ct. 130, 19 L. Ed. 2d 137 (1967) (decided under former law).

A plea of guilty voluntarily made, and after opportunity to consult with counsel and with full understanding of the consequences, is binding. *State v. Vigil*, 1968-NMCA-034, 79 N.M. 287, 442 P.2d 599 (decided under former law).

Withdrawal of guilty plea appropriate where defendant was not properly advised of the nature of the charges. — Where the state filed three criminal informations against defendant, each of which charged defendant with fraud and embezzlement against separate victims, and where defendant and the state entered into plea agreements under which defendant agreed to plead guilty to the fraud and embezzlement charges in all three cases, and where, during the change of plea hearing, defendant stated that he understood the charges to which he was pleading and acknowledged that the state had some evidence to prove his guilt of all the charges in all three cases, and where, following the district court's acceptance of the guilty pleas in all three cases and sentencing defendant to twenty-one years imprisonment, defendant moved to withdraw his guilty plea, claiming that he did not understand the basis for his fraud and embezzlement convictions, the trial court erred in denying defendant's motion to withdraw his guilty plea, because defendant did not knowingly and voluntarily plead guilty. The district court accepted defendant's guilty pleas without providing him with any explanation of the charges to which he pleaded guilty, much less an explanation of how his conduct in each case satisfied the essential elements of both fraud and embezzlement, which under the circumstances of this case were mutually exclusive because the same conduct cannot satisfy the essential elements of both fraud and embezzlement. *State v. Yancey*, 2021-NMCA-009, cert. denied.

Due process requires an opportunity for defendant to withdraw his plea where he was deprived of his right to a knowing and voluntary plea. — Where defendant pleaded guilty to second-degree criminal sexual penetration, and where the district court, in the first judgment and sentence (J&S), erred in ordering that defendant serve two years of parole, resulting in an unlawfully short period of mandatory parole, and where, thirteen days later, the district court attempted to correct the sentencing error by

entering a second amended J&S, which replaced defendant's parole period of two years with five-to-twenty years, both of which were illegal sentences, as 31-21-10.1(A)(2) NMSA 1978, requires a sex offender convicted of CSP in the second degree to serve an indeterminate period of supervised parole for not less than five years and up to the natural life of the sex offender, and where defendant challenged the revised parole period in a petition for writ of habeas corpus, and where the district court determined that it had no jurisdiction to correct the illegal parole sentence in the first J&S and accordingly granted defendant's habeas petition, invalidated and voided the second amended J&S, and reinstated the original two-year parole period, and where the New Mexico supreme court held that a district court has the inherent authority to correct a sentence that is illegal due to clear error, defendant was deprived of his right to a knowing and voluntary plea when his sentence was changed in the second amended J&S to include more onerous consequences than those explained at the plea hearing; due process required an additional hearing at which defendant would have been advised of the increased consequence with an opportunity to withdraw his plea. *State v. Romero*, 2023-NMSC-008, *overruling State v. Torres*, 2012-NMCA-026, 272 P.3d 689.

Whether a plea is knowing and voluntary must be assessed from the totality of the circumstances. — Where defendant was charged in several related cases with fraud, embezzlement, and racketeering, and where, upon advice of counsel, he entered into three plea and disposition agreements which were recorded upon the standardized plea-agreement forms approved by the New Mexico Supreme Court, and where the district court accepted and recorded defendant's guilty pleas at a plea hearing, the trial court did not err in denying defendant's motion to withdraw his pleas despite defendant never expressly pleaded guilty in open court to any crime, because no talismanic incantation of the words "I plead guilty" is required in order for a defendant to plead guilty, and, in this case, defendant informed the court that his pleas were voluntary and that he understood and consented to the terms of the plea agreements, including the range of sentences that the court could impose in all three cases. *State v. Yancey*, 2019-NMSC-018, *rev'g* 2017-NMCA-090, 406 P.3d 1050.

Judgment and sentence entered pursuant to a plea agreement is void in the absence of an express guilty plea on the record. — Where defendant was charged with three counts of fraud, three counts of embezzlement and two counts of racketeering in three separate criminal complaints, and where defendant made a separate plea agreement in each case, and where at the plea hearing on all three complaints, the district court complied with the prerequisites set forth in Rules 5-303 and 5-304 NMRA, ensuring that the proposed guilty plea was voluntary and intelligent, but where the district court never specifically asked defendant to plead, and defendant never expressly admitted his guilt to anything in open court on the record in the hearing, the district court was without authority to sentence defendant, because in the absence of an express guilty plea on the record, a judgment and sentence that is entered pursuant to the plea agreement is void. *State v. Yancey*, 2017-NMCA-090, cert. granted.

Burden of proof on defendant. — Upon appeal, the burden of proof is on defendant to show that the plea is involuntary. *State v. Ortiz*, 1967-NMSC-104, 77 N.M. 751, 427 P.2d 264 (decided under former law).

Silent trial record shifts burden to government to prove that a trial waiver was knowingly, voluntarily and intelligently made. *Sena v. Romero*, 617 F.2d 579 (10th Cir. 1980).

Voluntariness may still be shown. — Even if the trial record is silent, reversal is not required if the voluntariness and intelligence of a guilty plea is proved at a post-conviction evidentiary hearing. *Sena v. Romero*, 617 F.2d 579 (10th Cir. 1980).

Competency to plead. — The trial court did not err in applying the same standard to a defendant's competency to enter into a plea agreement as would have been appropriate in determining his competency to stand trial. *State v. Lucas*, 1990-NMCA-056, 110 N.M. 272, 794 P.2d 1201.

Metropolitan court may not use a conviction based on nolo contendere plea as sole basis of probation revocation. *State v. Baca*, 1984-NMCA-056, 101 N.M. 415, 683 P.2d 970.

V. REFUSAL TO PLEAD.

Effect of remaining mute. — Objections to form of verification were waived by defendant who remained mute and had a plea of not guilty entered for him by the trial court. *State ex rel. Hanagan v. Armijo*, 1963-NMSC-057, 72 N.M. 50, 380 P.2d 196.

VI. ADVICE TO DEFENDANT.

Generally. — Before accepting a plea of guilty a trial court has a duty to ascertain that a defendant knows the consequences of his plea and to advise him of those consequences if he is not otherwise advised. That a defendant is represented by counsel does not alter this rule. *Neller v. State*, 1968-NMSC-130, 79 N.M. 528, 445 P.2d 949 (decided under former law).

Knowledge of consequences of guilty plea, a requirement recognized by supreme court, means that in some manner the accused should be informed of the nature of the charges, acts sufficient to constitute the offense, the right to plead "not guilty," the right to a jury trial, the right to counsel and the permissible range of sentences. *State v. Montler*, 1973-NMSC-043, 85 N.M. 60, 509 P.2d 252 (decided under former law).

Admonition of immigration consequences of defendant's guilty plea, that it "could" affect his immigration status, was sufficient advice to satisfy federal due process and Rule 5 303(E)(5) but distinct possibility that defense attorney failed to provide specific advice regarding impact of guilty plea on his immigration status established prima facie

case of ineffective assistance of counsel. *State v. Paredez*, 2004-NMSC-036, 136 N.M. 533, 101 P.3d 799.

Mandate that district court advise the defendant that his guilty plea will affect his constitutional right to bear arms does not apply retroactively. — Where in 2001 defendant entered a plea to six counts of armed robbery, each with a firearm enhancement, false imprisonment, second degree kidnapping, and resisting, evading, or obstructing an officer, and where in 2018, four years after his sentence was fully served and two years after he had been arrested and charged in federal court for being a felon in possession of a firearm, defendant filed a coram nobis motion for relief from judgment and to withdraw his plea based on his contention that he was never advised of the consequences to his second amendment right to bear arms at the time of the plea, defendant's plea was not involuntary, unknowing, or unintelligent based on the fact that he was not so advised and the district court did not err in denying defendant's motion to withdraw his plea, because the mandate that the district court advise the defendant that his guilty plea will affect his constitutional right to bear arms, enacted in 2007, does not apply retroactively. *State v. Otero*, 2020-NMCA-030, cert. denied.

Substantial compliance. — Absent a showing of prejudice to the defendant's right to understand his guilty plea and its consequences, substantial compliance with Paragraph E is sufficient. *State v. Garcia*, 1996-NMSC-013, 121 N.M. 544, 915 P.2d 300.

Substantial compliance with Paragraph E was not shown since the court did not ascertain if the defendant understood the nature of the charge and the possible range of penalties provided by law. *State v. Garcia*, 1996-NMSC-013, 121 N.M. 544, 915 P.2d 300.

Source of information. — Provided the record shows the defendant had the requisite information, the court need not be the only source of information. *State v. Garcia*, 1996-NMSC-013, 121 N.M. 544, 915 P.2d 300.

Lack of compliance with paragraph not constitutional claim. — The claim that defendant's guilty pleas were invalid because the trial court did not comply with Subdivision (e) (*see now* Paragraph E) in accepting the pleas is not a claim that the pleas were constitutionally invalid. *State v. Gallegos*, 1977-NMCA-113, 91 N.M. 107, 570 P.2d 938.

Plea not rendered involuntary by later statements. — Having concluded that the plea of guilty was voluntarily and understandingly made, nothing which was later said by the court renders this plea involuntary. *State v. Vigil*, 1968-NMCA-034, 79 N.M. 287, 442 P.2d 599 (decided under former law).

Waiver of lesser included offense instructions. — It is not necessary to subject the defendant's decision to waive lesser included offense instructions to the formulaic inquiry required under Paragraph E for all pleas of guilty. *State v. Boeglin*, 1987-NMSC-002, 105 N.M. 247, 731 P.2d 943.

VII. ENSURING VOLUNTARY PLEA.

Due process requires that a guilty plea be made voluntarily and intelligently. *State v. Lucero*, 1981-NMCA-143, 97 N.M. 346, 639 P.2d 1200.

Record established that defendant understood the nature of his charges. — Where defendant was indicted on ten alleged offenses, including four counts of third degree criminal sexual contact of a minor (CSCM), three counts of aggravated indecent exposure, and two counts of contributing to the delinquency of a minor, and where defendant and the state entered into a plea agreement in which defendant agreed to plead no contest to the four counts of CSCM, one count of aggravated indecent exposure, and one count of contributing to the delinquency of a minor in return for the state dismissing the remaining counts in the indictment as well as charges in four other pending cases and two charges for which defendant had not yet been indicted, and where defendant moved to withdraw his guilty plea, claiming that the district court failed to determine whether he understood the nature of the four CSCM charges to which he pleaded no contest, the district court did not abuse its discretion in denying defendant's motion to withdraw his guilty plea, because the record shows that the district court substantially complied with the requirements of Rule 5-303(F)(1) NMRA and that defendant acquired an understanding of the nature of the CSCM charges based on the facts that at his arraignment, defendant's original counsel told the district court that she had reviewed the indictment together with defendant and that defendant understood the charges contained in the indictment, and at his plea hearing, defendant stated that he had discussed the plea agreement with his counsel and that he understood the agreement. Moreover, it is defendant's burden to demonstrate prejudice, and defendant failed to carry his burden of showing prejudice. *State v. Valenzuela*, 2023-NMCA-045, cert. denied.

Where plea not voluntary. — Defendant's plea of guilty could not have been freely, intelligently or knowingly given if court-appointed counsel did not and would not discuss any of such possible issues as police reports, potential defenses or relevant statutory requirements, with defendant. The items, considered together and in relation to the "facts" related in the police report, show manifest error was committed by the trial court in not permitting defendant to withdraw his plea of guilty. The issue is whether under the foregoing undisputed facts, defendant had effective assistance of counsel. *State v. Kincheloe*, 1974-NMCA-126, 87 N.M. 34, 528 P.2d 893.

Trial counsel's relation to the defendant of an agreement later found by the court to be nonexistent, which information induces defendant's guilty plea, clearly removed that plea from the category of pleas "freely, intelligently or knowingly given". *State v. Lucero*, 1981-NMCA-143, 97 N.M. 346, 639 P.2d 1200.

Where defendant, who was charged with premeditated first degree murder and assault and battery upon a police officer, protested defendant's culpability for the assault and battery charges, challenged the premeditation element of the first degree murder charge, and expressed confusion about the sentencing in the plea agreement; the

prosecution alerted the court to the prosecution's concerns regarding the adequacy of defendant's understanding of the murder charge; the court did not inquire about defendant's understanding of the charges or the sentencing; the court appeared to cajole defendant into stating that the plea agreement was voluntary; the court did not allow a recess to permit defense counsel to address defendant's misunderstanding about the plea agreement or to claim that defendant's misunderstanding had been remedied; and the court did not advise defendant of the mandatory minimum sentence, defendant's plea was not knowing, intelligent or voluntary. *State v. Ramirez*, 2011-NMSC-025, 149 N.M. 698, 254 P.3d 649.

Where plea of guilty held voluntary. — The court, in a habeas corpus proceeding under former law, held that plea of guilty was voluntary even though sheriff and district attorney told him he would be prosecuted under the habitual criminal statute and that his wife would be prosecuted as an accessory if he did not plead guilty. The comments by the district attorney were said to be just a statement of his potential criminal responsibility which he already knew. The important thing is that the plea be genuine and that he not be deceived or coerced. *Allen v. Rodriguez*, 372 F.2d 116 (10th Cir. 1967) (decided under former law).

Validity where counsel, not defendant, responds to court's inquiries. — Prior to the adoption of this rule, it was held that a guilty plea would not be voided because the response to the court's inquiries was made by counsel rather than defendant. Further, it was held that the fact that the trial court failed to question defendant as to his understanding of the guilty plea, and its consequences, did not in itself provide a basis for post-conviction relief. *State v. Murray*, 1970-NMCA-045, 81 N.M. 445, 468 P.2d 416 (decided under former law).

Trial court determines whether guilty plea is voluntary. *State v. Gallegos*, 1977-NMCA-113, 91 N.M. 107, 570 P.2d 938 (decided under former law).

It is the trial court that determines whether a guilty plea is voluntary, whether a plea of guilty may be withdrawn and whether a guilty plea is invalid. *State v. Martinez*, 1978-NMSC-083, 92 N.M. 256, 586 P.2d 1085.

Although a trial judge need not specifically enumerate the trial rights a defendant waives by pleading guilty, the judge must be satisfied that the plea is being given voluntarily and with knowledge of its consequences. *Sena v. Romero*, 617 F.2d 579 (10th Cir. 1980).

The trial court must make the separate and distinct inquiry required by the second sentence of Subdivision (f) (*see now* Paragraph F). *State v. Lucero*, 1981-NMCA-143, 97 N.M. 346, 639 P.2d 1200.

Rejection of plea agreement draws into question voluntariness of plea. — When a trial judge rejects a plea agreement he removes the basis upon which the defendant entered his plea and draws into question the voluntariness of the plea; even where the

only "promise" was a prosecutorial recommendation for a lighter sentence, there nevertheless remains at least the taint of false inducement. *Eller v. State*, 1978-NMSC-064, 92 N.M. 52, 582 P.2d 824.

Plea not invalidated by reliance on counsel's advice. — The fact that defendant did rely on his counsel's advice does not establish that his plea was involuntary and does not set forth a basis for post-conviction relief. *Goodwin v. State*, 1968-NMCA-062, 79 N.M. 438, 444 P.2d 765 (decided under former law).

The district court did not abuse its discretion in summarily dismissing petition to withdraw guilty pleas. — Where, between 1989 and 2001, Petitioner pleaded guilty three times to misdemeanor driving while intoxicated charges in San Juan County municipal courts, and where, in 2003, Petitioner pleaded guilty to a fourth DWI in the Eleventh Judicial District Court, which resulted in a fourth degree felony conviction pursuant to NMSA 1978, Section 66-8-102(G), and where Petitioner was sentenced to eighteen months incarceration which ended in 2006, and where, in 2020, Petitioner filed a Rule 5-803 petition and sought to invalidate all four pleas, asserting that the judges in each plea hearing failed to advise the Petitioner on the record of the essential elements of the charged crime and ensure that he understood those elements, and where the district court summarily dismissed the petition, the district court did not abuse its discretion in summarily dismissing the petition, because Petitioner failed to meet his burden to establish that the misdemeanor pleas, which were not on the record, were not knowing and voluntary, and the record of the fourth plea colloquy demonstrated that Petitioner actually understood how his conduct satisfied the elements of the charges against him and therefore his guilty plea was knowing and voluntary. *State v. McGarrh*, 2022-NMCA-036.

Effect of time before arrest and arraignment. — The length of time between arrest and arraignment may be one of the factors which creates a coercive atmosphere in violation of the due process clause of U.S. Const., amend. XIV. *State v. Ortiz*, 1967-NMSC-006, 77 N.M. 316, 422 P.2d 355 (decided under former law).

Raising of certain issues for first time on appeal prohibited. — The issue of voluntariness of a guilty plea cannot be raised for the first time on appeal nor may issues directed to the trial court's procedure in accepting a guilty plea, such as claimed violations of this rule, be raised for the first time on appeal. *State v. Brakeman*, 1975-NMCA-081, 88 N.M. 153, 538 P.2d 795, cert. denied, 88 N.M. 318, 540 P.2d 248.

VIII. RECORD OF PROCEEDINGS.

Use of record and trial order on appeal. — Order of trial which stated that the court interrogated the defendant and was satisfied that he voluntarily and intelligently entered a plea of guilty, having been advised of the constitutional rights which he was waiving and the sentence which could be imposed, and which was not attacked in the trial court or on appeal, together with the record of the hearing, was sufficient to show that defendant's plea of guilty to charge of unlawful possession of amphetamines was

voluntarily and understandingly made. *State v. Bachicha*, 1972-NMCA-137, 84 N.M. 395, 503 P.2d 1173, cert. denied, 84 N.M. 390, 503 P.2d 1168 (decided under former law).

IX. WAIVER OF ARRAIGNMENT.

Waiver of arraignment by stipulation and going to trial. — Where, in pretrial stipulation, defendant waived the time limitations for arraignment and agreed arraignment could be held on or before trial date, when no arraignment was held, case was called for trial, and defendant announced ready for trial and proceeded thereto, right to be arraigned was effectively waived. *State v. Dosier*, 1975-NMCA-031, 88 N.M. 32, 536 P.2d 1088, cert. denied, 88 N.M. 28, 536 P.2d 1084.

5-304. Pleas.

A. **Alternatives.**

(1) In general. The attorney for the state and the attorney for the defendant, or the defendant when acting pro se, may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or no contest to a charged offense or to a lesser or related offense, the attorney for the state will move for dismissal of other charges, or will recommend or not oppose the imposition of a particular sentence, or will do both. A judge who presides over any phase of a criminal proceeding shall not participate in plea discussions. A judge, or judge pro tempore, not presiding over the criminal proceeding, may be assigned to participate in plea discussions to assist the parties in resolving a criminal case in a manner that serves the interests of justice.

(2) With the approval of the court and the consent of the state, a defendant may enter a conditional plea of guilty or no contest, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified pre-trial motion. A defendant who prevails on appeal shall be allowed to withdraw the plea.

B. **Notice.** If a plea agreement has been reached by the parties which contemplates entry of a plea of guilty or no contest it shall be reduced to writing substantially in the form approved by the Supreme Court. The court shall require the disclosure of the agreement in open court at the time the plea is offered and shall advise the defendant as required by Paragraph F of Rule 5-303 NMRA. If the plea agreement was not made in exchange for a guaranteed, specific sentence and was instead made with the expectation that the state would only recommend a particular sentence or not oppose the defendant’s request for a particular sentence, the court shall inform the defendant that such recommendations and requests are not binding on the court. Thereupon the court may accept or reject the agreement, or may defer its decision as to acceptance or rejection until there has been an opportunity to consider the presentence report.

C. **Acceptance of plea.** If the court accepts a plea agreement that was made in exchange for a guaranteed, specific sentence, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement. If the court accepts a plea agreement that was not made in exchange for a guaranteed, specific sentence, the court may inform the defendant that it will embody in the judgment and sentence the disposition recommended or requested in the plea agreement or that the court's judgment and sentence will embody a different disposition as authorized by law.

D. **Rejection of plea.** If the court rejects a plea agreement, the court shall inform the parties of this fact, advise the defendant personally in open court that the court is not bound by the plea agreement, afford either party the opportunity to withdraw the agreement and advise the defendant that if the defendant persists in a guilty plea or plea of no contest the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement. This paragraph does not apply to a plea for which the court rejects a recommended or requested sentence but otherwise accepts the plea.

E. **Time of plea agreement procedure.** Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at such time, as may be fixed by the court.

F. **Inadmissibility of plea discussions.** Evidence of a plea of guilty, later withdrawn, a plea of no contest, or of an offer to plead guilty or no contest to the crime charged or any other crime, or of statements made in connection with any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer.

G. **Determining accuracy of plea.** Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

H. **Form of written pleas.** A plea and disposition agreement or a conditional plea shall be submitted substantially in the form approved by the Supreme Court.

[As amended, effective August 1, 1989; January 15, 1998; as amended by Supreme Court Order No. 10-8300-028, effective December 3, 2010; as provisionally amended by Supreme Court Order No. 22-8300-002, effective for all cases pending or filed on or after January 18, 2022.]

Committee commentary. — Paragraphs A through F of this rule provide for a "plea bargaining" procedure. They originally were taken verbatim from proposed Rule 11(e) of the Federal Rules of Criminal Procedure. *See* 62 F.R.D. 271, 276, 280-86 (1974). Prior to the adoption of Paragraph A of this rule, judicial involvement in plea bargaining in New Mexico varied with the interest of the individual district court judges. The propriety of judicial involvement had been questioned by the Supreme Court. *See State v.*

Scarborough, 1966-NMSC-009, ¶ 14, 75 N.M. 702, 410 P.2d 732. By the adoption of this rule, the Court specifically eliminated all judicial involvement in the plea bargaining discussions. Under the rule as originally written, the judge's role was explicitly limited to acceptance or rejection of the bargain agreed to by counsel for the state, defense counsel, and defendant. *See generally* 62 F.R.D. 271, 283-84 (1974). Although not categorically abandoning this approach, the Court's 2022 provisional amendment to the rule temporarily allows for some limited judicial involvement in plea discussions in order to streamline the processing of criminal cases during the COVID-19 public health emergency. For the administrative order issued by the Court in conjunction with the order provisionally approving the rule amendments, *see* Supreme Court Order No. 22-8500-002.

Paragraph B of this rule requires the parties to reduce the agreement to writing. It may be held that the defendant was denied effective assistance of counsel if he is advised to plead guilty without a written plea agreement. *See State v. Lucero*, 97 N.M. 346, 351, 639 P.2d 1200, 1205 (Ct. App. 1981).

With the exception of Paragraph D of this rule, providing for withdrawal of the plea when the court rejects the plea bargain, this rule does not govern the withdrawal of a plea. Withdrawal of a voluntary plea is within the discretion of the court. *State v. Brown*, 33 N.M. 98, 263 P. 502 (1927); *Santobello v. New York*, 404 U.S. 257 (1971).

In *State v. Pieri*, 2009-NMSC-019, ¶ 29, 146 N.M. 155, 207 P.3d 1132, the Court overruled *Eller v. State*, 92 N.M. 52, 582 P.2d 824 (1978), and held that "if the court rejects a sentence recommendation or a defendant's unopposed sentencing request, and the defendant was aware that the court was not bound to those recommendations or requests, the court need not afford the defendant the opportunity to withdraw his or her plea." But within the context of a plea that leads to a subsequent request by the state to enhance the sentence for the crime that was the subject of the plea, the Court in *Marquez v. Hatch*, 2009-NMSC-040, ¶ 13, 146 N.M. 556, 212 P.3d 1110, held that if the defendant is not advised of the possible sentence enhancements at the time of the plea "the court should conduct a supplemental plea proceeding to advise the defendant of the likely sentencing enhancements that will result, and determine whether the defendant wants to withdraw the plea in light of the new sentencing enhancement information."

[As amended by Supreme Court Order No. 10-8300-028, effective December 3, 2010; as amended by Supreme Court Order No. 16-8300-025, effective for all cases pending or filed on or after December 31, 2016; as provisionally amended by Supreme Court Order No. 22-8300-002, effective for all cases pending or filed on or after January 18, 2022.]

ANNOTATIONS

The 2022 amendment, approved by Supreme Court Order No. 22-8300-002, effective January 18, 2022, amended the committee commentary, and in Paragraph A(1),

deleted “The court shall not participate in any such discussions”, and added “A judge who presides over any phase of a criminal proceeding shall not participate in plea discussions. A judge, or judge pro tempore, not presiding over the criminal proceeding, may be assigned to participate in plea discussions to assist the parties in resolving a criminal case in a manner that serves the interests of justice.”

The 2016 amendment, approved by Supreme Court Order No. 16-8300-025, effective December 31, 2016, amended the committee commentary by deleting the American Bar Association’s recommended considerations in dealing with a request to withdraw a guilty plea; and in the third paragraph of the committee commentary, after “*Santobello v. New York*, 404 U.S. 257 (1971)”, deleted the remainder of the paragraph.

The 2010 amendment, approved by Supreme Court Order No. 10-8300-028, effective December 3, 2010, in Paragraphs A(1) and (2) after "no contest", deleted "or guilty but mentally ill"; in Paragraph B, after "no contest", deleted " or guilty but mentally ill in the expectation that a specific sentence will be imposed or that other charges before the court will be dismissed"; in the second sentence, after "the plea is offered", added the remainder of the sentence; and added the third sentence; in Paragraph C, in the first sentence, after "accepts a plea agreement", added "that was made in exchange for a guaranteed, specific sentence", and added the last sentence; in Paragraph D, deleted "or guilty but mentally ill", and added the last sentence; in Paragraph F, deleted both references to "or guilty but mentally ill"; and in Paragraph G, deleted "guilty but mentally ill."

The 1997 amendment, effective January 15, 1998, substituted "Pleas" for "Plea agreements" in the Rule heading, in Paragraph A, substituted "Alternatives" for "In general" as the Paragraph heading, deleted the last sentence of former Paragraph A, redesignated the remainder of Paragraph A as A (1) and added Subparagraph A (2), in Paragraph B, substituted "substantially in the form" for "on a form" in the first sentence and added Paragraph H.

Compiler's notes. — This rule is similar to Rule 11(e) of the Federal Rules of Criminal Procedure.

Cross references. — For plea and disposition agreement form, *see* Rule 9-408 NMRA.

Rejection of sentencing recommendation in a plea agreement. — A court is not required to afford a defendant the opportunity to withdraw his or her plea when it rejects a sentencing recommendation or a defendant’s unopposed sentencing request, so long as the defendant has been informed that the sentencing recommendation or request is not binding on the court. However, if the defendant and the state have bargained for a specific sentence and the court rejects the specific sentence, the court must give the defendant an opportunity to withdraw his or her plea agreement. *State v. Pieri*, 2009-NMSC-019, 146 N.M. 155, 207 P.3d 1132, *overruling Eller v. State*, 1978-NMSC-064, 92 N.M. 52, 582 P.2d 824.

Breach of plea agreement. — Where the state agreed not to oppose the defendant's request for a suspended sentence on the condition that the defendant testify truthfully in a pending case against the defendant's spouse; the district court held the defendant's sentencing hearing before the defendant had an opportunity to testify in the case against the defendant's spouse; and the state opposed a suspended sentence because the defendant had not satisfied the conditions of the agreement, the state breached its agreement and the defendant should have either been afforded specific performance of the agreement or have been allowed to withdraw the defendant's plea. *State v. Pieri*, 2009-NMSC-019, 146 N.M. 155, 207 P.3d 1132, *overruling Eller v. State*, 1978-NMSC-064, 92 N.M. 52, 582 P.2d 824 (1978).

A plea-bargained sentence must be fulfilled by the prosecution. — When a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise or agreement must be fulfilled. *State v. King*, 2015-NMSC-030.

Where detective, relaying a message from the prosecutor, promised defendant that a tampering charge would be dismissed in exchange for defendant showing the police the location of the murder weapon, and where defendant, relying on this agreement, led police to the murder weapon, it was reasonable for defendant to believe that the tampering charge would be dismissed, and it was incumbent upon the prosecutor to fulfill his promise; where prosecution breached this agreement, specific performance of the agreement was the appropriate remedy. *State v. King*, 2015-NMSC-030.

The district court's denial of defendant's motion to withdraw guilty plea was not an abuse of discretion where defense counsel was not ineffective. — Where defendant moved to withdraw his guilty plea to criminal sexual penetration and criminal sexual contact of a minor, claiming that defense counsel was ineffective, the district court did not abuse its discretion in denying defendant's motion where, although defense counsel erroneously informed defendant that his DNA was found on the couch where the incident occurred, defendant failed to establish that he was prejudiced by counsel's performance. Moreover, the evidence against defendant was significant and there was sufficient evidence in the record to support the district court's determination that defendant made a strategic decision to plead guilty. Defendant failed to show that there was a reasonable probability that but for counsel's error regarding the non-existent DNA evidence he would not have pleaded guilty and, instead, would have insisted on going to trial. *State v. Montano*, 2019-NMCA-019, cert. denied.

Withdrawal of plea warranted where counsel fails to advise defendant regarding the immigration consequences of a plea. — The voluntariness of a guilty plea depends on whether counsel provided the effective assistance to which defendants are constitutionally entitled; improper advice regarding immigration consequences can undermine the knowing and voluntary nature of a guilty plea and render it invalid. *State v. Tejeiro*, 2015-NMCA-029.

Where defendant, who pleaded guilty to a drug trafficking charge, never received competent counsel but rather received incorrect advice regarding the immigration consequences of his plea, and where defendant also established a reasonable probability that he would have rejected the plea if aware of those consequences, thus demonstrating prejudice, defendant's plea could not have been knowing and voluntary. *State v. Tejeiro*, 2015-NMCA-029.

Defendant has the burden to show that the defendant was not advised about the immigration consequences of plea. — Where the defendant, who entered guilty pleas and no contest pleas, seeks relief from the defendant's convictions on the ground that the defendant's attorney failed to advise the defendant of the specific immigration consequences of the defendant's pleas; the defendant is seeking relief on the basis that the defendant's counsel was constitutionally ineffective; the defendant has the burden to show that the defendant's attorney failed to advise the defendant about the specific immigration consequences of the defendant's pleas and the defendant must show that if it were not for the attorney's failure to properly advise defendant, the defendant would not have made the pleas. *State v. Tran*, 2009-NMCA-010, 145 N.M. 487, 200 P.3d 537.

Failure to plead or make prima facie case that defendant was not advised of the immigration consequences of a guilty plea or no contest plea. — Where the defendant asserted that there was no concrete and certain evidence that the defendant had been advised of the specific immigration consequences of the defendant's guilty pleas and no contest pleas; asserted that the court cannot assume that the defendant's attorney advised the defendant about the immigration consequences of the pleas; and asserted that the record contained no evidence that the defendant's attorney advised the defendant about the immigration consequences of the pleas; the defendant failed to plead or make a prima facie case that he was denied the effective assistance of counsel. *State v. Tran*, 2009-NMCA-010, 145 N.M. 487, 200 P.3d 537.

No contest plea. — A court is not required to inquire into whether there is a factual basis for a no contest plea. *State v. Vincent*, 2005-NMCA-064, 137 N.M. 462, 112 P.3d 1119, cert. granted, 2005-NMCERT-005.

State case law fails to make distinction between pre-sentence plea withdrawals and requests for withdrawal after sentencing. *State v. Hunter*, 2005-NMCA-089, 138 N.M. 96, 117 P.3d 254, cert. granted, 2005-NMCERT-007.

Effect of committee commentary. — Although this rule does not expressly address withdrawal of pleas, the committee commentary to this rule, citing the recommendations of the American Bar Association Standards relating to Pleas of Guilty, provides guidance. *State v. Hunter*, 2005-NMCA-089, 138 N.M. 96, 117 P.3d 254, cert. granted, 2005-NMCERT-007.

The commentary to this rule draws a rather sharp distinction in Subparagraphs (a) and (b) between pre-sentence and other motions to withdraw. *State v. Hunter*, 2005-NMCA-089, 138 N.M. 96, 117 P.3d 254, cert. granted, 2005-NMCERT-007.

Defendant has burden of proving fair and just reason exists for the withdrawal of a pre-sentence plea. *State v. Hunter*, 2005-NMCA-089, 138 N.M. 96, 117 P.3d 254, cert. granted, 2005-NMCERT-007.

Factors used by federal courts adopted. — In evaluating whether a fair and just reason exists for the withdrawal of a pre-sentence plea, the factors used by the federal courts are adopted. *State v. Hunter*, 2005-NMCA-089, 138 N.M. 96, 117 P.3d 254, cert. granted, 2005-NMCERT-007.

In reviewing pre-sentence plea withdrawal request, the district court in its discretion may allow the defendant to withdraw a plea of guilty or no contest for any fair and just reason unless the prosecution has been substantially prejudiced by reliance upon the defendant's plea. *State v. Hunter*, 2005-NMCA-089, 138 N.M. 96, 117 P.3d 254, cert. granted, 2005-NMCERT-007.

Standard for post-sentencing plea withdrawals is manifest injustice. *State v. Hunter*, 2005-NMCA-089, 138 N.M. 96, 117 P.3d 254, cert. granted, 2005-NMCERT-007.

Pre-trial confinement did not create a coercive condition that warranted withdrawal of defendant's guilty plea. — Where defendant was indicted on 211 counts of securities fraud, forgery and identity theft, and where defendant pleaded guilty to 13 counts of securities fraud and one count of conspiracy to commit securities fraud, and where the plea and disposition agreement provided an avenue under which defendant could possibly serve no jail time, the district court did not err in imposing a $250,000 cash-only bond after evaluating defendant's conditions of release on three separate occasions, and basing its decision on the crimes with which defendant was charged, the facts about defendant's alleged scheme, the impact on the victim, the potential financial resources of defendant and his extended family, and the strength of the state's case, and therefore the fact that defendant was confined pretrial, on its own, did not create a coercive condition that warranted withdrawal of defendant's plea. *State v. Turner*, 2017-NMCA-047, cert. denied.

Defendant's claims of inhumane conditions of jail insufficient to warrant withdrawal of guilty plea. — Where defendant was indicted on 211 counts of securities fraud, forgery and identity theft, and where defendant pleaded guilty to 13 counts of securities fraud and one count of conspiracy to commit securities fraud, the district court did not err in denying defendant's motion to withdraw his guilty plea on the grounds that the deplorable conditions of the jail created a coercive condition that rendered his guilty plea involuntary, because at the plea hearing, defendant confirmed that nobody had threatened him or promised him anything in exchange for his plea, defendant made no mention of the conditions of his confinement until nine months later, and defendant informed the court that he was motivated to plead guilty because the state agreed to dismiss 197 counts, and the record supports that defendant pleaded guilty as part of a bargained-for transaction. *State v. Turner*, 2017-NMCA-047, cert. denied.

Subdivision (g) (*see now* Paragraphs A to F) is similar to Rule 11(e) of the Federal Rules of Criminal Procedure. *Eller v. State*, 1978-NMSC-064, 92 N.M. 52, 582 P.2d 824.

Rule was designed to obtain disclosure. *State v. Lord*, 1977-NMCA-139, 91 N.M. 353, 573 P.2d 1208, cert. denied, 91 N.M. 491, 576 P.2d 297 (1978).

Reliance on rule by defendant. — The determinative factor in excluding statements pursuant to Rule 11-410 NMRA (similar to this rule) is whether it may be naturally inferred that the defendant relied on the rule in deciding to break silence, because the rule encourages cooperation only if the defendant relied on it. *State v. Anderson*, 1993-NMSC-077, 116 N.M. 599, 866 P.2d 327.

Presumption of reliance. — To assure "fairness", when a suspect is induced by the state to engage in plea negotiations, as in formal plea negotiations with a state attorney or an agent of the attorney, there will be an irrebuttable presumption that such person has relied on the rule in breaking his silence, and all statements made during the course of "making a deal" are inadmissible in future proceedings, whether the statements are offers to confess or offers to plead guilty, and regardless of whether the declarant has been formally charged with a crime. The court may be guided by the established standards of voluntariness in finding inducement by the state. *State v. Anderson*, 1993-NMSC-077, 116 N.M. 599, 866 P.2d 327.

Absent a finding by the court that statements were made with the belief they could not be "held against" the declarant, if a defendant or suspect makes uninduced statements after receiving *Miranda* warnings (i.e., being told that any statement made may be used against such person in court), there is no reason to presume that such person was motivated to make inculpatory statements in reliance on some rule of inadmissibility. *State v. Anderson*, 1993-NMSC-077, 116 N.M. 599, 866 P.2d 327.

Agreement not to prosecute is not plea bargain unless defendant pleads guilty or is granted immunity. *State v. Doe*, 1984-NMCA-114, 103 N.M. 178, 704 P.2d 432.

Sentence recommendation permitted. — The state, by offering the defendant a mandatory minimum sentence, did not propose an illegal plea bargain by allegedly invading the court's sentencing province. Even if the defendant had accepted the plea offer, the prosecutor did no more than recommend the imposition of a particular sentence, as permitted by this rule. The court still would have retained the right to accept or reject the plea bargain and make an independent decision regarding the appropriate sentence. *State v. Taylor*, 1988-NMSC-023, 107 N.M. 66, 752 P.2d 781.

Defendant’s understanding of ambiguous plea agreement controls. — A district court is required to clarify any ambiguity in a plea agreement, including those related to sentencing provisions, before it decides whether to accept or reject the plea agreement. If the district court does not resolve the ambiguity, the language in the plea agreement

will be construed in favor of a defendant's reasonable understanding of the agreement. *State v. Miller*, 2013-NMSC-048, *rev'g in part* 2012-NMCA-051, 278 P.3d 561.

Where defendant entered into a plea agreement and pled guilty to four second-degree felonies and two third-degree felonies; the agreement provided that the sentence for each count would run concurrently, that the maximum sentence at initial sentencing would be 40 years, and that the remaining two years of the 42 year exposure would run concurrent with parole of two years; the district court sentenced defendant to concurrent sentences for a total incarceration of 42 years; the State argued that the agreement provided for 42 years of total incarceration if defendant violated probation after serving the initial sentence; defendant reasonably understood the agreement to provide that defendant would face no more than 40 years of incarceration under any circumstance; and the district court never resolved the ambiguity by clarifying the actual number of years defendant could be incarcerated for the balance of the sentence if defendant violated probation, the ambiguity would be resolved in favor of defendant's reasonable understanding of the agreement. *State v. Miller*, 2013-NMSC-048, *rev'g in part* 2012-NMCA-051, 278 P.3d 561.

Defendant's understanding of plea controls. — Since plea agreements should be interpreted in accordance with what the defendant reasonably understood when he entered his plea, the issue of whether the trial court breached the plea agreement after accepting it is a question of law that is reviewable de novo by an appellate court, and any ambiguity in the plea agreement should be construed against the State. Since the defendant understood the plea agreement provided for nine years incarceration and that at least seven years was to be suspended on condition that he be placed on probation, the subsequent imposition of nine years incarceration following probation revocation violated his plea assignment. *State v. Mares*, 1994-NMCA-079, 118 N.M. 217, 880 P.2d 314 (Ct. App.), *rev'd on other grounds*, 1994-NMSC-123, 119 N.M. 48, 888 P.2d 930.

Guilty plea not set aside where alleged promise not disclosed. — Defendant's claim of an unkept promise by the state, when based on his own failure to disclose the alleged promise, does not require his guilty plea to be set aside. He cannot take advantage of his own nondisclosure. *State v. Lord*, 1977-NMCA-139, 91 N.M. 353, 573 P.2d 1208, cert. denied, 91 N.M. 491, 576 P.2d 297 (1978).

Secret plea agreements are impermissible under these rules. *State v. Lucero*, 1981-NMCA-143, 97 N.M. 346, 639 P.2d 1200.

State must present some evidence to carry burden of validly obtained pleas. — Although it is settled law that the absence of the record of the guilty plea proceedings does not establish the invalidity of the pleas, the state must present some evidence in order to carry its burden of persuasion that the pleas were validly obtained. *State v. Garcia*, 1980-NMSC-132, 95 N.M. 246, 620 P.2d 1271.

Failure to utilize the form set out in Rule 9-408 NMRA did not invalidate a guilty plea where there were adequate indicia that the plea was knowing and voluntary. *State v.*

Jonathan B., 1998-NMSC-003, 124 N.M. 620, 954 P.2d 52, cert. denied, 525 U.S. 865, 119 S. Ct. 155, 142 L. Ed. 2d 127 (1998).

Effect of accepting plea bargain. — Having obtained the advantage of the dismissal of other charges, defendant should not be permitted to welch on his part of the bargain. By his guilty pleas pursuant to a plea bargain that has not been questioned, defendant waived any right to attack the validity of those guilty pleas. *State v. Gallegos*, 1977-NMCA-113, 91 N.M. 107, 570 P.2d 938.

Generally, where change of plea to guilty valid. — Where the motion, affidavit and record in the cause clearly show or imply: (1) that the defendant was represented by a competent attorney; (2) that the plea discussion was between the assistant district attorney and defendant's attorney; (3) that defendant's attorney informed and discussed with defendant the proposal made by the assistant district attorney; (4) that defendant's attorney informed the court that defendant wished to change his plea to guilty, and this was done in the hearing and presence of defendant; (5) that defendant himself advised the court he wished to change his plea to guilty, and this was done in the hearing and presence of his attorney; (6) that defendant advised the court that he was voluntarily changing his plea to guilty, and this was done in the hearing and presence of his attorney; (7) that defendant and his attorney fully understood the consequences of the plea of guilty; and (8) that defendant and his attorney waived a presentence report, requested that the sentence be pronounced and acquiesced in and agreed to the sentence, and defendant thanked the court, nothing further was required to conclusively show that defendant did voluntarily change his plea from not guilty to guilty after proper advice from competent counsel, that he did understand the consequences of his act in changing his plea, and that he is not entitled to relief. *State v. Robbins*, 1967-NMSC-091, 77 N.M. 644, 427 P.2d 10, cert. denied, 389 U.S. 865, 88 S. Ct. 130, 19 L. Ed. 2d 137 (1967) (decided under former law).

Plea negotiation involves exchange of concessions and advantages between the state and the accused. *State v. Gallegos*, 1977-NMCA-113, 91 N.M. 107, 570 P.2d 938.

Action of court upon discovering plea involuntary. — It is a fundamental rule of criminal procedure that a judgment and sentence cannot stand if based upon an involuntary plea of guilty induced by an unkept promise of leniency. A guilty plea induced by either promises or threats which deprive it of the character of a voluntary act is void and subject to collateral attack. To withhold the privilege of withdrawing a guilty plea in order to reassume the position occupied prior to its entry would constitute a denial of due process of law. *State v. Ortiz*, 1967-NMSC-104, 77 N.M. 751, 427 P.2d 264 (decided under former law).

No constitutional right to have court accept guilty plea. — A trial judge need not accept every constitutionally valid guilty plea merely because a defendant wishes so to plead; a criminal defendant does not have an absolute right under the federal constitution to have his guilty plea accepted by the court although the states may by

statute or otherwise confer such a right. *State v. Jiminez*, 1976-NMCA-096, 89 N.M. 652, 556 P.2d 60.

Court has discretionary power to refuse to accept guilty plea, and the trial court did not err in refusing to accept a guilty plea proffered by defendant immediately prior to trial and after the close of the state's case to two of four counts in the indictment (aggravated assault and assault with intent to commit a violent felony) when he was also charged with first-degree criminal sexual penetration and aggravated battery. *State v. Jiminez*, 1976-NMCA-096, 89 N.M. 652, 556 P.2d 60.

The trial judge has discretion to accept or reject a guilty plea, which will not be disturbed on appeal unless he abuses his discretion. *State v. Holtry*, 1981-NMCA-149, 97 N.M. 221, 638 P.2d 433.

"Abuse of discretion" test applicable. — The "abuse of discretion" test applies when a trial judge accepts or rejects a plea and disposition agreement. *State v. Holtry*, 1981-NMCA-149, 97 N.M. 221, 638 P.2d 433.

Unduly light sentence sound reason for rejecting agreement. — A decision that a plea bargain will result in the defendant's receiving too light a sentence under the circumstances of the case is a sound reason for a judge's refusing to accept the agreement. *State v. Holtry*, 1981-NMCA-149, 97 N.M. 221, 638 P.2d 433.

Refusal to accept agreement did not demonstrate judicial bias. — Judge's refusal to accept a tendered plea agreement did not demonstrate judicial bias or prejudice, where, when the plea and disposition agreement was tendered, the judge reserved ruling on it until he could consider a presentence report, information on treatment programs, and written statements from the victim of the crime and her brother regarding their feelings and views on the proposed disposition. *State v. Swafford*, 1989-NMCA-069, 109 N.M. 132, 782 P.2d 385.

Plea agreements, absent constitutional invalidity, are binding upon both parties. *State v. Bazan*, 1982-NMCA-018, 97 N.M. 531, 641 P.2d 1078, *overruled on other grounds by State v. Ball*, 1986-NMSC-030, 104 N.M. 176, 718 P.2d 686.

Defendant waives right to appeal by entering into plea and disposition agreement. *State v. Bazan*, 1982-NMCA-018, 97 N.M. 531, 641 P.2d 1078, *overruled on other grounds by State v. Ball*, 1986-NMSC-030, 104 N.M. 176, 718 P.2d 686.

Requirements of a valid conditional plea. — Conditional pleas must meet the requirements of court approval, prosecutorial consent, issue preservation and reservation, meaning that there must be an adverse determination of any specified pre-trial motion and that the defendant must specify the issue or issues that the defendant is reserving for appellate review. *State v. Winters*, 2015-NMCA-050, *cert. denied*, 2015-NMCERT-004.

Where defendant indicated, at his plea hearing, that he wished to enter into a conditional plea of no contest to reserve an issue for appeal, without specifying any particular issue, defendant failed to preserve and reserve a specific issue for appellate review; without an adverse determination from the court or alleged error on which to base appellate review, defendant did not enter a valid conditional plea reserving his right to appeal an evidentiary ruling. *State v. Winters*, 2015-NMCA-050, *cert. denied*, 2015-NMCERT-004.

Withdrawal of guilty plea appropriate where defendant was not properly advised of the nature of the charges. — Where the state filed three criminal informations against defendant, each of which charged defendant with fraud and embezzlement against separate victims, and where defendant and the state entered into plea agreements under which defendant agreed to plead guilty to the fraud and embezzlement charges in all three cases, and where, during the change of plea hearing, defendant stated that he understood the charges to which he was pleading and acknowledged that the state had some evidence to prove his guilt of all the charges in all three cases, and where, following the district court's acceptance of the guilty pleas in all three cases and sentencing defendant to twenty-one years imprisonment, defendant moved to withdraw his guilty plea, claiming that he did not understand the basis for his fraud and embezzlement convictions, the trial court erred in denying defendant's motion to withdraw his guilty plea, because defendant did not knowingly and voluntarily plead guilty. The district court accepted defendant's guilty pleas without providing him with any explanation of the charges to which he pleaded guilty, much less an explanation of how his conduct in each case satisfied the essential elements of both fraud and embezzlement, which under the circumstances of this case were mutually exclusive because the same conduct cannot satisfy the essential elements of both fraud and embezzlement. *State v. Yancey*, 2021-NMCA-009, cert. denied.

Whether a plea is knowing and voluntary must be assessed from the totality of the circumstances. — Where defendant was charged in several related cases with fraud, embezzlement, and racketeering, and where, upon advice of counsel, he entered into three plea and disposition agreements which were recorded upon the standardized plea-agreement forms approved by the New Mexico Supreme Court, and where the district court accepted and recorded defendant's guilty pleas at a plea hearing, the trial court did not err in denying defendant's motion to withdraw his pleas despite defendant never expressly pleaded guilty in open court to any crime, because no talismanic incantation of the words "I plead guilty" is required in order for a defendant to plead guilty, and, in this case, defendant informed the court that his pleas were voluntary and that he understood and consented to the terms of the plea agreements, including the range of sentences that the court could impose in all three cases. *State v. Yancey*, 2019-NMSC-018, *rev'g* 2017-NMCA-090, 406 P.3d 1050.

Judgment and sentence entered pursuant to a plea agreement is void in the absence of an express guilty plea on the record. — Where defendant was charged with three counts of fraud, three counts of embezzlement and two counts of racketeering in three separate criminal complaints, and where defendant made a

separate plea agreement in each case, and where at the plea hearing on all three complaints, the district court complied with the prerequisites set forth in Rules 5-303 and 5-304 NMRA, ensuring that the proposed guilty plea was voluntary and intelligent, but where the district court never specifically asked defendant to plead, and defendant never expressly admitted his guilt to anything in open court on the record in the hearing, the district court was without authority to sentence defendant, because in the absence of an express guilty plea on the record, a judgment and sentence that is entered pursuant to the plea agreement is void. *State v. Yancey*, 2017-NMCA-090, cert. granted.

A valid conditional plea requires preservation of the issue reserved for appeal. — Where defendant pleaded no-contest to child solicitation by electronic communication device, reserving the right to appeal the issue of whether due process required that defendant be advised that he would be required upon conviction to register as a sex offender at the time he was charged in 2011, instead of at the time he pleaded guilty in 2014, defendant failed to preserve the issue for appellate review by making a pretrial motion to the district court and invoking a ruling on the due process issue. *State v. Morgan*, 2016-NMCA-089, cert. denied.

Right to appeal preserved. — Where the "Waiver of Defenses and Appeal" provision of the plea agreement was crossed out; and the child had previously filed a motion to suppress evidence that had been obtained during a search of the child's backpack at school, the child preserved the right to appeal the district court's denial of the child's motion to suppress the evidence. *State v. Gage R.*, 2010-NMCA-104, 149 N.M. 14, 243 P.3d 453.

Reservation of right to appeal inadvertently broadened by the court. — Where defendant, who was charged with DWI, entered into a conditional plea and disposition agreement in which defendant waived the right to a jury trial and the right to appeal the DWI conviction that resulted from entry of the agreement; defendant reserved the right to appeal the district court's denial of defendant's motion to suppress evidence arising from a traffic stop and waived all other motions and defenses; in the district court's judgment and sentence, the district court stated that defendant reserved the right to appeal the denial of the motion to suppress and the right to appeal any other issues arising and pertaining to the case; the district court broadened the agreement to permit a carte blanche appeal without any discussion with or agreement of the State; and defendant appealed the denial of the motion to suppress, the State's alleged inappropriate dismissal of charges in magistrate court and refiling of charges in district court, and the alleged violation of defendant's right to a speedy trial and to a jury trial, defendant clearly did not reserve a right to appeal based on the conduct of the prosecution or on the right to a speedy trial or a jury trial. *State v. Salas*, 2014-NMCA-043, cert. denied, 2014-NMCERT-003.

Once a plea is accepted, the court is bound by the dictates of due process to honor the plea agreement and is barred from imposing a sentence which is outside the parameters of the plea agreement. *State v. Sisneros*, 1981-NMCA-085, 98 N.M. 279,

648 P.2d 318, *aff'd in part, rev'd on other grounds*, 1982-NMSC-068, 98 N.M. 201, 647 P.2d 403, *aff'd*, 1984-NMSC-085, 101 N.M. 679, 687 P.2d 736.

Withdrawal of plea agreement by the court. — Where defendant entered into a plea agreement, which required defendant to make restitution to investors in defendant's limited liability company; at the plea hearing, the court informed defendant that the court's primary concern was to ensure that the victims of defendant's crimes received maximum restitution and defendant represented to the court that defendant would make a substantial and immediate lump-sum restitution payment; the plea agreement did not specifically reference a lump-sum payment; the court orally sentenced defendant; and defendant was either unable or unwilling to make the payment, the court did not abuse its discretion in withdrawing the plea agreement. *State v. Soutar*, 2012-NMCA-024, 272 P.3d 154.

Plea agreements will be specifically enforced. — Where defendant entered into three plea agreements in which the state agreed that defendant would serve zero to nine years of incarceration, supervised probation, treatment program, or a combination thereof and that the sentences in each case would be served concurrently with each other; and the district court accepted the plea agreements and sentenced defendant to twenty-one years in prison, with sixteen years suspended, for an actual prison term of five year, plus five years of supervised probation, the sentence violated the terms of the plea agreements because the suspended sentence allowed for the possibility that defendant could actually serve more than nine years in prison and defendant was entitled to specific performance of the plea agreements. *State v. Gomez*, 2011-NMCA-120, 267 P.3d 831.

Plea agreement provided for a specific sentence. — Where the plea agreement provided for a maximum sentence of forty years and the court accepted the plea, the plea agreement constituted a promise, not a recommendation, for a sentence within a particular range that the court was bound to enforce and the imposition of a forty-two year sentence, nine of which were suspended, violated the sentence cap in the plea agreement. *State v. Miller,* 2012-NMCA-051, 278 P.3d 561, cert. granted, 2012-NMCERT-005.

Plea agreement for a maximum sentence "at initial sentencing". — Where the plea agreement provided for a maximum sentence of forty years "at initial sentencing", the phrase "at initial sentencing" did not transform the limit on sentencing into a limit on the initial period of incarceration because the sentence could not be increased at a later date and the court's sentence of forty-two years imprisonment, nine of which were suspended, violated the plea agreement. *State v. Miller,* 2012-NMCA-051, 278 P.3d 561, cert. granted, 2012-NMCERT-005.

Refusal by the trial court to follow a plea agreement worked out by the parties affords the defendant the opportunity to withdraw his plea. *State v. Sisneros*, 1981-NMCA-085, 98 N.M. 279, 648 P.2d 318, *aff'd in part, rev'd on other grounds*, 1982-

NMSC-068, 98 N.M. 201, 647 P.2d 403, *aff'd*, 1984-NMSC-085, 101 N.M. 679, 687 P.2d 736.

District court's failure to offer defendant the opportunity to withdraw his plea after the court refused to accept the prosecutor's sentencing recommendation pursuant to a plea agreement between the state and defendant was fundamental error, requiring a remand to the court with instructions either (1) to resentence defendant in conformity with the plea agreement or (2) to permit defendant to withdraw his plea. *State v. Bencomo*, 1990-NMCA-028, 109 N.M. 724, 790 P.2d 521.

Acceptance of plea by other than assigned judge. — Nothing in Paragraphs C or D prevents another judge vested with the same jurisdiction and with equal standing as the assigned judge, to accept a plea in the stead of the assigned judge when the assigned judge was unavailable. *State v. Martinez*, 2002-NMSC-008, 132 N.M. 32, 43 P.3d 1042.

Hearing on plea-withdrawal motion. — Trial court's refusal to hold an evidentiary hearing on defendant's plea-withdrawal motion was well within his discretion because the same judge presided over the trial, the plea change, and the sentencing; denial of the motion was reasonably based on personal observation. *State v. Guerro*, 1999-NMCA-026, 126 N.M. 699, 974 P.2d 669, cert. denied, 126 N.M. 533, 972 P.2d 352.

Refusal to reinstate plea. — The trial court properly refused to reinstate the defendant's earlier guilty plea since the plea had been withdrawn because the defendant's profession of innocence was supported by a factual basis inconsistent with guilt. *State v. Willis*, 1997-NMSC-014, 123 N.M. 55, 933 P.2d 854.

Paragraph F applicable to metropolitan court probation revocation proceedings. — Since Subdivision (g)(6) (*see now* Paragraph F) is applicable to district court proceedings on probation revocation, there is no reason why it should not apply to such metropolitan court proceedings. *State v. Baca*, 1984-NMCA-056, 101 N.M. 415, 683 P.2d 970.

Prosecution could use plea-related statements first introduced by defendant. — Having interjected taped conversations of statements made in connection with offers to plead into the trial for his own purposes, defendant could not properly complain of the prosecutor's use of the tapes on cross-examination to attack the credibility of defendant's trial testimony. *State v. Watkins*, 1979-NMCA-003, 92 N.M. 470, 590 P.2d 169.

Defendant, whose conduct fell within charge, not entitled to relief. — Where at arraignment inquiries made of defendant by the prosecuting attorney and defendant's answers furnished information sufficient to satisfy the court that defendant's conduct actually fell within the charges, defendant is not entitled to relief because of any shortcomings in the information given by the court, such as to severity of sentence, before accepting the plea. The court also said that recent federal cases holding that similar situations would be a basis for relief under federal rules, applied only to the

federal courts. *State v. Guy*, 1970-NMCA-080, 81 N.M. 641, 471 P.2d 675 (decided under former law).

Statements volunteered are not protected. — Letter voluntarily written by defendant initiating contact with the authorities is not within the protection of Rule 11-410 NMRA, even if the letter is viewed as an offer to plea bargain. *State v. Fernandez*, 1994-NMCA-056, 117 N.M. 673, 875 P.2d 1104.

Plea agreement admissible in habitual offender proceeding. — An unrelated plea agreement containing an admission of the defendant's identity in prior convictions was admissible for purposes of a habitual offender proceeding. *State v. Roybal*, 1995-NMCA-097, 120 N.M. 507, 903 P.2d 249.

Evidence of a plea of nolo contendere is inadmissible in any subsequent proceeding. — Where plaintiffs filed suit for damages against defendants, alleging fraud, constructive fraud, intentional misrepresentation, and conversion, claiming that defendants, during the formation of a joint business venture, failed to disclose a nineteen-year-old nolo contendere plea to a theft of trade secrets charge, and alleging that had plaintiffs known of the plea, they never would have agreed to go into business with defendants, the district court, in construing Rule 11-410 NMRA, did not err in granting defendants' motion for summary judgment, because the evidentiary rule prohibits the admission of a nolo contendere plea against the pleader in subsequent proceedings, thereby leaving plaintiffs unable to prove misrepresentation, a necessary element of their case. *Kipnis v. Jusbasche*, 2017-NMSC-006, *rev'g* 2015-NMCA-071, 352 P.3d 687.

Law reviews. — For article, "Defending the Criminal Alien in New Mexico: Tactics and Strategy to Avoid Deportation," see 9 N.M.L. Rev. 45 (1978-79).

For note, "Eller v. State: Plea Bargaining in New Mexico," see 9 N.M.L. Rev. 167 (1978-79).

For comment, "Definitive Sentencing in New Mexico: The 1977 Criminal Sentencing Act," see 9 N.M.L. Rev. 131 (1978-79).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law § 78 et seq.

Propriety of sentencing justice's consideration of defendant's failure or refusal to accept plea bargain, 100 A.L.R.3d 834.

Accused's right to sentencing by same judge who accepted guilty plea entered pursuant to plea bargain, 3 A.L.R.4th 1181.

Adequacy of defense counsel's representation of criminal client regarding plea bargaining, 8 A.L.R.4th 660.

Judge's participation in plea bargaining negotiations as rendering accused's guilty plea involuntary, 10 A.L.R.4th 689.

Right of prosecutor to withdraw from plea bargain prior to entry of plea, 16 A.L.R.4th 1089.

Sufficiency of court's statement, before accepting plea of guilty, as to waiver of right to jury trial being a consequence of such plea, 23 A.L.R.4th 251.

Power or duty of state court, which has accepted guilty plea, to set aside such plea on its own initiative prior to sentencing or entry of judgment, 31 A.L.R.4th 504.

Use of plea bargain or grant of immunity as improper vouching for credibility of witness - state cases, 58 A.L.R.4th 1229.

Guilty plea as affected by fact that sentence contemplated by plea bargain is subsequently determined to be illegal or unauthorized, 87 A.L.R.4th 384.

Effect, under Rule 11(e) of Federal Rules of Criminal Procedure, of plea bargain based on offer of leniency toward person other than accused, 50 A.L.R. Fed. 829.

Standards of Rule 11 of Federal Rules of Criminal Procedure, requiring personal advice to accused from court before acceptance of guilty plea, as applicable where accused's stipulation or testimony allegedly amounts to guilty plea, 53 A.L.R. Fed. 919.

What constitutes "rejection" of plea agreement under Rule 11(e)(4) of the Federal Rules of Criminal Procedure, allowing withdrawal of plea if court rejects agreements, 60 A.L.R. Fed. 621.

When is statement of accused made in connection with plea bargain negotiations so as to render statement inadmissible under Rule 11(e)(6) of the Federal Rules of Criminal Procedure, 60 A.L.R. Fed. 854.

Use of plea bargain or grant of immunity as improper vouching for credibility of witness in federal cases, 76 A.L.R. Fed. 409.

Right of access to Federal District Court guilty plea proceeding or records pertaining to entry or acceptance of guilty plea in criminal prosecution, 118 A.L.R. Fed. 621.

Choice of remedies where federal prosecutor has breached plea bargain - post-Santobello v. New York (1971) 404 U.S. 257, 30 L. Ed. 2d 427, 92 S. Ct. 495 cases, 120 A.L.R. Fed. 501.

Prohibition of federal judge's participation in plea bargaining negotiations under Rule 11(e) of Federal Rules of Criminal Procedure, 161 A.L.R. Fed. 537.

22 C.J.S. Criminal Law § 365 et seq.

ARTICLE 4
Release Provisions

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;

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

(c) if the defendant remains in custody pending a hearing under Rule 5-403(D) NMRA, then within three (3) days after the date of the initial hearing conducted under Rule 5-403 NMRA if the defendant is being held in the local detention center, or five (5) days after the date of the initial hearing conducted under Rule 5-403 NMRA if the defendant is not being held in the local detention center.

(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.

(3) ***Local detention center; defined.*** A “local detention center” is one that is commonly used by the district court in the normal course of business and not necessarily within the territorial jurisdiction of the court.

B. **Right to pretrial release; recognizance or unsecured appearance bond.** 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 on the execution of an unsecured appearance bond in an amount set by the court. 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. The court may order execution of a secured appearance bond only if the court makes written findings of

particularized reasons why the release will not reasonably ensure the appearance of the defendant as required under Paragraphs E and F of this rule.

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 and the financial resources of the defendant. In addition, the court may take into account the available information about

(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 about 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 about 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) refrain from any use of cannabis, cannabis products, or synthetic cannabinoids without a certification from a licensed medical practitioner;

(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 after release for employment, schooling, or other limited purposes; and

(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 written findings of the particularized 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 about secured bond.**

(1) ***Contents of order setting conditions of release.*** The written order setting conditions of release shall be provided to the defendant before release if the defendant is in custody or within three (3) days of the conditions of release hearing if the defendant is not in custody, and

(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 about secured bond.*** The court shall file written findings of the individualized facts justifying a secured bond 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 the defendant when the defendant is charged with a felony offense:

(a)involving the use of a firearm;

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

(c) which authorizes a sentence of life in prison without the possibility of parole.

(3) If the prosecutor does not file a 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; review of conditions of release.**

(1) ***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 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 initial conditions of release hearing. 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 then 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 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 reviewed the conditions of release and made a requisite ruling 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 after the review of the conditions of release.

(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.*** On 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, unless the case is dismissed or a finding of no probable cause is made. 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 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 send 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 send 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. The court shall hold a status review hearing in any case in which the defendant has been held for more than six (6) months and every six (6) months thereafter. The purpose of the status review hearing is to conduct a meaningful review of the progress of the case. If the court determines that insufficient progress has been made, then the court shall issue an appropriate scheduling order.

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 before 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, on notice to that court, any bond shall be transferred to the district court on 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. 20-8300-013, effective for all cases pending or filed on or after November 23, 2020; as amended by Supreme Court Order No. 22-8300-015, effective for all cases pending or filed on or after December 31, 2022; as amended by Supreme Court Order No. S-1-RCR-2023-00021, effective for all cases pending or filed on or after December 31, 2023; as amended by Supreme Court Order No. S-1-RCR-2024-00068, effective for all cases pending or filed on or after May 8, 2024.]

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 because of 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* Rule 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 any 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 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 before 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 on whether the defendant can afford to pay all or a part of the cost, or whether the court has the authority to waive the cost, because detaining a defendant because of inability to pay the cost associated with a condition of release is comparable to detaining a defendant because of 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) (1993) (authorizing the forfeiture of bond on 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 of the New Mexico Constitution 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 ten percent (10%). No other percentage is permitted under the rule. If a cash deposit of ten percent (10%) is inadequate, the court then must consider a property bond involving property that 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 one hundred percent (100%) of the amount of the bond with the court or to purchase a bond from a paid surety. Under Subparagraph (E)(2)(c), the defendant alone has the choice to post the bond by a one hundred percent (100%) cash deposit or a surety. The court does not have the option to set a cash-only bond or a surety-only bond; it must give the defendant the choice of either. A paid surety may execute a surety bond or a real or personal property bond only if the conditions of 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. 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 any supplemental findings in a separate document within two (2) days of the conclusion of the hearing.

Paragraph G addresses pretrial detention of a dangerous defendant under Article II, Section 13 of the New Mexico Constitution. 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. Paragraph G was amended in 2020 to permit the court to automatically schedule a pretrial detention hearing in certain categories of cases. However, before the hearing, the prosecutor retains the burden of filing an expedited motion for pretrial detention under Rule 5-409 NMRA. If the prosecutor does not file that motion before the hearing, then the court is to set conditions of release rather than consider detention.

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 of the New Mexico Constitution 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 because of 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 because of 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 because of "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."). This rule does not preclude earlier or more regular status review hearings. The purpose of the hearing is to determine how best to expedite a trial in the case. A meaningful review of the progress of the case includes assessment of the parties' compliance with applicable deadlines, satisfaction of discovery obligations, and witness availability, among other matters. If the court determines that the parties have made insufficient progress on these measures, then it shall issue an appropriate scheduling order.

Under NMSA 1978, Section 31-3-1 (1972), 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 the 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 before that defendant's first appearance before a judge.

Paragraph O requires the magistrate or metropolitan court to transfer any bond to the district court on 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 do not apply to proceedings in district court with respect to matters of pretrial release. As with courts in other types of proceedings in which the Rules of Evidence do not apply, a court presiding over a pretrial release hearing 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 (1985). Paragraph R of this rule does not prevent a judge from filing a recusal 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; as amended by Supreme Court Order No. 20-8300-021, effective for all cases pending or filed on or after November 23, 2020; as amended by Supreme Court Order No. 22-8300-015, effective for all cases pending or filed on or after December 31, 2022; as amended by Supreme Court Order No. S-1-RCR-2024-00068, effective for all cases pending or filed on or after May 8, 2024.]

ANNOTATIONS

The 2024 amendment, approved by Supreme Court Order No. S-1-RCR-2024-00068, effective May 8, 2024, provided that if the defendant remains in custody pending his initial hearing under 5-403(D) NMRA, the district court shall hold a pretrial release hearing within three days after the date of the initial hearing if the defendant is being held in the local detention center, or five days after the date of the initial hearing if the defendant is not being held in the local detention center, provided that the district court may order a secured appearance bond only if the court makes written findings of particularized reasons why the release will not reasonably ensure the appearance of the defendant as required, revised the list of non-monetary conditions of release that the district court may impose that will reasonably ensure the appearance of defendant as required, the safety of the community, and the orderly administration of justice, provided that the order setting conditions of release must be in writing and that the written order shall be provided to defendant before release if the defendant is in custody or within three days of the conditions of release hearing if the defendant is not in custody, revised the provisions related to scheduling a pretrial detention hearing in accordance with 5-

409 NMRA, revised the timing of when a district court must hold a hearing to review conditions of release, made certain technical amendments, and revised the committee commentary; in Paragraph A, Subparagraph A(1), added Item A(1)(c); in Paragraph B, deleted “unless the court makes written findings of particularized reasons why the release will not reasonably ensure the appearance of the defendant as required," and added “The court may order execution of a secured appearance bond only if the court makes written findings of particularized reasons why the release will not reasonably ensure the appearance of the defendants as required under Paragraphs E and F of this rule.”; in Paragraph D, deleted Subparagraph D(11), which provided “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,” and redesignated the succeeding subparagraphs accordingly; in Paragraph E, after “If the court makes”, added “written”, after “findings of the”, added “particularized”; in Paragraph F, Subparagraph F(1), added “written” preceding “order”, and after “conditions of release shall”, added “be provided to the defendant before release if the defendant is in custody or within three (3) days of the conditions of release hearing if the defendant is not in custody, and”; in Paragraph G, Subparagraph G(2), after “when”, added “the defendant is charged with a felony offense:”, deleted former Item G(2)(a), which provided “the defendant is charged with a felony offense”, and redesignated former Items G(2)(a)(i) through G(2)(a)(iii) as G(2)(a) through G(2)(c), and deleted former Item G(2)(b); in Paragraph H, in the paragraph heading, deleted “motion for” preceding “review”, in Subparagraph H(1), in the heading, deleted “Motion for” and after “the defendant shall”, deleted “on motion of the defendant or the court’s own motion”, and in Subparagraph H(2), after “five (5) days after the”, deleted “filing of the motion” and added “initial conditions of release hearing”; and in Paragraph K, Subparagraph K(1), after “municipal court has”, deleted “ruled on a motion to review” and added “reviewed”, after “the conditions of release”, added “and made a requisite ruling”, and after “municipal court order”, deleted “disposing of the defendant’s motion for review” and added “after the review of the conditions of release”.

The 2023 amendment, approved by Supreme Court No. S-1-RCR-2023-00021, effective December 31, 2023, defined “local detention center”, and made technical amendments; and in Paragraph A, added Subparagraph 3.

The 2022 amendment, approved by Supreme Court Order No. 22-8300-015, effective December 31, 2022, added the condition that the defendant refrain from any use of cannabis, cannabis products, or synthetic cannabinoids without a certification from a licensed medical practitioner to an existing list of conditions that the district court may impose when setting conditions of release that 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, clarified that the public safety assessment tools used by the district court when scheduling a pretrial detention hearing must be approved by the Supreme Court for use in the jurisdiction, clarified that upon a filing of a petition in the district court for review of the magistrate, metropolitan, or municipal court’s order setting conditions of release, the magistrate, metropolitan, or municipal court’s jurisdiction to set or amend the conditions of release shall be suspended pending

determination by the district court, unless the case is dismissed or a finding of no probable cause is made, provided that in cases in which the defendant is detained as a result of inability to post a secured bond or meet the conditions of release, the district court shall hold a status hearing in any case in which the defendant has been held for more than six months and every six months thereafter in order to review the progress of the case and required the district court to issue an appropriate scheduling order if the court determines that insufficient progress has been made in the case, made certain technical, nonsubstantive changes, and revised the committee commentary; in Paragraph D, added a new Subparagraph D(10) and redesignated the succeeding subparagraphs accordingly; in Paragraph G, Subparagraph G(2)(b), after "public safety assessment tool", added "approved by the Supreme Court for use in the jurisdiction", and in Subparagraph G(3), after "does not file", deleted "an expedited"; in Paragraph K, Subparagraph K(4), after "petition by the district court", added "unless the case is dismissed or a finding of no probable cause is made"; and in Paragraph L, added "The court shall hold a status review hearing in any case in which the defendant has been held for more than six (6) months and every six (6) months thereafter. The purpose of the status review hearing is to conduct a meaningful review of the progress of the case. If the court determines that insufficient progress has been made, then the court shall issue an appropriate scheduling order.".

The 2020 amendment, approved by Supreme Court Order Nos. 20-8300-013 and 20-8300-021, effective November 23, 2020, authorized the district court to schedule a pretrial detention hearing when the defendant is charged with certain felony offenses or if a public safety assessment tool flags potential new violent criminal activity for the defendant, required the court to treat the pretrial detention hearing as a pretrial release hearing if the prosecutor does not file an expedited motion for pretrial detention by the date scheduled for the detention hearing and to issue an order setting conditions of release, and revised the committee commentary; and added Subparagraphs G(2) and G(3).

The 2017 amendment, approved by Supreme Court Order No. 17-8300-005, effective July 1, 2017, provided the mechanism through which a defendant may effectuate the right to pretrial release afforded by Article II, Section 13 of the New Mexico Constitution, rewrote the rule to such an extent that a detailed comparison is impracticable, and revised the committee commentary.

The 2014 amendment, approved by Supreme Court Order No. 14-8300-017, effective December 31, 2014, changed the reference to the New Mexico Constitution in Paragraph F from "§ 1" to "Section 13".

The 2010 amendment, approved by Supreme Court Order No. 10-8300-033, effective December 10, 2010, added Paragraph P.

The 2007 amendment, effective December 10, 2007, revised Paragraph J to provide for return of the bond upon adjudication of the defendant's guilt. *See State v. Gutierrez*, 2006-NMCA-090, 140 N.M. 157, 140 P.3d 1106.

The 2005 amendment, effective September 1, 2005, revised former Paragraph A to require a written finding of the determination that release of the defendant on personal recognizance or upon execution of an unsecured appearance bond will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community, to designate all, but the first sentence of Paragraph A as a new Paragraph B, to redesignate former Paragraphs B through N as Paragraphs C through O and to make other non-substantive revisions.

Compiler's notes. — Paragraphs A to F and H of this rule are similar to 18 U.S.C. § 3142, referred to in Rule 46(a) of the Federal Rules of Criminal Procedure.

Cross references. — For procedural statutes relating to bail, *see* Sections 31-3-1 to 31-3-9 NMSA 1978.

For habeas corpus to obtain release or bail, *see* Sections 44-1-23, 44-1-24 NMSA 1978.

For Magistrate Court Rules relating to bail, *see* Rule 6-401 NMRA.

For release order form, *see* Rule 9-302 NMRA.

For appearance bond form, *see* Rule 9-303 NMRA.

For forms on bail bond and justification of sureties, *see* Rule 9-304 NMRA.

For Rules of Evidence inapplicable to bail proceedings, *see* Rule 11-1101 NMRA.

Constitutional right to bail. — Article II, Section 13 of the New Mexico Constitution affords criminal defendants the right to bail, and although there is a presumption that all persons are bailable pending trial, the right to bail is not absolute under all circumstances; the trial court must give proper consideration to all of the factors in determining conditions of release set forth in Paragraph C of this rule, and shall set the least restrictive of the bail options and release conditions that will reasonably assure the appearance of the person as required and the safety of any other person and the community. *State v. Brown*, 2014-NMSC-038.

Least restrictive bail option is required. — Where trial court determined that defendant was bailable, and made findings that defendant would not likely commit new crimes, that defendant did not pose a danger to anyone, and that defendant was likely to appear if released, and where trial court failed to give proper consideration to all of the factors in determining conditions of release set forth in Rule 5-401(C) NMRA, and trial court failed to set the least restrictive of the bail options and release conditions, it was an abuse of discretion to continue the imposition of bond. *State v. Brown*, 2014-NMSC-038.

Cash-only bond. — The court has the discretion to determine, under the particular facts and circumstances of each case, the type of secured bond needed to secure the

defendant's appearance at trial, including cash-only bonds. *State v. Gutierrez*, 2006-NMCA-090, 140 N.M. 157, 140 P.3d 1106, cert. denied, 2006-NMCERT-008.

Imposition of conditions of release. — Where a trial court did not allow defendant bail, the trial judge did not have an obligation to set specific "conditions of release"; it would not only be inconsistent but absurd to impose "conditions of release" on a defendant remanded to custody when it is not intended that he be released. *State v. Flores*, 1982-NMSC-132, 99 N.M. 44, 653 P.2d 875.

Pre-trial confinement did not create a coercive condition that warranted withdrawal of defendant's guilty plea. — Where defendant was indicted on 211 counts of securities fraud, forgery and identity theft, and where defendant pleaded guilty to 13 counts of securities fraud and one count of conspiracy to commit securities fraud, and where the plea and disposition agreement provided an avenue under which defendant could possibly serve no jail time, the district court did not err in imposing a $250,000 cash-only bond after evaluating defendant's conditions of release on three separate occasions, and basing its decision on the crimes with which defendant was charged, the facts about defendant's alleged scheme, the impact on the victim, the potential financial resources of defendant and his extended family, and the strength of the state's case, and therefore the fact that defendant was confined pretrial, on its own, did not create a coercive condition that warranted withdrawal of defendant's plea. *State v. Turner*, 2017-NMCA-047, cert. denied.

Security for restitution disallowed. — There is no statutory authorization for requiring security for restitution as a condition of bail pending appeal. *State v. Montoya*, 1993-NMCA-097, 116 N.M. 297, 861 P.2d 978

Effect of delay in fixing bond. — Delay in fixing of bond is no grounds for holding invalid the judgment and sentence thereafter imposed following a plea of guilty. *State v. Gibby*, 1967-NMSC-219, 78 N.M. 414, 432 P.2d 258 (decided under former law).

Interlocutory bail determination is not final judgment and bail decisions may be reviewed at any time and for a variety of reasons under this rule. *State v. David*, 1984-NMCA-119, 102 N.M. 138, 692 P.2d 524.

Review hearing required by Subdivision (e) (*see now* Paragraph E) of this rule is not required in order to appeal a denial or revocation of bail. *State v. David*, 1984-NMCA-119, 102 N.M. 138, 692 P.2d 524.

Law reviews. — For comment, "Criminal Procedure - Preventive Detention in New Mexico," see 4 N.M.L. Rev. 247 (1974).

For article, "The Constitutionality of Pretrial Detention Without Bail in New Mexico," see 12 N.M.L. Rev. 685 (1982).

For comment, "The Constitution Is Constitutional - A Reply to the Constitutionality of Pretrial Detention Without Bail in New Mexico," see 13 N.M.L. Rev. 145 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 8A Am. Jur. 2d Bail and Recognizance § 1 et seq.

Dismissal or vacation of indictment as terminating liability or obligation of surety on bail bond, 18 A.L.R.3d 1354.

When is a person in custody of governmental authorities for purpose of exercise of state remedy of habeas corpus - modern cases, 26 A.L.R.4th 455.

Bail: duration of surety's liability on pretrial bond, 32 A.L.R.4th 504.

Bail: duration of surety's liability on posttrial bail bond, 32 A.L.R.4th 575.

Bail: effect on liability of bail bond surety of state's delay in obtaining indictment or bringing defendant to trial, 32 A.L.R.4th 600.

Bail: effect on surety's liability under bail bond of principal's incarceration in other jurisdiction, 33 A.L.R.4th 663.

Propriety of applying cash bail to payment of fine, 42 A.L.R.5th 547.

Propriety, after obligors on appearance bond have been exonerated pursuant to Rule 46(f) of the Federal Rules of Criminal Procedure, of applying cash or other security to fine imposed on accused, 58 A.L.R. Fed. 676.

8 C.J.S. Bail § 1 et seq.

5-401A. Recompiled.

ANNOTATIONS

Recompilations. — Pursuant to Supreme Court Order No. 17-8300-005, former 5-401A NMRA, was recompiled and amended as 5-401.1 NMRA, effective for all cases pending or filed on or after July 1, 2017.

5-401B. Recompiled.

ANNOTATIONS

Recompilations. — Pursuant to Supreme Court Order No. 17-8300-005, former 5-401B NMRA, was recompiled and amended as 5-401.2 NMRA, effective for all cases pending or filed on or after July 1, 2017.

5-401.1. Property bond; unpaid surety.

Any bond authorized by Rule 5-401(E)(2)(b) NMRA shall be signed by the owner(s) of the real property as surety for the bond. The affidavit must contain a description of the property by which the surety proposes to justify the bond and the encumbrances thereon, the number and amount of other bonds and undertakings for bail entered into by the surety remaining undischarged, and a statement that the surety is a resident of New Mexico and owns real property in this state having an unpledged and unencumbered net value equal to the amount of the bond. Proof may be required of the matters set forth in the affidavit. The provisions of this rule shall not apply to a paid surety.

[Adopted, effective October 1, 1987; as amended, effective September 1, 1990; 5-401A recompiled and amended as 5-401.1 by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017.]

ANNOTATIONS

The 2017 amendment, approved by Supreme Court Order No. 17-8300-005, effective July 1, 2017, specified in the rule heading that the rule applies to “property bonds”, and revised the citation to the property bond provision in Rule 5-401 NMRA; in the rule heading, deleted “Bail” and added “Property bond”; in the first sentence, after “authorized by”, deleted “Subparagraph (2) of Paragraph A of”, and after “Rule 5-401”, added “(E)(2)(b) NMRA”.

Recompilations. — Pursuant to Supreme Court Order No. 17-8300-005, former 5-401A NMRA was recompiled and amended as 5-401.1 NMRA, effective for all cases pending on or after July 1, 2017.

5-401.2. Surety bonds; justification of compensated sureties.

A. **Justification of sureties.** Any bond submitted to the court by a paid surety under Rule 5-401(E)(2)(c) NMRA shall be signed by a bail bondsman, as surety, who is licensed under the Bail Bondsmen Licensing Law and who has timely paid all outstanding default judgments on forfeited surety bonds. A bail bondsman licensed as a limited surety agent shall file proof of appointment by an insurer by power of attorney with the bond. If authorized by law, a paid surety licensed under the Bail Bondsmen Licensing Law may deposit cash with the court in lieu of a surety or property bond, provided that the paid surety executes the appearance bond.

B. **Property bondsman.** If a property bond is submitted by a compensated surety, the bail bondsman or solicitor must be licensed as a property bondsman and must file, in each court in which the bondsman posts bonds, an irrevocable letter of credit in favor of the court, a sight draft made payable to the court, and a copy of the bondsman’s license.

C. **Property bond in certain districts.** A real or personal property bond may be executed for the release of a person under Rule 5-401 NMRA in any judicial district in which the chief judge of the district upon concurrence of a majority of the district judges of the district has entered an order finding that the provisions of Paragraph B of this rule will result in the detention of persons otherwise eligible for pretrial release under Rule 5-401 NMRA. If a property bond is submitted by a compensated surety under this paragraph, the bail bondsman or solicitor must be licensed as a property bondsman and must pledge or assign real or personal property owned by the property bondsman as security for the bail bond. In addition, a licensed property bondsman must file, in each court in which the bondsman posts bonds

(1) proof of the licensed bondsman's ownership of the property used as security for the bonds; and

(2) a copy of the bondsman's license.

The bondsman must attach to the bond a current list of all outstanding bonds, encumbrances, and claims against the property each time a bond is posted, using the court approved form.

D. **Limits on property bonds.** No single property bond submitted under this rule can exceed the amount of real or personal property pledged. The aggregate amount of all property bonds by the surety cannot exceed ten (10) times the amount pledged. Any collateral, security, or indemnity given to the bondsman by the principal shall be limited to a lien on the property of the principal, must be reasonable in relation to the amount of the bond, and must be returned to the principal and the lien extinguished upon exoneration on the bond. If the collateral is in the form of cash or a negotiable security, it shall not exceed fifty percent (50%) of the amount of the bond and no other collateral may be taken by the bondsman. If the collateral is a mortgage on real property, the mortgage may not exceed one hundred percent (100%) of the amount of the bond. If the collateral is a lien on a vehicle or other personal property, it may not exceed one hundred percent (100%) of the bond. If the bond is forfeited, the bondsman must return any collateral in excess of the amount of indemnification and the premium authorized by the superintendent of insurance.

[Adopted, effective October 1, 1987; as amended, effective September 1, 1990; 5-401B recompiled and amended as Rule 5-401.2 by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017.]

ANNOTATIONS

The 2017 amendment, approved by Supreme Court Order No. 17-8300-005, effective July 1, 2017, specified in the rule heading that the rule applies to "surety bonds", revised the citation to the surety bond provision in Rule 5-401 NMRA; throughout the rule, changed "he" and "his" to "the bondsman" and "the bondsman's", and changed "pursuant to" to "under"; in the rule heading, deleted "Bail" and added "Surety"; in

Paragraph A, after “by a paid surety”, deleted “pursuant to Paragraph A of” and added “under”, and after “Rule 5-401”, added “(E)(2)(c) NMRA”; in Paragraph C, after each occurrence of “Rule 5-401”, added “NMRA”; and in Paragraph D, after “exceed ten”, added “(10)”.

Cross references. — For acceptance of bail by designee, *see* Section 31-3-1 NMSA 1978.

For Bail Bondsmen Licensing Act, *see* Section 59A-51-1 NMSA 1978 et seq.

Recompilations. — Pursuant to Supreme Court Order No. 17-8300-005, former 5-401B NMRA, was recompiled and amended as 5-401.2 NMRA, effective for all cases pending or filed on or after July 1, 2017.

5-402. Release; during trial, pending sentence, motion for new trial and appeal.

A. **Release during trial.** A defendant released pending trial under Rule 5-401 NMRA shall continue on release under the same terms and conditions as previously imposed, unless the court determines that other terms and conditions or termination of release are necessary to ensure the defendant’s presence during the trial or to ensure that the defendant’s conduct will not obstruct the orderly administration of justice.

B. **Release pending sentencing.** A defendant released pending or during trial may continue on release pending the imposition of sentence under the same terms and conditions as previously imposed, unless the surety has been released or the court has determined that other terms and conditions or termination of release are necessary to ensure

(1) that the defendant will not flee the jurisdiction of the court;

(2) that the defendant’s conduct will not obstruct the orderly administration of justice; or

(3) that the defendant does not pose a danger to any other person or to the community.

C. **Release after sentencing.** After imposition of a judgment and sentence, the court, on motion of the defendant, may establish conditions of release pending appeal or a motion for new trial. The court may utilize the criteria listed in Rule 5-401(C) NMRA, and may also consider the fact of defendant’s conviction and the length of sentence imposed. The defendant shall be detained unless the district court after a hearing determines that the defendant is not likely to flee and does not pose a danger to the safety of any other person or the community if released. In the event the court requires a secured bond in the same amount as that established for release pending trial, the bond previously furnished shall continue pending appeal or disposition of a motion for a

new trial, unless the surety has been discharged by order of the court. Nothing in this rule shall be construed as prohibiting the judge from increasing the amount of bond on appeal.

D. **Revocation of release or modification of conditions of release pending appeal.** The taking of an appeal does not deprive the district court of jurisdiction under Rule 5-403 NMRA, and the state may file a motion in the district court for revocation of release or modification of conditions of release on appeal.

[As amended, effective October 15, 1986; 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.]

Committee commentary. — Paragraph A of this rule is substantially similar to Rule 46(b) of the Federal Rules of Criminal Procedure. Under most circumstances, the defendant will have had conditions of release set by the magistrate at the initial appearance. This rule makes it clear that when the case is transferred to the district court directly after a preliminary hearing or indirectly by the filing of an indictment, the district court need not set new conditions of release. However, the rule also allows the district court to set other conditions at the time of trial under certain circumstances.

Paragraph C of this rule was added in 1975. The former rule provided that release should automatically continue pending appeal under the same terms and conditions previously imposed, unless the court determined that other conditions were necessary. The amended rule requires a motion for release following the imposition of sentence and specifies the criteria that may be considered in setting conditions of release for an appeal or if a motion for a new trial is pending. The amended rule preserves the original intent of the rule by allowing a defendant to proceed without a new bond pending appeal if the surety has not been discharged and the court does not set a higher bond. In addition, Paragraph C of this rule incorporates the provisions of former Subdivision (d) of this rule, requiring a bond only for the additional amount if the court decides to increase the amount of the bond.

The amended rule also requires a new determination of conditions of release for a new trial. The conditions of release for an appeal might well be different than the conditions imposed for a new trial. Therefore, the district court, under Rule 5-401 NMRA, may set new conditions of release when a new trial is granted.

The rule was also amended to provide for revocation or modification of conditions of release while the case is on appeal. Paragraph D of this rule allows the state to seek revocation or modification under Rule 5-403 NMRA. *See* commentary to Rule 5-403 NMRA.

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

ANNOTATIONS

The 2017 amendment, approved by Supreme Court Order No. 17-8300-005, effective July 1, 2017, clarified certain provisions related to release after sentencing and revocation of release, made technical changes, and revised the committee commentary; throughout the rule, replaced each occurrence of “person” and “his” with “defendant” or “defendant’s”, and replaced “assure” with “ensure”; in Paragraph C, after “criteria listed in”, deleted “Paragraph C of”, after “Rule 5-401”, added “(C)”, and after “court requires a”, deleted “bail” and added “secured”; and in Paragraph D, after “revocation of”, deleted “bail” and added “release” in two places.

The 2014 amendment, approved by Supreme Court Order No. 14-8300-017, effective December 31, 2014, in Paragraph C, changed the reference from “Paragraph B”, to “Paragraph C”.

Defendant is not automatically entitled to release under same terms and conditions that were previously imposed pending or during trial after he has been adjudicated guilty but not yet sentenced. *State v. Valles*, 2004-NMCA-118, 136 N.M. 429, 99 P.3d 1164.

Release of surety. — By its terms, this rule recognizes that a surety may be released upon a finding of guilt. *State v. Valles*, 2004-NMCA-118, 136 N.M. 429, 99 P.3d 1164.

Release pending motion for new trial. — An individual has a qualified right to release pending a motion for a new trial, even after appellate affirmance of a conviction. Such a right, however, can be invoked only by a timely motion for a new trial, and by a motion for release pending a motion for a new trial duly filed and served in the manner required by this rule. *In re Martinez*, 1982-NMSC-115, 99 N.M. 198, 656 P.2d 861.

Jurisdiction to revoke appeal bond. — Section 31-11-1C NMSA 1978 denied an appeal bond unless and until the court had a hearing and made specific findings; therefore, Paragraph C of this rule allowed the district court to establish conditions of release pending appeal or a motion for a new trial. *State v. Rivera*, 2003-NMCA-059, 133 N.M. 571, 66 P.3d 344, *rev'd on other grounds*, 2004-NMSC-001, 134 N.M. 768, 82 P.3d 939.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 775 to 778, 780 to 784.

Bail: duration of surety's liability on posttrial bail bond, 32 A.L.R.4th 575.

What is "a substantial question of law or fact likely to result in reversal or an order for a new trial" pursuant to 18 USCS § 3143(b)(2) respecting bail pending appeal, 79 A.L.R. Fed. 673.

22A C.J.S. Criminal Law § 419 et seq.

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. **Revocation or modification of conditions of release.**

(1) The court shall consider revocation of the defendant's pretrial release or modification of the defendant's conditions of release on motion of the prosecutor, on notice of a non-technical violation of a condition of release by a court pretrial services agency, 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; temporary detention of certain defendants.**

(1) On motion or notice of a non-technical violation of a condition of release by a court pretrial services agency, the court shall enter an order with specific findings about why amended or revoked conditions of release are unnecessary, or 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.

(2) A defendant previously released by any court in this state pending any felony charge or pending a charge for an enumerated misdemeanor, who is arrested and charged with a new felony or new enumerated misdemeanor defined in Rule 5-403.1 NMRA alleged to have occurred during the period of initial release, shall be held without conditions of release pending an initial hearing under Paragraph D of this rule. The initial hearing required by Paragraph D shall be conducted by the court with current jurisdiction over the defendant's initial conditions of release.

(3) A defendant previously released by any court in this state pending any felony charge or pending a charge for an enumerated misdemeanor defined in Rule 5-403.1 NMRA, who is charged but not arrested for a new felony or new enumerated misdemeanor alleged to have occurred during the period of initial release, shall be summonsed by the court with current jurisdiction over the defendant's initial conditions of release to an initial hearing required by Paragraph D of this rule, unless the court finds that the interests of justice may be better served by the issuance of a bench

warrant. The initial hearing required by Paragraph D shall be conducted by the court with current jurisdiction over the defendant's initial conditions of release.

D. **Initial hearing.**

(1) The court shall hold an initial hearing as soon as practicable. 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. If the defendant is not in custody, the hearing shall be held no later than ten (10) days after the motion or notice of alleged violation is filed.

(2) At the initial hearing, the court may continue the existing conditions of release, set different conditions of release, or if the court is considering revocation of release, the court shall schedule an evidentiary hearing under Paragraph E of this rule, unless waived by the defendant.

(3) If at the conclusion of the initial hearing, the court continues or amends the defendant's conditions of release, then a written order continuing or amending the defendant's conditions of release shall be provided to the defendant at the time of release from custody if the defendant is in custody, or within three (3) days of the hearing if the defendant is not in custody. If the defendant waives the evidentiary hearing under Paragraph E and the court finds that the conditions of release should be revoked, an order revoking conditions of release, including written findings of the individualized facts justifying revocation, shall be filed within three (3) days of the initial hearing.

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. If the defendant is not in custody, the evidentiary hearing shall be held no later than ten (10) 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, and 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 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 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 and shall be filed within three (3) days of the evidentiary hearing. If the court continues or amends the defendant's conditions of release, then a written order continuing or amending the defendant's conditions of release shall be provided to the defendant at the time of release from custody if the defendant is in custody, or within three (3) days of the hearing if the defendant is not in custody.

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, on 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. The court shall hold a status review hearing in any case in which the

defendant has been held for more than six (6) months and every six (6) months thereafter. The purpose of the status review hearing is to conduct a meaningful review of the progress of the case. If the court determines that insufficient progress has been made, then the court shall issue an appropriate scheduling order.

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.*** On 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 send 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 send the order to the magistrate, metropolitan, or municipal court, 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 Nos. 20-8300-013 and 20-8300-019, effective for all cases pending or filed on or after November 23, 2020; as amended by Supreme Court Order No. 22-8300-015, effective for all cases pending or filed on or after December 31, 2022; as amended by Supreme Court Order No. S-1-RCR-2024-00068, effective for all cases pending or filed on or after May 8, 2024.]

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, ¶¶ 1, 24-25, 321 P.3d 140, *overruled on other grounds by State v. Ameer*, 2018-NMSC-030, ¶ 69, 458 P.3d 390, 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.

As used in Paragraph D, a "local detention center" is "one that is commonly used by the district court in the normal course of business and not necessarily within the territorial jurisdiction of the court." Rule 5-401(A)(3) NMRA.

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. As with courts in other types of proceedings in which the Rules of Evidence do not apply, a court presiding over a pretrial detention hearing 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).

Paragraph I 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 because of "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."). This rule does not preclude earlier or more regular status review hearings. The purpose of the hearing is to determine how best to expedite a trial in the case. A meaningful review of the progress of the case includes assessment of the parties' compliance with applicable deadlines, satisfaction of discovery obligations, and witness availability, among other matters. If the court determines that the parties have made insufficient progress on these measures, then it shall issue an appropriate scheduling order.

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 (1985). Paragraph L of this rule does not prevent a judge from filing a recusal 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 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; as amended by Supreme Court Order No. 22-8300-015, effective for all cases pending or filed on or after December 31, 2022; as amended by Supreme Court Order No. S-1-RCR-2023-00021, effective for all cases pending or filed on or after December 31, 2023.]

ANNOTATIONS

The 2024 amendment, approved by Supreme Court Order No. S-1-RCR-2024-00068, effective May 8, 2024, approved by Supreme Court Order No. S-1-RCR-2024-00068, effective May 8, 2024, added mandatory language to an existing provision regarding the court's duty to consider revocation of the defendant's pretrial release or modification of the defendants conditions of release on motion of the prosecutor or on the court's own motion, required the court to consider revocation or modification of conditions of release upon notice of a non-technical violation of a condition of release by a court pretrial services agency, required the district court, when notified of a non-technical violation of a condition of release by a court pretrial services agency, to enter an order with specific findings when deciding that amended or revoked conditions of release are unnecessary, required the temporary detention of a defendant previously released by any court in this state who is arrested or charged with a new felony or enumerated misdemeanor defined in 5-403.1 NMRA, required the court with current jurisdiction over the defendant's initial conditions of release to conduct a hearing, provided for the timing of an initial hearing when a defendant is not in custody, provided that if the district court is considering a revocation of conditions of release, the court shall schedule an evidentiary hearing, provided that at the conclusion of the initial hearing, the court shall make written findings and file a written order within three days of the initial hearing, provided the timing for an evidentiary hearing and the timing for the filing of the order that follows the evidentiary hearing, and required that that the written order continuing or amending the defendant's conditions of release be provided to the defendant at the time of release from custody if the defendant is in custody or within three days of the hearing if the defendant is not in custody; in Paragraph B, in the paragraph heading, deleted "Motion for", in Subparagraph B(1), after "The court", deleted "may" and added "shall", and after "motion of the prosecutor", added "on notice of a non-technical violation of a condition of release by a court pretrial services agency"; in Paragraph C, in the paragraph heading, added "temporary detention of certain defendants", in Subparagraph C(1), deleted "If the court does not deny the motion on the pleadings" and added "On motion or notice of a non-technical violation of a condition of release by a court pretrial services agency, the court shall enter an order with specific findings about why amended or revoked conditions of release are unnecessary, or", and added Subparagraphs C(2) and C(3); in

Paragraph D, Subparagraph D(1), added “If the defendant is not in custody, the hearing shall be held no later than ten (10) days after the motion or notice of alleged violation is filed.”, in Subparagraph D(2), after “different conditions of release, or”, deleted “propose revocation of release” and added “if the court is considering revocation of release, the court shall schedule an evidentiary hearing under Paragraph E of this rule, unless waived by the defendant”, deleted former Subparagraph D(3), which provided “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”, and added Subparagraph D(3); in Paragraph E, Subparagraph E(1), added “If the defendant is not in custody, the evidentiary hearing shall be held no later than ten (10) days after the initial hearing.”; and in Paragraph F, added “and shall be filed within three (3) days of the evidentiary hearing. If the court continues or amends the defendant’s conditions of release, then a written order continuing or amending the defendant’s conditions of release shall be provided to the defendant at the time of release from custody if the defendant is in custody, or within three (3) days of the hearing if the defendant is not in custody”.

The 2023 amendment, approved by Supreme Court No. S-1-RCR-2023-00021, effective December 31, 2023, revised the committee commentary.

The 2022 amendment, approved by approved by Supreme Court Order No. 22-8300-015, effective December 31, 2022, required the district court to conduct a status review hearing in any case in which the defendant has been held for more than six months and every six months thereafter in order to review the progress of the case, and required the district court to issue an appropriate scheduling order if the court determines that insufficient progress has been made in the case, and removed provisions that required the court to hold a status review hearing if the defendant has been in custody for more than one year and only upon a motion of the prosecutor, defendant, or on the court’s own motion, made certain technical, nonsubstantive changes, and revised the committee commentary; and in Paragraph I, deleted “On the written motion of the prosecutor or the defendant, or on the court’s own motion” and after “held for more than”, deleted “one (1) year” and added “six (6) months and every six (6) months thereafter. The purpose of the status review hearing is to conduct a meaningful review of the progress of the case. If the court determines that insufficient progress has been made, then the court shall issue an appropriate scheduling order.”.

The 2020 amendment, approved by Supreme Court Order Nos. 20-8300-013 and 20-8300-019, effective for all cases pending or filed on or after November 23, 2020, required the district court, on the written motion of the prosecutor or the defendant, or on the court’s own motion, to hold a status review hearing in any case in which the defendant has been held for more than one year; and in Paragraph I, added the last sentence of the paragraph.

The 2018 amendment, approved by Supreme Court Order No. 18-8300-024, effective February 1, 2019, effective for all cases pending or filed on or after February 1, 2019, extended the period of time within which the court must hold an initial hearing when the

defendant is not being held in the local detention center; authorized the court to revoke the defendant's release if the court finds that there is probable cause to believe that the defendant committed a crime; in Subparagraph D(1), after "as practicable, but", added "if the defendant is in custody, the hearing shall be held", and after "the defendant is detained", added "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"; in Subparagraph F(3), added new subparagraph designations "(a)" and deleted former subparagraph designation "(a)"; in Subparagraph F(3)(a), added new Subparagraph F(3)(a)(i) and new subparagraph designation "(ii)"; added new subparagraph designation "(b)", in Subparagraph F(3)(b), added new subparagraph designation "(i)" and redesignated former Subparagraph F(3)(b) as Subparagraph F(3)(b)(ii); and after subparagraph designation "(b)", added "finds that there is clear and convincing evidence".

The 2017 amendment, approved by Supreme Court Order No. 17-8300-005, effective July 1, 2017, clarified the procedures 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, and revised the committee commentary; in the rule heading, added "or modification" and "orders"; and deleted former Paragraphs A through D and added new Paragraphs A through L.

The 2013 amendment, approved by Supreme Court Order No. 13-8300-046, effective December 31, 2013, changed the references to paragraphs of Rule 5-401 NMRA that specify conditions of release; and in Subparagraph (1) of Paragraph A, after "Paragraph", deleted "A" and adds "B" and after "B or", deleted "C" and added "D".

Cross references. — For encouraging violation of bail as a misdemeanor, *see* Section 30-22-18 NMSA 1978.

Due process right to hearing on revocation of bail.— Where the State alleged that defendant violated the conditions of defendant's pretrial release by harassing the victim and by using drugs; the district court ordered defendant to submit to a urinalysis test; the pretrial services employee who administered the test reported to the court that defendant had tested positive for opiates; the district judge personally examined the test strip and agreed with findings of the pretrial services employee; based on that evidence, the district court found that defendant had violated the conditions of defendant's release and revoked bail and remanded defendant back into custody; the district court denied defendant's request for a full evidentiary hearing; defendant was denied any opportunity to examine witnesses, to present any evidence in opposition to the State's motion to revoke bail; to show any mitigating circumstances that might continue defendant's release from custody, or to defend against the revocation of bail; and the district court did not consider any alternatives to incarceration or whether additional conditions of release would adequately protect the community, the State's witnesses, and assure defendant's appearance at trial, defendant was denied defendant's procedural due process right to an adequate hearing prior to revocation of bail and remand into custody. *State v. Segura*, 2014-NMCA-037.

Right to allocution in probation revocation hearings. — A defendant has a right to allocution in probation revocation hearings, because in a probation revocation hearing the district court has a multitude of options in sentencing, all of which have the potential to impact a defendant's liberty interests, and allowing a defendant to address the district court prior to sentencing in a probation revocation hearing allows the defendant to ask for mercy based on factors that might not otherwise be brought to the court's attention and retains the same practical significance as it would in the original sentencing hearing. *State v. Williams*, 2021-NMCA-021, cert. denied.

Where defendant pled guilty to residential burglary, two counts of receiving stolen property, receiving or transferring a stolen motor vehicle, battery upon a peace officer, and larceny, and where the district court suspended defendant's entire sentence and placed him on supervised probation for a total of nine years, the conditions of which required defendant to get permission from his probation officer before leaving the county and not consume illegal drugs, and where several months later, the state filed a petition to revoke defendant's probation, alleging that he failed to adhere to his curfew and used illegal drugs, and where, based on defendant's admission that he used methamphetamine while on probation, the district revoked defendant's probation but failed to advise defendant that he had the right to personally address the court before the court proceeded to disposition, the court denied defendant his right of allocution. It is the duty of the court to inform a defendant of his or her right to allocution, and when the district court does not fulfill this duty, the sentence is invalid. *State v. Williams*, 2021-NMCA-021, cert. denied.

Sufficient evidence that defendant willfully violated the condition of his probation. — Where defendant pled guilty to residential burglary, two counts of receiving stolen property, receiving or transferring a stolen motor vehicle, battery upon a peace officer, and larceny, and where the district court suspended defendant's entire sentence and placed him on supervised probation for a total of nine years, the conditions of which required defendant to get permission from his probation officer before leaving the county and not consume illegal drugs, and where several months later, the state filed a petition to revoke probation, alleging that defendant failed to adhere to his curfew and used illegal drugs in violation of his conditions of probation, the district court did not abuse its discretion by finding that defendant willfully violated conditions of his probation based on a signed admission form in which defendant admitted that he used methamphetamine on the day that he violated his curfew, and where defendant, at his probation revocation hearing, further admitted to using methamphetamine while on probation. *State v. Williams*, 2021-NMCA-021, cert. denied.

This rule grants broad latitude to the trial court to revoke the release of an accused person if circumstances arising after the initial release indicate the release should not be continued. Exercise of that discretion provides no basis for disqualification. *State v. Corneau*, 1989-NMCA-040, 109 N.M. 81, 781 P.2d 1159.

Revocation proper although defendant had not been charged, arrested, indicted or bound over for any crime allegedly committed while he was released. *State v. David*, 1984-NMCA-119, 102 N.M. 138, 692 P.2d 524.

Law reviews. — For comment, "Criminal Procedure - Preventive Detention in New Mexico," see 4 N.M.L. Rev. 247 (1974).

For comment, "The Constitution Is Constitutional - A Reply to the Constitutionality of Pretrial Detention Without Bail in New Mexico," see 13 N.M.L. Rev. 145 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 8A Am. Jur. 2d Bail and Recognizance §§ 1, 14, 31, 77, 92, 104, 106, 143, 144, 146 to 148 .

Bail: duration of surety's liability on posttrial bail bond, 32 A.L.R.4th 575.

5-403.1. Enumerated misdemeanor, non-technical violation defined.

For purposes of Rules 5-403, 6-403, and 7-403 NMRA:

A. An “enumerated misdemeanor” means:

1. battery, contrary to Section 30-3-4 NMSA 1978;

2. aggravated battery, contrary to Section 30-3-5(B) NMSA 1978;

3. negligent use of a deadly weapon, contrary to Section 30-7-4 NMSA 1978;

4. battery against a household member, contrary to Section 30-3-15 NMSA 1978;

5. aggravated battery against a household member, contrary to Section 30-3-16 NMSA 1978;

6. stalking, contrary to Section 30-3A-3 NMSA 1978;

7. violation of an order of protection, contrary to Section 40-13-6 NMSA 1978;

8. criminal sexual contact, contrary to Section 30-9-12 NMSA 1978;

9. harassment, contrary to Section 30-3A-2 NMSA 1978;

10. driving under the influence of intoxicating liquor or drugs, contrary to Section 66-8-102 NMSA 1978; or

11. operating a motorboat while under the influence of intoxicating liquor or drugs, contrary to Section 66-13-3 NMSA 1978.

B. A “non-technical violation” of a condition of release shall be defined by the Administrative Office of the Courts’ pretrial services policies and procedures.

[Adopted by Supreme Court Order No. S-1-RCR-2024-00068, effective for all cases pending or filed on or after May 8, 2024.]

Committee commentary. — The Administrative Office of the Courts’ pretrial services policies and procedures may be located at the Administrative Office of the Courts’ website at https://pretrial.nmcourts.gov/.

[Adopted by Supreme Court Order No. S-1-RCR-2024-00068, effective for all cases pending or filed on or after May 8, 2024.]

5-404. Bail for witness.

If it appears by affidavit that the testimony of a person is material in any felony proceeding and that it may become impracticable to secure his presence by subpoena, the court may require such person to give bail for his appearance as a witness. If the witness is not in court, a warrant for his arrest may be issued and upon return thereof the court may require him to give bail as provided in Rule 5-401 for his appearance as a witness. If a witness fails to give bail, he may be committed to the custody of the sheriff for a period not to exceed five (5) days, within which time his deposition shall be taken as provided in Rule 5-503. The court upon good cause shown may extend the time for taking such depositions for an additional period not exceeding five (5) days. Only in a capital, first or second degree felony case shall any surety be required for the bail of a witness.

Committee commentary. — The deposition of a material witness may be taken and can be introduced at trial pursuant to Rule 5-503.

The release of a material witness is handled generally in the same manner as one accused of an offense. There are two important exceptions: (1) the witness may not be held in custody for more than five (5) days, unless the time is extended to ten (10) days; and (2) unless the criminal offense charged is a capital, first or second degree felony, conditions may not be imposed which would require the witness to post a surety bond. *See* Section 31-3-7 NMSA 1978.

ANNOTATIONS

Cross references. — For bail for witnesses, *see* Section 31-3-7 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 1160, 1161, 1163 to 1167.

97 C.J.S. Witnesses §§ 6 to 16.

5-405. Appeal from orders regarding release or detention.

A. **Right of appeal.** A party may appeal an order regarding release or detention as provided by Article II, Section 13 of the New Mexico Constitution, Section 39-3-3(A)(2) NMSA 1978, or as otherwise provided by law. In accordance with the Rules of Appellate Procedure, an appeal may be filed in the Supreme Court or Court of Appeals, as jurisdiction may be vested by law, under the following circumstances.

(1) ***Order setting conditions of release.*** After a hearing by the district court under Rule 5-401(H) or (K) NMRA, the defendant may appeal if

(a) the defendant is detained or continues to be detained because of an inability to post a secured bond or meet a condition of release; or

(b) the defendant is subject to a condition of release that requires the defendant to return to custody for specified hours following release for employment, schooling, or other limited purposes.

(2) ***Order revoking release.*** After a hearing by the district court under Rule 5-403 NMRA, the defendant may appeal if the defendant is subject to an order revoking release.

(3) ***Order granting or denying motion for pretrial detention.*** After a hearing by the district court under Rule 5-409 NMRA,

(a) the defendant may appeal if the district court has granted the prosecutor's motion for pretrial detention; or

(b) the state may appeal if the district court has denied the prosecutor's motion for pretrial detention.

B. **Stay of proceedings.** An appeal under this rule does not stay proceedings in the district court.

[As amended, effective September 1, 1990; March 1, 1995; 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.]

Committee commentary. — This rule was amended in 2017 in response to the 2016 amendment to Article II, Section 13 of the New Mexico Constitution. As amended, Article II, Section 13 (1) permits 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) requires the district court to release a defendant who is in custody solely due to financial inability to post a secured bond.

[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.]

ANNOTATIONS

The 2017 amendment, approved by Supreme Court Order No. 17-8300-005, effective July 1, 2017, clarified the procedures for appeals from orders regarding release or detention to conform with amendments to Article II, Section 13 of the New Mexico Constitution; in the heading, added “or detention”; in Paragraph A, added the first two sentences and redesignated the former introductory clause as Subparagraph A(1) and former Subparagraphs A(1) and A(2) as Subparagraphs A(1)(a) and A(1)(b), respectively, in Subparagraph A(1), added the heading, deleted “If”, after “district court”, deleted “pursuant to Paragraph F or G of” and added “under”, after “Rule 5-401”, added “(H) or (K)”, and after “NMRA”, added “the defendant may appeal if”, in Subparagraph A(1)(a), after “detained because of”, deleted “a failure to” and added “an inability to post a secured bond or”, and after “meet”, deleted “a condition imposed; or” and added “a condition of release; or”, in Subparagraph A(1)(b), after the first occurrence of “the”, deleted “requirement” and added “defendant is subject to a condition of release that requires the defendant”, after “return to custody”, deleted “after” and added “for”, and after “specified hours”, deleted “is continued, the defendant may appeal such order to the Supreme Court or Court of Appeals, as jurisdiction may be vested by law, in accordance with the Rules of Appellate Procedure” and added “following release for employment, schooling, or other limited purposes”, and added Subparagraphs A(2) and A(3); and in Paragraph B, after “An appeal”, deleted “pursuant to” and added “under”.

The 2013 amendment, approved by Supreme Court Order No. 13-8300-046, effective December 31, 2013, changed the references to paragraphs of Rule 5-401 NMRA that provided for hearings to determine if bail should be denied or to review conditions of release; and in Subparagraph (1) of Paragraph A, after “Paragraph”, deleted “E or” and after “F”, added “or G”.

The 1995 amendment, effective March 1, 1995, deleted former Paragraph B, which read: "**Habeas corpus.** A defendant must exhaust his remedy under this rule before applying for a writ of habeas corpus", and redesignated former Paragraph C as Paragraph B.

Cross references. — For procedure for appeal under this rule, *see* Rule 12-204 NMRA.

Supreme Court’s exclusive jurisdiction. — The Supreme Court has exclusive jurisdiction over interlocutory appeals from pretrial release orders in cases where the

defendant faces a possible sentence of life imprisonment or death. *State v. Brown*, 2014-NMSC-038.

Review of motion to reduce bond is unwarranted on appeal from conviction because the trial court's ruling on bond has no relation to the merits of the appeal. *State v. Smith*, 1979-NMSC-020, 92 N.M. 533, 591 P.2d 664.

Law reviews. — For article, "Habeas Corpus in New Mexico," see 11 N.M.L. Rev. 291 (1981).

5-406. Bonds; exoneration; forfeiture.

A. **Exoneration of bond.** Unless otherwise ordered for good cause, a bond shall be automatically exonerated only under the following circumstances:

(1) twelve (12) months after the posting of the bond if the crime is a felony and no charges are pending in the district court;

(2) six (6) months after the posting of the bond if the crime is a misdemeanor or petty misdemeanor and no charges are pending;

(3) at any time prior to entry of a judgment of default on the bond if the district attorney approves;

(4) upon surrender of the defendant to the court by an unpaid surety;

(5) upon dismissal of the case without prejudice, unless the case involves a paid surety; or

(6) upon acquittal, conviction, or dismissal of the case with prejudice.

B. **Surrender of the defendant by a paid surety.** If the paid surety arrests the defendant under Section 31-3-4 NMSA 1978 prior to the entry of a judgment of default on the bond, the court may absolve the paid surety of responsibility to pay all or part of the bond.

C. **Forfeiture.** If the defendant has been released upon the execution of an unsecured appearance bond, percentage bond, property bond, cash bond, or surety bond under Rule 5-401 NMRA, and the defendant fails to appear in court as required, the court may declare a forfeiture of the bond. If a forfeiture has been declared, the court shall hold a hearing on the forfeiture prior to entering a judgment of default on the bond. A hearing on the forfeiture shall be held thirty (30) or more days after service of the Notice of Forfeiture and Hearing on the defendant, at the defendant’s last known address, and on the surety, if any, in the manner provided by Rule 5-407 NMRA.

D. **Setting aside forfeiture.** The court may direct that a forfeiture be set aside in whole or in part upon a showing of good cause why the defendant did not appear as required by the bond or if the defendant is surrendered by a surety, if any, into custody prior to the entry of a judgment of default on the bond. Notwithstanding any provision of law, no other refund of the bond shall be allowed.

E. **Judgment of default; execution.** If, after a hearing, the forfeiture is not set aside, the court shall enter a judgment of default on the bond. If the judgment of default is not paid within ten (10) days after it is filed and served on the defendant, at the defendant's last known address, and on the surety, if any, in the manner provided by Rule 5-407 NMRA, execution may issue thereon.

F. **Appeal.** Any aggrieved person may appeal from a judgment or order entered under this rule as authorized by law for appeals in civil actions in accordance with the Rules of Appellate Procedure. An appeal of a judgment or order entered under this rule does not stay the underlying criminal proceedings.

[Adopted, effective October 1, 1987; as amended by Supreme Court Order No. 10-8300-033, effective December 10, 2010; as amended by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017.]

Committee commentary. — Under Paragraph A, a bond is automatically exonerated upon a finding of guilty or not guilty. *See* NMSA 1978, § 31-3-10 ("All recognizances secured by the execution of a bail bond shall be null and void upon the finding that the accused person is guilty, and all bond liability shall thereupon terminate.").

Under Paragraph B and NMSA 1978, Section 31-3-4, if a paid surety wants to be discharged from the obligation of its bond, the surety may arrest the defendant and deliver the defendant to the county sheriff. Section 31-3-4 provides that a "paid surety may be released from the obligation of its bond only by an order of the court" and sets forth the circumstances under which the "court shall order the discharge of a paid surety."

Under Paragraph C, the court may declare a forfeiture of any secured or unsecured bond if the defendant fails to appear in court as required. *See* NMSA 1978, § 31-3-2 (failure to appear; forfeiture of bail bonds); *see also State v. Romero*, 2006-NMCA-126, ¶ 12, 140 N.M. 524, 143 P.3d 763 (holding that the court may not declare a forfeiture of bail for violations of conditions of release unrelated to appearance before the court), *aff'd*, 2007-NMSC-030, 141 N.M. 733, 160 P.3d 914.

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

ANNOTATIONS

The 2017 amendment, approved by Supreme Court Order No. 17-8300-005, effective July 1, 2017, revised the circumstances under which a bond is automatically exonerated, clarified the provision relating to the discharge of a paid surety's obligation to pay all or part of the bond, clarified the circumstances under which the court may declare a forfeiture of the bond, and added the committee commentary; in the rule heading, deleted "Bail"; in Paragraph A, in the introductory clause, after "shall", deleted "only", and after "exonerated", added "only under the following circumstances", in Subparagraphs A(1) and (2), deleted "after", after "months", added "after the posting of the bond", and after "no charges", deleted "have been filed" and added "are pending", added Subparagraphs A(5) and A(6); in Paragraph B, in the heading, deleted "an offender" and added "the defendant", deleted "A person who is released upon execution of a bail bond by a paid surety may be arrested by the paid surety if the court has revoked the defendant's conditions of release pursuant to Rule 5-403 NMRA or if the court has declared a forfeiture of the bond pursuant to the provisions of this rule.", after the next occurrence of "paid surety", deleted "delivers" and added "arrests", and after the next occurrence of "defendant", deleted "to the court" and added "under Section 31-3-4 NMSA 1978"; in Paragraph C, deleted "If there is a breach of condition of a bond," and added "If the defendant has been released upon the execution of an unsecured appearance bond, percentage bond, property bond, cash bond, or surety bond under Rule 5-401 NMRA, and the defendant fails to appear in court as required", after "forfeiture of the", deleted "bail" and added "bond", after "Notice of Forfeiture and", deleted "Order to Show Cause" and added "Hearing", and after "on the", deleted "clerk of the court" and added "defendant, at the defendant's last known address, and on the surety, if any"; in Paragraph D, after "surrendered by", deleted "the" and added "a", after "surety", added "if any", and after "refund of the", deleted "bail"; and in Paragraph E, in the heading and in two occurrences in the paragraph, changed "default judgment" to "judgment of default", after "not set aside", added "the court shall enter", after "bond", deleted "shall be entered by the court", after "served on", added "the defendant, at the defendant's last known address, and on", and after "surety", added "if any".

The 2010 amendment, approved by Supreme Court Order No. 10-8300-033, effective December 10, 2010, in Paragraph B, after "court may absolve the", deleted "bondsman" and added "paid surety"; and added Paragraph F.

Proper forfeiture of bond. — Where defendant was charged with the felony offense of driving while under the influence of intoxicating liquor, released on bail by the magistrate court in the amount of $5,000 subject to certain conditions, fled to Arkansas after his initial bond hearing, and where appellant bond company, over a year later, took defendant into custody in Arkansas and returned him to New Mexico, the district court did not err in affirming the forfeiture of the bond by the magistrate court where the evidence established that appellant did not take any action in Arkansas prior to the forfeiture hearing in the magistrate court and did not appear at the forfeiture hearing to show "good cause" why the defendant failed to appear at his preliminary hearing, that defendant was not in custody in Arkansas, and that Arkansas did not thwart the efforts of appellant to apprehend defendant; appellant failed to sustain its burden of showing

an impediment to defendant's appearance or that defendant was taken into custody prior to the entry of the magistrate court judgment. *State v. Naegle*, 2017-NMCA-017.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Forfeiture of bail for breach of conditions of release other than that of appearance, 68 A.L.R.4th 1082.

5-407. Bail bonds; notice.

By entering into a bond in accordance with the provisions of these rules, the obligors submit to the jurisdiction of the court and irrevocably appoint the clerk of the court as their agent upon whom any papers affecting their liability may be served. Their liability may be enforced on motion of the district attorney or upon the court's own motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court who shall forthwith mail copies to the obligors at their last known addresses.

[Adopted, effective October 1, 1987.]

5-408. Pretrial release by designee.

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.]

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 for an expedited pretrial detention hearing 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 motion for an expedited pretrial detention hearing at any time in the court where the case is pending. The motion shall include the specific facts that warrant pretrial detention and shall specify whether the state is requesting a preliminary examination to establish probable cause. If the state requests a preliminary examination, the motion shall also specify whether the state is requesting that an expedited pretrial detention hearing be held concurrently.

(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) Except when the court finds no probable cause, the court may not grant or deny the motion for pretrial detention without a hearing.

C. **Case initiated 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 shall proceed to conduct the defendant's first appearance under Rule 6-501 NMRA or Rule 7-501 NMRA and thereafter promptly send 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 shall then close the case and its jurisdiction shall be terminated, and the district court shall acquire exclusive jurisdiction over the case, except as provided in Paragraph I of this rule.

D. **Case initiated in district court.** If a motion for pretrial detention is filed in the district court and an initial finding of probable cause has not been made under Rule 5-301 NMRA, Rule 6-203 NMRA, or Rule 7-203 NMRA, the district court shall determine probable cause in accordance with Rule 5-301 NMRA. If the court finds no probable cause, the 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. If probable cause is found, the court shall proceed to conduct the defendant's first appearance under Rule 5-301(D) NMRA and Rule 5-401(A) NMRA.

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 under that designation is terminated on 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. **Expedited pretrial detention hearing.** The district court shall hold an expedited 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. On the request of the prosecutor or on the court's own motion, the court shall set the matter for a preliminary examination to be held concurrently with the motion for pretrial detention.

(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) *Time limit for concurrent hearings.* Notwithstanding the time limit specified in Subparagraph (F)(1)(a) of this rule, if the prosecutor requests or the court on its own motion orders the expedited pretrial detention hearing and preliminary examination to be held concurrently, the consolidated hearing shall be held no less than eight (8) days and no more than ten (10) days after the applicable triggering event identified in Subparagraph (F)(1)(a)(i) and (ii) of this rule.

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

(i) for three (3) days to five (5) days, as provided in Subparagraph (F)(1)(b) of this rule, if in the motion for pretrial detention the prosecutor requests or the court on its own motion orders a preliminary hearing to be held concurrently with the detention hearing;

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

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

(iv) on stipulation of the parties.

(d) *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 before 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 the defendant is likely to pose a threat to the safety of others if released pending trial and 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 about pretrial detention based on documentary evidence, court records, proffer, witness testimony, hearsay, argument of counsel, input from a victim, 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; and

(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.

G. **Order for pretrial detention.** The district 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 the defendant is likely to pose a threat to the safety of others if released pending trial and that no release conditions will reasonably protect the safety of any other person or the community. An order containing findings of the individualized facts justifying the detention must be filed as soon as possible, but no later than three (3) days after the conclusion of the hearing.

H. **Order setting conditions of release.** The district 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 cases initiated in magistrate or metropolitan court.** If, after a preliminary examination, the district court finds no probable cause to believe that the defendant has committed a felony offense, the court shall set conditions of release and may remand any remaining misdemeanor charges to the magistrate or metropolitan court for further proceedings.

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. The court shall hold a status review hearing in any case in which the defendant has been held for more than six (6) months and every six (6) months thereafter. The purpose of the status review hearing is to conduct a meaningful review of the progress of the case. If the court determines that insufficient progress has been made, then the court shall issue an appropriate scheduling order.

K. **Successive motions for pretrial detention and motions to reconsider.** On written motion of the prosecutor or the defendant, the district 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 after 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 Nos. 20-8300-013 and 20-8300-021, effective for all cases

pending or filed on or after November 23, 2020; as amended by Supreme Court Order No. 22-8300-015, effective for all cases pending or filed on or after December 31, 2022; as amended by Supreme Court Order No. S-1-RCR-2024-00068, effective for all cases pending or filed on or after May 8, 2024.]

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." *Id*. 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 before that date for which capital punishment may be imposed. *See State v. Ameer*, 2018-NMSC-030, ¶¶ 5-6, 70, 458 P.3d 390.

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 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), and 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.

Under this paragraph, the prosecutor retains discretion to "obtain a neutral determination of probable cause" by either presenting the case to a grand jury or proceeding with a preliminary examination. *See Herrera v. Sanchez*, 2014-NMSC-018, ¶ 14, 328 P.3d 1176. However, because the district court faces time constraints in setting a preliminary examination if requested, the prosecutor is required to advise the court of the need for the setting by stating in the motion for pretrial detention whether the prosecutor intends to proceed by grand jury indictment or instead by preliminary examination and the filing of a criminal information.

Paragraph C — Under Paragraph C, the filing of a motion for pretrial detention deprives the magistrate or metropolitan court of jurisdiction and confers exclusive jurisdiction on the district court, except as provided by Paragraph I. The district court's exclusive jurisdiction extends to cases that are refiled after dismissal.

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 forty-eight (48) hours after arrest, in order to continue detention or other significant restraint of liberty. *Cnty. 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)(c)(i) authorizes an extension of time if the prosecutor requests or the court orders 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 of

the New Mexico Constitution. *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. Both the prosecutor and the defendant may proceed by proffer at the pretrial detention hearing.

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 is 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. This assessment "require[s] a detention court to engage in a delicate case-by-case balancing of all relevant factors, with the calculus limited only 'by what evidence the litigants present.'" *State v. Mascareno-Haidle*, 2022-NMSC-015, ¶ 39, 514 P.3d 454 (citing *State v. Ferry*, 2018-NMSC-004, ¶ 7, 409 P.3d 918). Among other factors, the court may consider 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 *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. However, the detention court shall not "consider the nature and circumstances of the offense factor in isolation and to the exclusion of all other relevant factors, whether those factors are expressly identified in the rule or not." *Masacreno-Haidle*, 2022-NMSC-015, ¶ 39 (internal quotation marks omitted). Furthermore, the type of offense charged, by itself and without more, will not suffice to meet the prosecutor's burden. *See Groves*, 2018-NMSC-006, ¶ 33 (discounting the relevance at a detention hearing of "the category or punishability of the charged crime," and recognizing that "the court's focused concern is not to impose punishment for past conduct but instead to assess a defendant's likely future conduct" (citing *Torrez*, 2018-NMSC-005, ¶ 101)). 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." *Ferry*, 2018-NMSC-004, ¶ 6. "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*.

The 2024 amendment removes a reference to a pretrial risk assessment instrument approved by the Supreme Court. The risk assessment instrument remains valid. However, this instrument only measures risk and should not be used as a stand-alone factor to make a recommendation for or against pretrial detention. The risk assessment

score may be considered as part of a defendant's history and characteristics under Subparagraph (F)(6)(c).

Paragraph I — On the transfer of a case to the district court, the magistrate or metropolitan court generally loses jurisdiction under Paragraph C of this rule. A single narrow exception is set out in Paragraph I, whose provisions allow a case to be remanded to the magistrate or metropolitan court only if, after a preliminary hearing, misdemeanor—not felony—charges alone remain, and then at the sole discretion of the district court. A case in which the prosecutor files and subsequently withdraws a motion for pretrial detention cannot be remanded to the magistrate or metropolitan court for further proceedings, unless the case otherwise meets the misdemeanor exception carved out under this paragraph.

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 because of "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."). This rule does not preclude earlier or more regular status review hearings. The purpose of the hearing is to determine how best to expedite a trial in the case. A meaningful review of the progress of the case includes assessment of the parties' compliance with applicable deadlines, satisfaction of discovery obligations, and witness availability, among other matters. If the court determines that the parties have made insufficient progress on these measures, then it shall issue an appropriate scheduling order.

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 of the New Mexico Constitution, 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 when 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 (1985). Paragraph M does not prevent a judge from filing a recusal 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; as amended by Supreme Court Order No. 20-8300-021, effective for all cases pending or filed on or after November 23, 2020; as amended by Supreme Court Order No. 22-8300-015, effective for all cases pending or filed on or after December 31, 2022; as amended by Supreme Court Order No. S-1-RCR-2024-00068, effective for all cases pending or filed on or after May 8, 2024.]

ANNOTATIONS

The 2024 amendment, approved by Supreme Court Order No. S-1-RCR-2024-00068, effective May 8, 2024, approved by Supreme Court Order No. S-1-RCR-2024-00068, effective May 8, 2024, removed a reference to a pretrial risk assessment instrument approved by the Supreme Court, made certain technical changes, and revised the committee commentary; in Paragraph B, Subparagraph B(3), after "Except", deleted "where" and added "when"; and in Paragraph F, Subparagraph F(6), deleted Item F(6)(g), which provided "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."

The 2022 amendment, approve by Supreme Court Order No. 22-8300-015, effective December 31, 2022, required a motion for pretrial detention to specify whether the state is requesting a preliminary examination to establish probable cause, and if so, the motion shall also specify whether the state is requesting that an expedited pretrial detention hearing be held concurrently with the preliminary examination, removed a provision that allowed the prosecutor to file a motion for an expedited pretrial detention hearing in both the court where the case is pending and in the district court and limited the filing to the court where the case is pending, provided an exception to the rule that the district court may not grant or deny the motion for pretrial detention without a hearing, provided that, in cases initiated in the magistrate or metropolitan court, when a motion for pretrial detention is filed and the court finds probable cause, the court shall proceed to conduct the defendant's first appearance under Rule 6-501 NMRA or Rule 7-501 NMRA, provided an exception to the rule that, in cases initiated in the magistrate or metropolitan court and a motion for pretrial detention has been filed, the court's jurisdiction is terminated after a finding of probable cause and after the case is bound over to the district court, provided that, in cases initiated in the magistrate or metropolitan court and where the district court, in its preliminary examination, found no probable cause to believe that the defendant committed a felony, the district court shall set conditions of release and may remand any remaining misdemeanor charges to the

magistrate or metropolitan court for further proceedings, provided that, in cases initiated in the district court and a motion for pretrial detention has been filed and the court finds probable cause, the court shall proceed to conduct the defendant's first appearance under Rule 5-301(D) NMRA, provided that, notwithstanding the time limit specified in Subparagraph F(1)(a), if the prosecutor requests or the court on its own motion orders the expedited pretrial detention hearing and preliminary examination to be held concurrently, the consolidated hearing shall be held no less than eight days and no more than ten days following the applicable triggering event identified in Subparagraph F(1)(a)(i) and (ii) of this rule, made certain provisions related to extending the time limits for holding the pretrial detention hearing mandatory, enlarged the time in which the court may extend the time limit for holding a pretrial detention hearing when the pretrial detention hearing and the preliminary examination are to be held concurrently, revised a provision related to the prosecutor's burden at a pretrial detention hearing, revised a provision related to the district court' standard for issuing an order for pretrial detention, required the district court to conduct a status review hearing in any case in which the defendant has been held for more than six months and every six months thereafter in order to review the progress of the case, and required the district court to issue an appropriate scheduling order if the court determines that insufficient progress has been made in the case, made certain technical, nonsubstantive changes, and revised the committee commentary; in Paragraph A, after "if the prosecutor files a motion", deleted "titled 'Expedited Motion for Pretrial Detention'" and added "for an expedited pretrial detention hearing"; in Paragraph B, in the introductory paragraph, after "The prosecutor may file", deleted "an expedited", after "motion for", added "an expedited", after "at any time in", deleted "both", after "where the case is pending", deleted "and in the district court", and added "and shall specify whether the state is requesting a preliminary examination to establish probable cause. If the state requests a preliminary examination, the motion shall also specify whether the state is requesting that an expedited pretrial detention hearing be held concurrently", and in Subparagraph B(3), added "Except where the court finds no probable cause"; in Paragraph C, in the paragraph heading, after "Case", deleted "pending" and added "initiated", after the third occurrence of "magistrate or metropolitan court", deleted "clerk" and added "shall proceed to conduct the defendant's first appearance under Rule 6-501 NMRA or Rule 7-501 NMRA and thereafter", after "The magistrate or metropolitan", added "court shall then close the case and its", and after "exclusive jurisdiction over the case", added "except as provided in Paragraph I of this rule"; in Paragraph D, in the paragraph heading, after "Case", deleted "pending" and added "initiated", added "an initial finding of" preceding the first occurrence of "probable cause", after "under", deleted "Article II, Section 14 of the New Mexico Constitution or Rule 5-208(D) NMRA", after "Rule 6-203 NMRA", deleted "Rule 6-204(B) NMRA" and added "or", after "Rule 7-203 NMRA", deleted "or Rule 7-204(B) NMRA", and added the last sentence of the paragraph; in Paragraph F, in the paragraph heading, added "Expedited", in the introductory paragraph, after "The district court shall hold", added "an expedited", after "On the request of the prosecutor", added "or on the court's own motion", added a new Subparagraph F(1)(b) and redesignated former Subparagraphs F(1)(b) and F(1)(c) as Subparagraphs F(1)(c) and F(1)(d), respectively, in Subparagraph F(1)(c), in the introductory clause, after "The court", deleted "may" and added "shall", in Subparagraph

F(1(c)(i), after “for”, deleted “up to”, after “three (3)”, added “days to five (5)”, after the next occurrence of “days”, added “as provided in Subparagraph (F)(1)(b) of this rule”, and after “prosecutor requests”, added “or the court on its own motion order”, in Subparagraph F(4), after “clear and convincing evidence that”, added “the defendant is likely to pose a threat to the safety of others if released pending trial and that”; in Paragraph G, after “clear and convincing evidence that”, added “the defendant is likely to pose a threat to the safety of others if released pending trial and that”, after “other person in the community”, deleted “The court shall file” and added “An order containing”, and after “justifying the detention”, added “must be filed”; in Paragraph I, in the paragraph heading, after “Further proceedings in”, added “cases initiated”, deleted “Upon completion of the hearing, if the case was pending in the magistrate or metropolitan court, the district court shall promptly transmit to the magistrate or metropolitan court an order closing the magistrate or metropolitan court case.” and added the remainder of the paragraph; and in Paragraph J, after “in which the defendant is detained pending trial.”, added the remainder of the paragraph.

The 2020 amendments, approved by Supreme Court Order Nos. 20-8300-013 and 20-8300-021, effective November 23, 2020, provided the district court with exclusive jurisdiction over a case following a magistrate or metropolitan court’s finding of probable cause while the case was pending in the magistrate or metropolitan court, removed a provision regarding notice to the magistrate or metropolitan court that the preliminary examination is to be held in the district court, provided the type of evidence upon which a district court may make its decision regarding pretrial detention, and, upon completion of the pretrial detention hearing in the district court, required the district court to transmit to the magistrate or metropolitan court an order closing the magistrate or metropolitan court case if the case was pending in the magistrate or metropolitan court, and revised the committee commentary; in Paragraph C, after “The magistrate or metropolitan court’s jurisdiction”, deleted “to set or amend conditions of release”, and after “exclusive jurisdiction over”, deleted “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” and added “the case”; in Paragraph F, in the introductory paragraph, deleted “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”, and in Subparagraph F(5), after “information at the hearing.”, added the remainder of the subparagraph; and in Paragraph I, after “Upon completion of the hearing, if the case”, deleted “is” and added “was”, and deleted “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” and added “an order closing the magistrate or metropolitan court case”.

The 2018 amendment, approved by Supreme Court Order No. 18-8300-024, effective February 1, 2019, prohibited the court from granting or denying a motion for pretrial detention without a conducting a hearing, authorized the district court, upon the request of the prosecutor, to set the matter for a preliminary examination to be held concurrently

with the motion for pretrial detention, authorized the district court to extend the time limit for holding a pretrial detention hearing for up to three days if the prosecutor requests a preliminary hearing to be held concurrently with the detention hearing, added certain notice provisions, provided an exception to the deadline for evidentiary disclosures, provided factors that the court may consider in making its determination on pretrial detention, extended the time within which the court must file findings of fact justifying the court's ruling on the detention motion, authorized the court to reopen the detention hearing before trial if circumstances have changed subsequent to the initial hearing, and revised the committee commentary; added Subparagraph B(3); in Paragraph F, added the last sentence of the introductory paragraph, added new Subparagraph F(1)(b)(i) and subparagraph designation "(ii)" and redesignated former subparagraphs, and added Subparagraph F(1)(c), in Subparagraph F(2), deleted "Discovery" and added "Initial disclosures", rewrote Subparagraph F(2)(a), added Subparagraph F(2)(b), and added Subparagraph F(6); in Paragraphs G and H, deleted "two (2)" and added "three (3)"; and in Subparagraph K(1), after "time of the hearing", deleted "and that" and added "or circumstances have changed subsequent to the hearing, and", and in Subparagraph K(2), after the subparagraph designation, added "the information or changed circumstances".

The nature of the evidence required in pretrial detention hearings. — On a writ of superintending control, where petitioner sought guidance on the nature of the evidence required in pretrial detention hearings authorized by the 2016 amendment to Article II, Section 13 of the New Mexico Constitution, the New Mexico Supreme Court ruled that neither the United States Constitution nor the New Mexico Constitution categorically requires live witness testimony at pretrial detention hearings, and under New Mexico Supreme Court procedural rules, judges may consider all reasonably reliable information, without regard to strictures of the formal rules of evidence, in considering whether any pretrial release conditions will reasonably protect the safety of any other person or the community. *State ex rel. Torrez v. Whitaker*, 2018-NMSC-005.

Unlawful use of money to detain. — Setting a money bond that a defendant cannot afford to post is a denial of the constitutional right to be released on bail for those who are not detainable for dangerousness in the new due process procedures under the New Mexico Constitution. If a court finds that a defendant is too dangerous to release under any available conditions, the court should enter a detention order. If the court instead finds that a defendant is entitled to release under Article II, Section 13 of the New Mexico Constitution and Rule 5-409 NMRA, the court must not use a money bond to impose pretrial detention. *State ex rel. Torrez v. Whitaker*, 2018-NMSC-005.

Pretrial detention based on history of dangerous conduct and failure to abide by requirements of previous release orders. — Where defendant and another man stole a van in Albuquerque and attempted to flee pursuing police officers, driving recklessly at extremely high speeds through residential city streets, and where defendant, shown to be the driver of the stolen van by physical evidence and her post-arrest statements to police, crashed the van into another car at an intersection, killing a teenage girl, fatally injuring the girl's mother, and breaking the leg of the mother's three-year-old son, and

after the crash, defendant and her cohort jumped out of the stolen van and continued their flight from police, stealing another vehicle and succeeding in eluding police, but leaving behind a number of clues that resulted in defendant's identification and arrest two days later, the district court did not abuse its discretion in granting the state's motion for pretrial detention, because the factual information about defendant's current and previous offenses that was relied on by the district court carried strong indicia of reliability, the information supported the conclusion that defendant had uncontrolled propensities to persist in the commission of unlawful and dangerous conduct, and based on defendant's record of continued criminal activity and dangerous conduct while on previous conditions of release and pattern of refusal to comply with directions of the court and of police, there was clear and convincing evidence supporting a conclusion that no available conditions a court could impose would protect against defendant's likely future dangerous conduct. *State v. Groves*, 2018-NMSC-006.

Pretrial detention pending trial. — The district court may order the detention pending trial of a defendant charged with a felony offense if the prosecutor proves by clear and convincing evidence that the defendant poses a future threat to others or the community, and no conditions of release will reasonably protect the safety of another person or the community. *State v. Ferry*, 2018-NMSC-004.

Nature and circumstances of defendant's conduct. — The nature and circumstances of a defendant's conduct in the underlying charged offenses may be sufficient, despite other evidence, to sustain the state's burden of proving by clear and convincing evidence that the defendant poses a threat to others or the community. If the state meets this initial burden of proof, the state must still prove by clear and convincing evidence, under Article II, Section 13 of the New Mexico Constitution, that no release conditions will reasonably protect the safety of any other person or the community. *State v. Ferry*, 2018-NMSC-004.

Where defendant was alleged to have participated in the kidnapping, mutilation, and murder of a person and to have tampered with evidence, and where the state filed a motion for pretrial detention which was denied by the district court judge after an evidentiary hearing, it was not clear from the record whether the district judge believed that he was precluded from finding that reliable evidence of the nature and circumstances of the crime can never, in and of itself, be sufficient for the state to meet its burden of proving a defendant's future dangerousness, and therefore the case was remanded for clarification. *State v. Ferry*, 2018-NMSC-004.

Analysis for release-conditions prong of the pretrial detention inquiry. — In considering the release-conditions prong of the pretrial detention analysis, the State must prove by clear and convincing evidence that no release conditions can *reasonably* protect the public, not that no release conditions can *possibly* protect the public. The district court must consider patterns in a defendant's past behavior, including the disregard for official directives, and not only whether a defendant is likely to comply with release conditions but also the likely consequences to any person or the community should a defendant fail to comply, and the district court must view these considerations

in light of the magnitude of a defendant's dangerousness. *State v. Anderson*, 2023-NMSC-019.

The trial court abused its discretion in denying pretrial detention. — The trial court abused its discretion when it failed to conclude that no release conditions could reasonably protect the public when it failed to apply the correct analytical framework of Rule 5-409 NMRA and by failing to make individualized findings as to each factor in Rule 5-409(F)(6), and when it found that there were release conditions that could reasonably protect the safety of the public from defendant where the State presented reliable evidence that defendant, charged with first-degree murder, had an extensive criminal history that included crimes of violence, failures to appear, violations of probation, new charges while on probation, committing felonies while incarcerated, knowingly possessing a firearm while a felon, and noncompliance with pretrial services requirements. It was beyond reason, and therefore an abuse of discretion, to conclude that release conditions could reasonably protect the public from defendant's dangerous behavior. *State v. Anderson*, 2023-NMSC-019.

State failed to meet its evidentiary burden to place defendant on pretrial detention. — Where Defendant was charged with one count of residential burglary, one count of unlawful taking of a motor vehicle, and one count of receiving/transferring stolen property, and where, at Defendant's pretrial detention hearing, the district court found that the allegations against Defendant were inherently dangerous, but that the State failed to prove by clear and convincing evidence that no release conditions would reasonably protect the safety of another person or the community, and where the State brought additional charges against Defendant, including larceny, conspiracy to commit residential burglary, unlawful taking of a motor vehicle, two counts of conspiracy to commit a third- or fourth-degree felony, and contributing to the delinquency of a minor, and where at Defendant's second pretrial detention hearing, the district court found that the State again failed to present evidence that no conditions or combination of conditions could be imposed to reasonably protect the community if Defendant was released, the district court did not err in denying the State's motion for pretrial detention, because the State failed to produce any evidence or make any argument that no release conditions could be imposed to reasonably protect the safety of any other person or the community, but instead focused its argument solely on the dangerousness component of the detention determination. Pretrial detention or release decisions cannot be made to turn on any single factor, be it the nature and circumstances of the charged offense or otherwise. *State v. Mascareno-Haidle*, 2022-NMSC-015.

ARTICLE 5
Discovery

5-501. Disclosure by the state.

A. **Information subject to disclosure.** Unless a shorter period of time is ordered by the court, within ten (10) days after arraignment or the date of filing of a waiver of arraignment, subject to Paragraph E of this rule, the state shall disclose or make available to the defendant:

(1) any statement made by the defendant, or codefendant, or copies thereof, within the possession, custody or control of the state, the existence of which is known, or by the exercise of due diligence may become known, to the district attorney;

(2) the defendant's prior criminal record, if any, as is then available to the state;

(3) any books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the state, and which are material to the preparation of the defense or are intended for use by the state as evidence at the trial, or were obtained from or belong to the defendant;

(4) any results or reports of physical or mental examinations, and of scientific tests or experiments, including all polygraph examinations of the defendant and witnesses, made in connection with the particular case, or copies thereof, within the possession, custody or control of the state, the existence of which is known, or by the exercise of due diligence may become known to the prosecutor;

(5) a written list of the names and addresses of all witnesses which the prosecutor intends to call at the trial, identifying any witnesses that will provide expert testimony and indicating the subject area in which they will testify, together with any statement made by the witness and any record of prior convictions of any such witness which is within the knowledge of the prosecutor; and

(6) any material evidence favorable to the defendant which the state is required to produce under the due process clause of the United States Constitution.

B. **Examination by defendant.** The defendant may examine, photograph or copy any material disclosed pursuant to Paragraph A of this rule.

C. **Depositions.** The state may move the court to perpetuate the testimony of any such witness by taking the witness' deposition pursuant to Rule 5-503 NMRA.

D. **Certificate of compliance.** The prosecutor shall file with the clerk of the court at least ten (10) days prior to trial a certificate stating that all information required to be produced pursuant to Paragraph A of this rule has been produced, except as specified. The certificate shall contain an acknowledgment of the continuing duty to disclose additional information. If information specifically excepted from the certificate is furnished by the prosecutor to the defendant after the filing of the certificate, a supplemental certificate shall be filed with the court setting forth the material furnished.

A copy of the certificate and any supplemental certificate shall be served on the defendant.

E. **Disclosures for enhanced sentences.** If the state intends to use a prior criminal conviction to enhance a sentence, the state shall provide or make available to the defendant certified copies or other proof of any prior conviction to be offered during the sentencing hearing.

F. **Information not subject to disclosure.** The prosecutor shall not be required to disclose any material required to be disclosed by this rule if:

(1) the disclosure will expose a confidential informer;

(2) there is substantial risk to some person of physical harm, intimidation, bribery, economic reprisals or unnecessary annoyance or embarrassment resulting from such disclosure, which outweighs any usefulness of the disclosure to defense counsel.

G. **Statement defined.** As used in this rule, and Rules 5-502 and 5-503, "statement" means:

(1) a writing made by a person having percipient knowledge of relevant facts and which contains such facts, other than drafts or notes that have been incorporated into a subsequent draft or final report; or

(2) any written, stenographic, mechanical, electrical or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral declaration and which is recorded contemporaneously with the making of the oral declaration.

H. **Failure to comply.** If the state fails to comply with any of the provisions of this rule, the court may enter an order pursuant to Rule 5-505 NMRA or hold the prosecutor in contempt or take other disciplinary action pursuant to Rule 5-112 NMRA.

[As amended, effective December 1, 1998; as amended by Supreme Court Order No. 07-8300-02, effective March 15, 2007; as amended by Supreme Court Order No. 15-8300-010, effective for all cases pending or filed on or after December 31, 2015.]

Committee commentary. — Section 14 of Article 2 of the New Mexico Constitution gives the defendant a right to "demand the nature and cause of the accusation." This rule provides procedures for the exercise of the right to determine the "cause of the accusation" to obtain discovery of relevant evidence that may tend to prove or disprove the factual allegations of a criminal charge. A motion for discovery of evidence should not be confused with a motion for statement of facts pursuant to Rule 5-205 NMRA, which is intended to obtain more specificity regarding the factual manner in which the defendant is alleged to have committed his or her criminal acts.

This rule was derived from Rule 16(a) of the Federal Rules of Criminal Procedure. *See generally*, 62 F.R.D. 271, 304-313 (1974); 48 F.R.D. 553, 587-606 (1970).

This rule and Rule 5-502 require the prosecution and the defense to exchange certain information. Judicial involvement should be in the rare case.

Under Subparagraph (4) of Paragraph A of this rule, the state has a duty to disclose to the defense any reports prepared by experts in connection with the defendant's case.

Subparagraph (6) of Paragraph A of this rule was added in 1979 to make it clear that the state has a duty to provide the defense with exculpatory material evidence. *See Brady v. Maryland*, 373 U.S. 83 (1963) and *Giles v. Maryland*, 386 U.S. 66 (1967). Failure to produce such evidence may result in the entry of an order pursuant to Rule 5-505 or if discovered after trial in a new trial unless the nondisclosure constitutes harmless error. *See* Paragraph A of Rule 5-113 and *United States v. Agurs*, 427 U.S. 97 (1976).

There are a number of supreme court decisions recognizing the duty of the prosecutor to produce evidence which is material and exculpatory. *See* for example: *Trimble v. State*, 75 N.M. 183, 402 P.2d 162 (1965) (loss of certain letters and erasure of parts of tape held violation of due process of law); *State v. Gomez*, 75 N.M. 545, 408 P.2d 48 (1965) (failure, upon request, to disclose contents of supplemental police report held reversible error); *State v. Morris*, 69 N.M. 244, 365 P.2d 668 (1961) (failure to produce letter prior to trial held not suppression of material evidence requiring reversal); *Chacon v. State*, 88 N.M. 198, 539 P.2d 218 (Ct. App. 1975) (negligent nondisclosure of supplemental police report and statement of a witness misfiled in the district attorney's office found to be material evidence and reversible error); *State v. Vigil*, 79 N.M. 80, 439 P.2d 729 (Ct. App. 1968) (nondisclosure of evidence held not reversible error when defendant knew the evidence was in possession of the state and made no demand for its production); and *State v. Turner*, 81 N.M. 571, 469 P.2d 720 (Ct. App. 1970) (there must be particularized need for materials not produced for there to be reversible error).

Some of the appellate court decisions announced since the adoption of Subparagraph (5) of Paragraph A of this rule have not always indicated that the rule was being construed. Relying on a prerule decision, *State v. Herrera*, 84 N.M. 365, 503 P.2d 648 (Ct. App. 1972) holds that the defendant is entitled to statements of the witness, in that case a police report. *State v. Vigil*, 87 N.M. 345, 533 P.2d 578 (1975) holds that, once the witness has testified at trial the defendant is entitled to a copy of a written statement submitted by the witness to the grand jury. Subparagraph (5) of Paragraph A of this rule may require the statement of the witness to be disclosed prior to his testifying. (*See* Rule 5-506.)

In *State v. Sparks*, 85 N.M. 429, 512 P.2d 1265 (Ct. App. 1973), the court noted that this rule did not give the defendant a right to testimony of a witness before the grand jury. However, the court then held that the constitutional right to confrontation gave the defendant the right to the transcribed testimony for use in cross examination of the

witness once the witness had testified. In *State v. Felter*, 85 N.M. 619, 515 P.2d 138 (1973), the supreme court made it clear that, absent some showing of particularized need, the defendant is not entitled to a copy of the grand jury testimony before the witness has testified at trial.

In *State v. Quintana*, 86 N.M. 666, 526 P.2d 808 (Ct. App.), *cert. denied*, 86 N.M. 656, 526 P.2d 798 (1974), the court held that the failure of the state to "strictly comply" with Subparagraph (5) of Paragraph A of this rule was not reversible error without a showing that substantial rights of the defendant had been prejudiced. In *State v. Billington*, 86 N.M. 44, 519 P.2d 140 (Ct. App. 1974), the court held that failure of the state to comply with the rule was grounds for continuance of the trial as a matter of law. The cases might be reconciled on the basis of the importance of the witnesses whose names were not disclosed by the state in each case.

Paragraph D of this rule (prior to the 1980 amendment) was derived from Rule 34(b) of the Federal Rules of Civil Procedure, the procedure for production of documents and things and entry upon land for inspection. Paragraph E of this rule was derived from American Bar Association Standards Relating to Discovery and Procedure Before Trial, Section 2.5 (Approved Draft 1970).

On the privilege of the state to refuse to disclose the identity of an informer, *see* Rule 11-510. *See also*, *State v. Bauske*, 86 N.M. 484, 525 P.2d 411 (Ct. App. 1974).

[As amended by Supreme Court Order No. 13-8300-008, effective for all cases pending or filed on or after May 13, 2013; as amended by Supreme Court Order No. 15-8300-010, effective for all cases pending or filed on or after December 31, 2015.]

ANNOTATIONS

The 2015 amendment, approved by Supreme Court Order No. 15-8300-010, effective December 31, 2015, placed a duty on the State to identify, in its witness list, any witness that the State intends to call at trial that will provide expert testimony and to indicate the subject area on which the expert witness will testify; in Subparagraph A(5), after “call at the trial”, added “identifying any witnesses that will provide expert testimony and indicating the subject area in which they will testify”; and in the committee commentary, added the fourth paragraph.

The 2013 amendment, approved by Supreme Court Order No. 13-8300-008, effective May 13, 2013, revised the committee commentary.

The 2007 amendment, effective March 15, 2007, rewrote Paragraph G to limit the scope of the definition of "statement" to verbatim recordings and to exclude notes which are in substance recitals of oral statements. *See State v. Blackmer*, 2005-NMSC-008, ¶ 26, 137 N.M. 258, 110 P.3d 66.

The 1998 amendment, effective December 1, 1998, added present Paragraph E and redesignated former Paragraphs E through G as Paragraphs F through H.

Cross references. — For record of grand jury testimony, *see* Rule 5-506 NMRA and Section 31-6-8 NMSA 1978.

For subsequent offenses under Riot Control Act, *see* Section 12-10-16 NMSA 1978.

For subsequent stalking offenses, *see* Section 30-3A-3.1 NMSA 1978.

For subsequent robbery offenses, *see* Section 30-16-2 NMSA 1978.

For subsequent convictions as drug percursor, *see* Section 30-31B-12 NMSA 1978.

For subsequent convictions for illegal use of telephone devices, *see* Section 30-33A-4 NMSA 1978.

For sentencing of habitual offenders, *see* Sections 31-18-18 to 31-18-20 NMSA 1978.

For imposition of an enhanced penalty for a second of subsequent driving while under the influence of alcohol or drugs, *see* Section 66-8-102 NMSA 1978.

For forms on certificate and supplemental certificate of disclosure of information, *see* Rules 9-412 and 9-413 NMRA.

I. GENERAL CONSIDERATION.

Exclusion of witnesses is a proper sanction where discovery orders are not obeyed. — Where defendant, prior to trial, moved to exclude the state's witnesses due to the state's repeated failure to comply with the district court's discovery order that the state provide the defense with correct contact information for the witnesses listed on the state's witness list, the district court did not abuse its discretion in excluding the state's witnesses where the court found that the state had made insufficient efforts to confirm the accuracy of the addresses provided in the witness list, that defendant was prejudiced by the inability to communicate with essential witnesses, and by the delay, and where the sanction was tailored to fit the violation and the exclusion was the most effective and least severe way to achieve the desired results. *State v. Le Mier*, 2017-NMSC-017, *rev'g* No. 33,493, mem. op. (N.M. Ct. App. July 22, 2014).

Factors to consider when imposing sanctions for violations of discovery orders. — Where defendant was indicted for shoplifting and conspiracy to commit shoplifting, and where the district court dismissed defendant's charges with prejudice due to the State's failure to timely turn over recordings of witness identification interviews as required by local rule, the dismissal resulted in an abuse of discretion, because the district court failed to explain the manner in which it considered culpability, prejudice, and lesser sanctions. *State v. Lewis*, 2018-NMCA-019, cert. denied.

There is no provision in the Rules of Criminal Procedure that allows the prosecution to deny access to an expert witness not subpoenaed based on defendant's failure to pay an expert witness fee. *State v. Harper*, 2010-NMCA-055, 148 N.M. 286, 235 P.3d 625, cert. granted, 2010-NMCERT-006, 148 N.M. 582, 241 P.3d 180.

Exclusion of witnesses as a sanction for violation of discovery order. — The exclusion of witnesses as a sanction requires an intentional violation of a court order, prejudice to the opposing party, and consideration by the court of lesser sanctions. *State v. Harper*, 2011-NMSC-044, 150 N.M. 745, 266 P.3d 25, *aff'g in part and rev'g in part*, 2010-NMCA-055, 148 N.M. 286, 235 P.3d 625.

Where the district court established a deadline for the interview of witnesses; the prosecutor met with the minor victim and the victim's relative to arrange an interview and the victim agreed to appear for an interview; the prosecutor scheduled an interview of the victim on the day of the deadline; on the day before the interview was scheduled, the prosecutor confirmed the victim's appearance for the interview; the witness failed to appear for the interview; the prosecutor asked the district court for an extension of time to schedule an interview after the witness had been subpoenaed; defendant had the victim's safehouse interview; defendant did not file a motion to compel interviews, issue subpoenas, or contend that the delay was prejudicial; and ample time remained before the scheduled trial date to interview witnesses, the court's exclusion of the victim as a witness at trial constituted an abuse of discretion. *State v. Harper*, 2011-NMSC-044, 150 N.M. 745, 266 P.3d 25, *aff'g* 2010-NMCA-055, 148 N.M. 286, 235 P.3d 625.

Where the district court orally established a deadline for the interview of witnesses; the prosecutor did not schedule an interview for the state's medical expert witness because payment of a witness fee had not been approved; when the court established the deadline, it was on notice that payment of a witness fee was an issue, but did not specify whether, when or how a witness fee was to be paid or that failure to produce the witness for an interview by the deadline would result in the exclusion of the witness from testifying at trial; the court did not consider a less severe sanction than exclusion of the witness; and there was no proof of prejudice to defendant or an intentional refusal by the prosecutor to obey the court's discovery directive, the court's exclusion of the expert witness as a witness at at trial constituted an abuse of discretion. *State v. Harper*, 2011-NMSC-044, 150 N.M. 745, 266 P.3d 25, *rev'g* 2010-NMCA-055, 148 N.M. 286, 235 P.3d 625.

Sanctions for failure to comply with court's discovery order. — Where defendant's trial date was extended four times by the state because necessary witness interviews had not been completed; for a period of two years, the state had refused to make its expert witness available for interviews until defendant paid the expert a witness fee; the trial court entered an order setting a discovery deadline; the state maintained its refusal to schedule an interview with the expert despite the court's order; the state did not contest the order or request that the court attach conditions to the scheduling of interviews; and the state did not request a ruling as to whether its insistence on pre-payment of a witness fee was proper or request an order to either compel defendant to

pay the fee or to assist defendant obtain payment of the witness fee, the court did not abuse its discretion by excluding the expert witness's testimony. *State v. Harper*, 2010-NMCA-055, 148 N.M. 286, 235 P.3d 625, cert. granted, 2010-NMCERT-006, *rev'd*, 2011-NMSC-044, 150 N.M. 745, 266 P.3d 25.

Exclusion of witnesses is an appropriate sanction for violation of scheduling order. — Where the district court entered a scheduling order with appropriate deadlines that were clear and unambiguous, and where the prosecutor failed to follow the clear and unambiguous witness-interview deadline, failed to seek an extension of that deadline, failed to identify the witnesses it actually intended to call at trial, and failed to ensure that defense counsel was provided with a copy of the expert witness's report, the prosecutor's conduct prejudiced the defense by preventing defense counsel from effectively preparing and presenting the defendant's case, and the district court did not abuse its discretion in entering an order excluding the state's witnesses that had not been interviewed by the defense. *State v. Cazares*, 2018-NMCA-012.

Exclusion of witnesses as a sanction for violation of special order. — In order for the district court to exclude material witnesses, there must be an intentional refusal to comply with a court order, prejudice to the opposing party, and consideration of less severe sanctions. *State v. A. N-C*, 2017-NMCA-034, cert. granted.

Where defendant filed a motion to exclude witnesses due to the State's failure to meet certain deadlines set forth in the special calendar portion of the former version of a local rule, the district court abused its discretion in granting defendant's motion because the court failed to consider less severe sanctions. *State v. A. N-C*, 2017-NMCA-034, cert. granted.

Exclusion of witnesses and audio-visual evidence. — Where defendant filed motions, under the former version of local rule LR2-308, to exclude witnesses and to suppress all audio and video evidence based on the State's refusal to assist in scheduling witness interviews in the four months since defendant had been arraigned and for failure to comply with its discovery obligations, the district court abused its discretion in granting defendant's motions, because, with regard to the motion to exclude witnesses, no deadline for witness interviews was included in the scheduling order and, based on the requirements of the local rule, the deadline for pretrial interviews had not yet passed when defendant filed his motion, and with regard to the motion to suppress, the court failed to consider less severe sanctions and defendant was not prejudiced because he received the discovery four months prior to trial and two months prior to the pre-trial motions deadline. *State v. Seigling*, 2017-NMCA-035, cert. granted.

Denial of motion to exclude witness not an abuse of discretion. — In defendant's trial for shoplifting and conspiracy to commit shoplifting, the district court did not abuse its discretion in denying defendant's motion to exclude a state's witness after the state missed a court-imposed deadline to set up the witness interview, because the state demonstrated good faith by trying to set up the interview prior to the deadline and the

interview was conducted several months prior to trial, suggesting that defendant was able to effectively use the information from the interview at trial. *State v. Gallegos*, 2016-NMCA-076, cert. denied.

Sanctions for failure to comply with court's discovery order. — Where the trial court entered an order setting a discovery deadline; the state scheduled an interview with the victim on the last day for discovery to give defendant time to consider a plea bargain which would have been withdrawn, pursuant to the state's policy, once defendant interviewed the victim; at no time had the state refused to make the victim available for an interview; the victim was contacted personally to set the interview date and received a reminder the day before the scheduled interview; the state did not subpoena the victim because the state had no reason to believe the victim would not attend the interview; the victim failed to appear at the interview; the state was willing to reschedule the interview under subpoena; and several months remained before the trial deadline, the court abused its discretion by excluding the victim's testimony. *State v. Harper*, 2010-NMCA-055, 148 N.M. 286, 235 P.3d 625, cert. granted, 2010-NMCERT-006, *rev'd*, 2011-NMSC-044, 150 N.M. 745, 266 P.3d 25.

Definition of "statement" in Paragraph G of this rule is broad. *State v. Blackmer*, 2005-NMSC-008, 137 N.M. 258, 110 P.3d 66.

Despite the breadth of the definition of "statement", there are limits on the state's duty to disclose witness' statements. *State v. Blackmer*, 2005-NMSC-008, 137 N.M. 258, 110 P.3d 66.

An undocumented statement is not within the definition of "statement" in Paragraph G of this rule. *State v. Blackmer*, 2005-NMSC-008, 137 N.M. 258, 110 P.3d 66.

Dismissal with prejudice for failure to comply with discovery order. — Where defendant was stopped for driving while intoxicated; there was a gap of six minutes in the videotape of the stop; defendant sought specific discovery of the arresting officer's private cell phone records for the time of the six-minute gap; defendant showed that the cell phone records were in the control of the state, because they were in the possession of the officer during the time in question; defendant showed that the cell phone records were potentially material to the defense given that the records might contain information indicating why the officer stopped defendant; defendant showed that denial of the discovery was prejudicial in that the information was material to the defense of unlawful stop, but not produced, defendant would be denied the opportunity to prove an unlawful stop and obtain suppression relief; the district court ordered the state to determine the existence of records within the state's control and produce the records or make them available for an in camera review and permitted the state to seek protection from production based on lack of relevance or confidentiality; and the state refused to comply with the court's discovery order, the court did not abuse its discretion in dismissing the case with prejudice. *State v. Ortiz*, 2009-NMCA-092, 146 N.M. 873, 215 P.3d 811.

Deprivation of evidence. — Where defendant claims that he is prejudiced by late disclosure of witnesses and documents, defendant must demonstrate that the state breached a duty or intentionally deprived defendant of evidence; that the evidence was material because there is a reasonable probability that had the evidence been disclosed, the result of the proceedings would have been different; that the non-disclosure of the evidence prejudiced the defendant because defendant's case would have been improved by an earlier disclosure or that it would have been prepared differently for trial; and that the district court did not cure the failure to timely disclose the evidence. *State v. Duarte*, 2007-NMCA-012, 140 N.M. 930, 149 P.3d 1027; *State v. Ruiz*, 2007-NMCA-014, 141 N.M. 53, 150 P.3d 1003, cert. denied, 2007-NMCERT-001.

Late disclosure of evidence not prejudicial. — Where defendant was charged with forgery and identity theft based on allegations of check fraud at Wal-Mart, the trial court did not abuse its discretion in admitting the testimony of a records custodian and in admitting records of database searches for transactions appearing to involve defendant, because the late substitution of the records custodian for another records custodian that had previously been disclosed to defendant did not undermine defendant's preparation for trial, the records produced by the records custodian did not contain any new information not included in an earlier disclosure, and defendant did not demonstrate prejudice when he had the opportunity to interview the late-disclosed witness prior to trial. *State v. Imperial*, 2017-NMCA-040, cert. denied.

Trial court did not abuse its discretion in admitting late-disclosed evidence. — Where defendant, a franchisee, wrote checks provided by franchisor payable to herself and co-defendant, neither of whom was authorized to receive these funds, in amounts totaling over $200,000, the trial court did not abuse its discretion in admitting late-disclosed evidence that defendant was aware that she was not permitted to write checks to herself and that the use of the checks was limited to payments for nurses in amounts of $500 or less, because the late-disclosed evidence was cumulative of one witness's testimony, and the defense, having interviewed the witness prior to trial, was aware of this evidence. Because defendants were already aware of the substance of this evidence, earlier disclosure of the evidence would not have changed the outcome of the trial. *State v. Candelaria*, 2019-NMCA-032, cert. denied.

Victim advocate employed by district attorney's office is part of the prosecution team. *State v. Blackmer*, 2005-NMSC-008, 137 N.M. 258, 110 P.3d 66.

Purpose of rule is: (1) to facilitate plea discussions; (2) to facilitate preparation for cross-examination; and (3) to allow the taking of a deposition or statement. *State v. Quintana*, 1974-NMCA-095, 86 N.M. 666, 526 P.2d 808, cert. denied, 86 N.M. 656, 526 P.2d 798.

This rule governs discovery disclosure by the State. *State v. McDaniel*, 2004-NMCA-022, 135 N.M. 84, 84 P.3d 701, cert. denied, 2004-NMCERT-002.

The three-part test under which a conviction must be reversed includes three elements: (1) the state either breached some duty or intentionally deprived the defendant of evidence; (2) the improperly "suppressed" evidence was material; and (3) the suppression of this evidence prejudiced the defendant. Where the state initially deprives the defendant of evidence but then later produces the evidence, a fourth consideration is necessary; namely, whether the failure to timely disclose the evidence was cured by the trial court. *State v. Sandoval*, 1982-NMSC-143, 99 N.M. 173, 655 P.2d 1017.

Prejudice part of the test to obtain reversal for a violation of this rule requires the court to assess whether the omitted evidence created a reasonable doubt which did not otherwise exist. *State v. Clark*, 1986-NMCA-095, 105 N.M. 10, 727 P.2d 949.

Analysis of polygraph by state expert not called as a witness. — Where defendant was charged with criminal sexual contact of a minor; defendant submitted to a polygraph examination arranged by defense counsel; the data produced during the examination, which defendant presented at trial, showed that defendant's denial of the charge was true; the State had its polygraph expert analyze the polygraph data; the State did not give notice of or call an expert witness regarding the polygraph or offer evidence of any alternative evaluation of the polygraph data; and the State refused to disclose the findings of its polygraph expert, the court did not err in denying defendant access to evidence produced by the State's polygraph expert, because the evidence would not have created a reasonable probability of a different outcome in the case even if it were in accord with defendant's own polygraph evidence. *State v. Romero*, 2013-NMCA-101, cert. denied, 2013-NMCERT-009.

Destruction of evidence. — Destruction of seized marijuana by a federal agency did not prejudice defendant because she essentially did not lose the benefit of a defense without the evidence. *State v. Sanchez*, 1999-NMCA-004, 126 N.M. 559, 972 P.2d 1150.

Lost evidence. — Where defendant was charged with four counts of sexual abuse of a minor based on allegations that defendant anally penetrated the victim; the investigating officer recorded an initial interview of the victim on a digital recorder and later transferred the file to a computer; in the initial interview, the victim said that defendant attempted oral penetration, but never mentioned anal penetration; in a pretrial interview and during grand jury testimony, the victim said that defendant completed anal penetration; the State could not produce the interview because it had been lost due to problems with the investigating officer's computer; and defendant only sought to use the initial interview as impeachment, although the initial statement of the victim was material, defendant did not suffer prejudice by the loss of the initial interview because the investigating officer would have testified that the victim did not disclose anal penetration in the initial interview and the State was willing to stipulate or offer a jury instruction regarding the initial interview and the circumstances regarding the lost recording, so that the actual recording was not necessary to prove the inconsistency in

the victim's statements. *State v. Redd*, 2013-NMCA-089, cert. denied, 2013-NMCERT-008.

Loss of evidence did not prejudice defendant. — Where the State inadvertently lost photographic evidence of the crime scene prior to defendant's trial for aggravated battery with a deadly weapon, the district court did not abuse its discretion in refusing to mandate sanctions where defendant failed in his burden to establish the materiality of the evidence and where defendant was not prejudiced by the lost evidence because the photographic evidence would not have resolved any contested issue. *State v. Branch*, 2018-NMCA-031, *replacing* 2016-NMCA-071, 387 P.3d 250, cert. denied.

Destruction of evidence. — Where the State inadvertently lost photographic evidence of the crime scene prior to defendant's trial for aggravated battery with a deadly weapon, the district court did not abuse its discretion in refusing to mandate sanctions where defendant failed to establish the materiality of the evidence and where defendant was not prejudiced by the lost evidence, because the photographic evidence would not have resolved any contested issue. *State v. Branch*, 2016-NMCA-071, 387 P.3d 250, *replaced by* 2018-NMCA-031, and cert. quashed.

Delay in disclosing evidence. — Where delay in conducting scientific tests was caused by a combination of factors, including defendant's unavailability prior to his arrest, the state's workload, and the complexity of the testing, the state did not breach its duty to disclose test results in a timely fashion once they were available. *State v. Rojo*, 1999-NMSC-001, 126 N.M. 438, 971 P.2d 829.

Tape-recorded police interview disclosed after trial. — Where the State failed to produce a recording of defendant's post-arrest interview; the interview was found after trial and provided to defense counsel; there was no evidence of bad faith on the part of the State; an officer present at the interview testified at trial and was cross-examined by defense counsel, including specific questions about the missing recoding and the notes taken by the officer and a fellow officer who was present at the interview; the State presented as evidence the officers' notes; in the officers' notes and in the recording, defendant admitted selling methamphetamine and named person who was the source of the drugs; at trial, defendant denied selling drugs or knowing the person who was the source of the drugs; and had the recording been available at trial, the recording would have supported the State's evidence and contradicted defendant's claims, defendant failed to establish that defendant was prejudiced by the discovery and disclosure of the recording after defendant's trial. *State v. Silvas*, 2013-NMCA-093, cert. granted, 2013-NMCERT-009.

Negligent noncompliance punishable. — The state can be found to be in contempt not only for wilful noncompliance with this rule but also for negligent noncompliance. *State v. Wisniewski*, 1985-NMSC-079, 103 N.M. 430, 708 P.2d 1031.

Waiver of trial court error by compromise. — Record of trial revealing that defense counsel raised objection for failure to order state to furnish information of the beginning

of the trial and counsel's acceptance of compromise on this point constitutes a waiver by defendant of the trial court's failure to order the state to furnish information at the beginning of the trial. *State v. Snow*, 1972-NMCA-138, 84 N.M. 399, 503 P.2d 1177, cert. denied, 84 N.M. 390, 503 P.2d 1168 (decided under former law).

Sufficiency of indictment. — Indictments alleging fraud filed against several defendants were not vague and adequately apprised them of the specific charges against them, where the defendants had access to the grand jury proceedings, the prosecutor notified them that the state's file was open for their examination, and the state filed a statement of facts in response to defendants' motion that it be required to identify those practices, representations, or matters of conduct which were alleged to have been fraudulent. *State v. Crews*, 1989-NMCA-088, 110 N.M. 723, 799 P.2d 592.

Availability of discovery at probation revocation hearing. — A probationer was entitled to reasonable discovery, including disclosure of adverse witnesses, prior to a probation revocation hearing. *State v. DeBorde*, 1996-NMCA-042, 121 N.M. 601, 915 P.2d 906.

Law reviews. — For survey, "Children's Court Practice in Delinquency and Need of Supervision Cases Under the New Rules," see 6 N.M.L. Rev. 331 (1976).

For article, "Survey of New Mexico Law, 1979-80: Criminal Law and Procedure," see 11 N.M.L. Rev. 85 (1981).

For annual survey of New Mexico law relating to evidence, see 12 N.M.L. Rev. 379 (1982).

For article, "Survey of New Mexico Law, 1982-83: Criminal Procedure," see 14 N.M.L. Rev. 109 (1984).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 1258 to 1262; 23 Am. Jur. 2d Depositions and Discovery § 1 et seq.

Right of accused in state courts to inspections or disclosure of evidence in possession of prosecution, 7 A.L.R.3d 8.

Right of defendant in criminal case to inspection of statement of prosecution's witness for purposes of cross-examination or impeachment, 7 A.L.R.3d 181.

Right of accused in state courts to inspection or disclosure of tape recording of his own statements, 10 A.L.R.4th 1092.

Accused's right to production of composite drawing of subject, 13 A.L.R.4th 1360.

Exclusion of evidence in state criminal action for failure of prosecution to comply with discovery requirements as to physical or documentary evidence or the like - modern cases, 27 A.L.R.4th 105.

Right of accused in state courts to have expert inspect, examine, or test physical evidence in possession of prosecution - modern cases, 27 A.L.R.4th 1188.

Exclusion of evidence in state criminal action for failure of prosecution to comply with discovery requirements as to statements made by defendants or other nonexpert witnesses - modern cases, 33 A.L.R.4th 301.

What is accused's "statement" subject to state court criminal discovery, 57 A.L.R.4th 827.

Failure of police to preserve potentially exculpatory evidence as violating criminal defendant's rights under state constitution, 40 A.L.R.5th 113.

Failure of state prosecutor to disclose exculpatory photographic evidence as violating due process, 93 A.L.R.5th 527.

Use of Freedom of Information Act (5 USCS § 552) as substitute for, or as means of, supplementing discovery procedures available to litigants in federal civil, criminal, or administrative proceedings, 57 A.L.R. Fed. 903.

Constitutional duty of federal prosecutor to disclose Brady evidence favorable to accused, 158 A.L.R. Fed. 401.

21A C.J.S. Criminal Law §§ 792, 793, 816; 23 C.J.S. Depositions and Discovery § 108 et seq.

II. INFORMATION SUBJECT TO DISCLOSURE.

Work product. — The New Mexico rules for criminal procedure contain no general rule protecting discovery of work product. *State v. Blackmer*, 2005-NMSC-008, 137 N.M. 258, 110 P.3d 66.

The criminal procedure rules expressly protect some defense counsel work product but do not expressly protect a prosecutor's work product. *State v. Blackmer*, 2005-NMSC-008, 137 N.M. 258, 110 P.3d 66.

Material that is opinion work product should have the same protection in criminal actions as in civil actions; that material enjoys nearly absolute immunity. *State v. Blackmer*, 2005-NMSC-008, 137 N.M. 258, 110 P.3d 66.

Inclusion of undocumented verbal assertions within the scope of the authorized interview of the victim by a victim advocate goes beyond the rule. *State v. Blackmer*, 2005-NMSC-008, 137 N.M. 258, 110 P.3d 66.

This rule broadens the right of discovery. *State v. Sparks*, 1973-NMCA-108, 85 N.M. 429, 512 P.2d 1265.

Evidence which the state intends to use at trial must be disclosed. *State v. Clark*, 1986-NMCA-095, 105 N.M. 10, 727 P.2d 949.

District attorney should not hesitate to show his entire file to defendant, as it is the district attorney's primary duty to see that the defendant has a fair trial and that justice is done. *State v. Manus*, 1979-NMSC-035, 93 N.M. 95, 597 P.2d 280.

Prosecution did not violate this rule when it failed to turn over material it neither possessed nor controlled and because the prosecution was not in control of the material, it was error for the trial court to hold them responsible for the delay in producing the discovery. *State v. Jackson*, 2004-NMCA-057, 135 N.M. 689, 92 P.3d 1263, cert. granted, 2004-NMCERT-005.

There is no reversible error absent showing of prejudice by the state's nondisclosure of information, and the burden is on defendant to show that he has been prejudiced by the nondisclosure. *State v. Perrin*, 1979-NMSC-050, 93 N.M. 73, 596 P.2d 516.

Right to testimony of witness before grand jury. — This rule gives a defendant the right to "any recorded testimony of the defendant before a grand jury", but no parallel right is accorded for the testimony of a witness before the grand jury. Once witness has testified at criminal trial, about that which he testified before the grand jury, the accused is entitled to examination of that witness's grand jury testimony relating to the crime. *State v. Sparks*, 1973-NMCA-108, 85 N.M. 429, 512 P.2d 1265.

Once the witness has testified at the criminal trial about that which he testified before the grand jury, the accused is entitled to an order permitting examination of that portion of the witness' grand jury testimony relating to the crime for which defendant is charged; however, the accused's examination of the grand jury testimony of the witness should be confined to matters relating to the offense with which the accused is charged and for which he is being tried, and about which the witness testified before the grand jury. *State v. Vigil*, 1973-NMSC-123, 85 N.M. 735, 516 P.2d 1118.

Defendant, at criminal trial, is entitled to inspect grand jury testimony of state's witnesses where prosecutor calls state's witnesses and uses grand jury testimony as basis for his questions. *State v. Morgan*, 1960-NMSC-087, 67 N.M. 287, 354 P.2d 1002 (decided under former law).

Reference to grand jury testimony. — Mere reference to the fact that the witness had previously testified before the grand jury does not constitute a use of the prior testimony entitling defendant to grand jury testimony. *State v. Baca*, 1973-NMCA-054, 85 N.M. 55, 508 P.2d 1352 (decided under former law).

Solution to problem of availability of grand jury testimony is found in 31-6-8 NMSA 1978. *State v. Felter*, 1973-NMSC-102, 85 N.M. 619, 515 P.2d 138.

Limited right to discovery under former law. — Prior to enactment of these rules, there was no right to discovery by a defendant in criminal proceedings under New Mexico statutes or rules. Discovery was accorded only where to deny it would have deprived a defendant of a constitutional right, and where a particularized need had been demonstrated. *State v. Turner*, 1970-NMCA-054, 81 N.M. 571, 469 P.2d 720 (decided under former law).

Scope of duty to produce information. — Under Subdivision (a)(5) (*see now* Paragraph A(3)) the district attorney must, upon request of the defendant, produce any of the described items which are favorable or unfavorable to the defendant, but which are necessary or essential in aiding the defendant in the preparation of his defense, i.e., which bear upon the guilt or innocence of the accused. The district attorney cannot hide behind negligent or deliberate suppression of any one of the items described nor should he hesitate to show his entire file to the defendant, since it is not the primary duty of the district attorney to convict a defendant, but to see that the defendant has a fair trial and that justice is done. *Chacon v. State*, 1975-NMCA-094, 88 N.M. 198, 539 P.2d 218.

The state has a duty to disclose material evidence favorable to the defendant, of which it has knowledge. The defendant also has a corresponding duty to make available to the prosecution his or her list of witnesses and such documents and papers and reports which he or she intends to use as evidence at trial, and there shall be a continuing duty of disclosure on both of the parties. *State v. Stephens*, 1982-NMSC-128, 99 N.M. 32, 653 P.2d 863.

The state must disclose items which are material to the preparation of the defense. *State v. Clark*, 1986-NMCA-095, 105 N.M. 10, 727 P.2d 949.

Rule does not provide for discovery of criminal record of decedent of whose murder defendant is charged. *State v. Marquez*, 1974-NMCA-129, 87 N.M. 57, 529 P.2d 283, cert. denied, 87 N.M. 47, 529 P.2d 273.

Other police investigations. — Defendant had no right to disclosure of police investigations of other murders, which he sought to show were linked to the murder for which he was convicted. *State v. Brown*, 1998-NMSC-037, 126 N.M. 338, 969 P.2d 313.

Accused must show more than mere desire for all prosecution's information. — For an accused to be granted the right to inspect evidence in the possession of the prosecution, he must show something more than a mere desire for all the information

obtained by the prosecution. *State v. Tackett*, 1967-NMSC-207, 78 N.M. 450, 432 P.2d 415, cert. denied, 390 U.S. 1026, 88 S. Ct. 1414, 20 L. Ed. 2d 283 (1968) (decided under former law).

Physical delivery not contemplated. — This rule does not necessarily contemplate the physical delivery of items into the hands of defense counsel, rather it contemplates a request specifying a reasonable time, place and manner of making the inspection and performing the related acts, and where the defendant did not make such a request but instead went directly to the trial court and obtained an order which made no such specification, and took no steps to have the state produce and permit inspection of the items, he cannot complain. *State v. Quintana*, 1974-NMCA-095, 86 N.M. 666, 526 P.2d 808, cert. denied, 86 N.M. 656, 526 P.2d 798.

Use of confidential records. — Records may be confidential as against the public at large but an inspection must be allowed when the defendant's guilt or innocence may hinge on whether the jury believes the arresting officer is the aggressor. *State v. Pohl*, 1976-NMCA-089, 89 N.M. 523, 554 P.2d 984.

Where defendant, in a prosecution for battery upon a peace officer, had shown two prior instances of the officers' alleged misconduct, her request for an in camera inspection by the judge of all records of internal affairs investigations concerning allegations of police brutality or excessive use of force which had been filed against the officer could not be called a fishing expedition, and the trial court erred in not conducting such an inspection to determine whether the files contained evidence relevant and material to the defense; the judgment was conditionally affirmed pending such a determination, since in the absence of a determination of what the files would have shown the court could not hold there was no prejudice. *State v. Pohl*, 1976-NMCA-089, 89 N.M. 523, 554 P.2d 984.

Effect of suppression of evidence. — Suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. *State v. Turner*, 1970-NMCA-054, 81 N.M. 571, 469 P.2d 720 (decided under former law).

The deliberate suppression by the prosecutor of evidence favorable to and requested by the accused violates due process when the evidence is material either to guilt or punishment. *State v. Stephens*, 1982-NMSC-128, 99 N.M. 32, 653 P.2d 863.

Failure to comply not prejudicial. — The defendant was not prejudiced by the state's failure to disclose the plea agreement documents pursuant to this rule prior to offering them into evidence at the habitual offender hearing. *State v. Roybal*, 1995-NMCA-097, 120 N.M. 507, 903 P.2d 249.

Failure to comply not prejudicial where chemist's worksheets not submitted. — Defendant's claim on appeal that admission of a chemist's testimony concerning test results was plain error because the chemist did not bring his worksheets to court, thus

denying defendant the right to cross-examine concerning underlying facts as authorized by the rules of evidence, was without merit, since defendant could have but did not inform himself of the contents of the worksheets by proceeding under this rule. *State v. Carrillo*, 1975-NMCA-103, 88 N.M. 236, 539 P.2d 626.

Failure to disclose complete scientific reports was not prejudicial. — Where defendant and defendant's co-defendant were charged with attempting to kidnap the victim and then shooting and killing the victim; at trial, the State's toxicology expert referred to a toxicology report that differed from the toxicology report that defendant had received in discovery; the State did not disclose to defendant that the State had prepared a new toxicology report; the State's ballistics expert used bullet and fragment weights to determine the caliber of the gun that had fired the bullets taken from the victim's body and the victim's car; the two pages of the thirty-three page ballistics report that defendant received in discovery did not contain the weights of the bullets; defendant requested discovery on two occasions; the State breached its duty to disclose; the reports were relevant to the issues in the case; defendant made no assertion as to how any difference in the reports used at trial and those provided during discovery would have materially altered defendant's defense; and the jury had ample evidence to convict defendant of first degree murder even if the bullets did not come from defendant's gun; the raw data in the reports was available to defense counsel, but defense counsel failed to request it; and the district court allowed defendant a short time to meet with the ballistics expert and review the expert's notes, defendant was not prejudiced by the non-disclosure of the expert reports. *State v. Ortega*, 2014-NMSC-017.

Or where blood test witness and copies not provided. — Despite the fact that the state verbally informed defense counsel of blood type test results, but did not list as a witness the agent who later testified about it, and did not provide written copies of the test results nor make specimens available for independent testing, the failure to comply with the rules was not prejudicial to the conduct of the defense. *State v. Quintana*, 1974-NMCA-095, 86 N.M. 666, 526 P.2d 808, cert. denied, 86 N.M. 656, 526 P.2d 798.

Or evidence exculpating defendant. — Prior to enactment of rules of criminal procedure, court of appeals held that trial court did not err in denying defendant's motion for mistrial upon the ground that defendant did not know until near the end of the state's case that defendant's fingerprints had been sought and not found on the allegedly stolen car and an order had been granted to give defendant all exculpatory matter, where it was not shown that defendant was prejudiced in his defense, nor does it appear that defendant was denied the right to secure the presence at the trial of the officer who had unsuccessfully attempted to secure the fingerprints. *State v. Sluder*, 1971-NMCA-095, 82 N.M. 755, 487 P.2d 183 (decided under former law).

Data underlying furnished test report available but not requested. — Where during the state's opening argument the comment was made that primer residue had been found on defendant's hands, and defense counsel objected to the statement as "not true," claiming that the expert's report furnished to him concluded that the test on

defendant was "negative," but the state explained that the raw test data, according to the expert, showed some residue, though insufficient to establish the results as "positive," a mistrial would not have been required if the motion had been made, as the state had furnished "any results or reports . . . of scientific tests," as required by this rule, and the underlying data was available if it, too, had been requested. *State v. Hovey*, 1987-NMSC-080, 106 N.M. 300, 742 P.2d 512.

Court conducts in camera hearing to determine whether eyewitness' identity subject to disclosure. — Where an informer's testimony, pursuant to Rule 510, N.M.R. Evid. (*see now* Rule 11-510 NMRA), discloses the identity of a possible eyewitness to a crime, the trial court, under the disclosure requirements of Subdivision (e) (see now Paragraph E) of this rule and Rule 30, N.M.R. Crim. P. (*see now* Rule 5-505 NMRA), should conduct an in camera hearing to determine, first, whether the possible eyewitness would be able to give testimony that is relevant and helpful to the defense of the accused or is necessary to a fair determination of the defendant's guilt or innocence, and, second, whether disclosure would subject the possible eyewitness to a substantial risk of harm outweighing any usefulness of the disclosure to defense counsel. *State v. Gallegos*, 1981-NMCA-047, 96 N.M. 54, 627 P.2d 1253, *overruled on other grounds by* State v. Martin, 1984-NMSC-077, 101 N.M. 595, 686 P.2d 937.

Defendant not prejudiced by inadvertent nondisclosure of evidence. — Where after a tape was played to the jury, the state informed the court that the tape had not been available to the defendant in the police evidence locker, and that the tape had been given to the defendant in an inaudible form only, the trial court found that, although there was a technical violation of this rule, it was due to inadvertence and lack of communication, and that the defendant was not prejudiced by the nondisclosure of the tape. *State v. McGee*, 1980-NMCA-180, 95 N.M. 317, 621 P.2d 1129.

Hypnosis of witness must be disclosed. — It is incumbent upon either the prosecution or defense to disclose to opposing counsel that a witness called by a party has undergone hypnosis in order to facilitate memory recall. *State v. Beachum*, 1981-NMCA-137, 97 N.M. 682, 643 P.2d 246.

Lack of opportunity to interview witness held not grounds for continuance. — The trial court does not err in refusing to grant a mistrial or a continuance because defense counsel lacked an opportunity to interview a witness. *State v. Ewing*, 1982-NMCA-030, 97 N.M. 484, 641 P.2d 515.

Denial of in-camera inspection of police files. — Prior to enactment of rules of criminal procedure, court of appeals held that trial court did not err in denying defendant's motion for in-camera inspection of police files for purpose of identifying or of investigating officers, where defendant was accorded, by direct inquiry, the right he sought through an examination of police files. *State v. Sluder*, 1971-NMCA-095, 82 N.M. 755, 487 P.2d 183 (decided under former law).

Where undisclosed statement and report material. — An undisclosed witness statement which tended to corroborate defense witness as to how entry was obtained and tended to contradict the testimony of police witnesses, both in the case-in-chief and in rebuttal, as to the method of entry, was clearly material to that issue, as was an undisclosed supplemental police report which also tended to corroborate defense witnesses and to contradict the testimony of police witnesses that entry was by use of a pry bar. *Chacon v. State*, 1975-NMCA-094, 88 N.M. 198, 539 P.2d 218.

It was not error to refuse to require state to produce report not within its possession, custody or control. *State v. Bustamante*, 1978-NMCA-062, 91 N.M. 772, 581 P.2d 460.

Standard for determining right to new trial for violation. — Where a violation of Subdivision (a)(5) (*see now* Paragraph A(3)) is not discovered until after trial, the standards to be applied in determining whether defendant is entitled to a new trial because of nondisclosure are that the nondisclosed items must be material to the guilt or innocence of the accused, or to the penalty to be imposed, and furthermore, that nondisclosure of items material to the preparation of the defense is not reversible error in the absence of prejudice. *Chacon v. State*, 1975-NMCA-094, 88 N.M. 198, 539 P.2d 218.

In order to obtain a new trial for a violation of Subdivision (a)(5) (*see now* Paragraph A(3)), the nondisclosed items must be material to the guilt or innocence of the accused or to the penalty to be imposed, but where the nondisclosure does not prejudice the defendant, there are no grounds for reversal. *State v. Smith*, 1979-NMSC-020, 92 N.M. 533, 591 P.2d 664.

III. LIST OF STATE WITNESSES.

Purpose of discovery allowed in rule is to assist defense counsel in the preparation of a defense by providing the opportunity to interview the government's witnesses. *State v. Orona*, 1979-NMSC-011, 92 N.M. 450, 589 P.2d 1041.

Defendant does not have absolute and unlimited right of access to state's prospective witnesses. *State v. Orona*, 1979-NMSC-011, 92 N.M. 450, 589 P.2d 1041.

Court may not absolutely restrict access without good cause shown. — In the absence of some demonstrable good cause, a trial court may not impose an absolute restriction on defense counsel's access to the state's prospective witnesses. *State v. Orona*, 1979-NMSC-011, 92 N.M. 450, 589 P.2d 1041.

Failure to disclose no aid to defendant unless prejudice shown. — The failure of the state to disclose a witness will not aid the defendant unless he can show that he was prejudiced thereby. *State v. Manus*, 1979-NMSC-035, 93 N.M. 95, 597 P.2d 280.

No prejudice where blood test witness not listed. — Despite the fact that the state verbally informed defense counsel of blood type test results, but did not list as a witness the agent who later testified about it, and did not provide written copies of the test results nor make specimens available for independent testing, nevertheless, the failure to comply with the rules was not prejudicial to the conduct of the defense. *State v. Quintana*, 1974-NMCA-095, 86 N.M. 666, 526 P.2d 808, cert. denied, 86 N.M. 656, 526 P.2d 798.

Testimony of omitted witnesses to be important and critical. — The district attorney's failure to notify defendant's counsel in advance about two witnesses, one an employee of a funeral home whose testimony related solely to the chain of custody of the decedent's tee shirt, and a physician whose testimony as to the medical cause of death was merely technical and cumulative, although not in compliance with the rules and the court's order, was not prejudicial to the defense; before defendant can be prejudiced, the testimony of an omitted witness must be important and critical, not technical or cumulative. *State v. Quintana*, 1974-NMCA-095, 86 N.M. 666, 526 P.2d 808, cert. denied, 86 N.M. 656, 526 P.2d 798.

Before a defendant can be prejudiced by the state's failure to disclose a witness until five days before trial, the testimony of the omitted witness must be important and critical, not technical and cumulative. *State v. Hernandez*, 1986-NMCA-040, 104 N.M. 268, 720 P.2d 303.

Where rule substantially complied with. — Where well before trial defense knew of the existence of the witnesses who were endorsed on the back of the information or who testified in pretrial proceedings, and counsel could have taken and in some instances did take statements or depositions of these witnesses to learn the substance of their testimony, this rule was substantially complied with. *State v. Quintana*, 1974-NMCA-095, 86 N.M. 666, 526 P.2d 808, cert. denied, 86 N.M. 656, 526 P.2d 798.

No violation where state did not fail to disclose witness's identity or act in bad faith. — Where defendant, who was charged with aggravated battery with a deadly weapon, sought to suppress the testimony of the only witness to the altercation between defendant and the victim, the district court did not abuse its discretion by refusing to exclude the witness's testimony, because the state filed an updated witness list several years before trial which included the name of the witness and his address at the time, and although the witness moved out of state, the state searched to locate the witness for an interview prior to trial, and defendant was ultimately able to interview the witness prior to his testimony; the state did not fail to disclose the witness's identity or act in bad faith to conceal the witness's whereabouts. *State v. Lopez*, 2018-NMCA-002, cert. denied.

Sanctions for failure to list witness. — Striking a key prosecution witness because of the failure of the state to include his name on pretrial witness lists was not an abuse of discretion. *State v. Martinez*, 1998-NMCA-022, 124 N.M. 721, 954 P.2d 1198.

Showing of prejudice sufficient to reverse order denying access. — To reverse an order denying a defendant access to state witnesses, no more prejudice need be shown than that the order may have made a potential avenue of defense unavailable to the defendant. *State v. Orona*, 1979-NMSC-011, 92 N.M. 450, 589 P.2d 1041.

Rebuttal witnesses usually not in purview of rule. — As for whether rebuttal witnesses come within the purview of the witness list requirement of production of names and addresses of all witnesses to be called by the district attorney, the general rule seems to be that they do not, so long as the rebuttal is true rebuttal and not an attempt to present the state's case-in-chief in the rebuttal. *State v. Manus*, 1979-NMSC-035, 93 N.M. 95, 597 P.2d 280.

Trial court may place limitations on use of previously recorded statement by a witness where the statement, unsworn, is full of defamatory comments concerning a number of persons and there is nothing indicating disclosure of the defamatory comments to anyone other than defendant and his counsel has any usefulness. *State v. Davis*, 1979-NMCA-015, 92 N.M. 563, 591 P.2d 1160.

Disclosure of prior arrests within judge's discretion. — Where the defendant is not entitled, under the rules, to information concerning prior arrests of all witnesses which the district attorney intends to call at trial and where the defendant does not provide any other basis which would entitle him to disclosure of such arrest records, disclosure must necessarily fall within the exercise of the judge's discretion. *State v. Smith*, 1979-NMSC-020, 92 N.M. 533, 591 P.2d 664.

No misconduct in not listing address for transient. — Where the witness is a transient who moves around constantly, there is no misconduct by the prosecution in not listing an address for him. *State v. Hutchinson*, 1983-NMSC-029, 99 N.M. 616, 661 P.2d 1315.

5-502. Disclosure by the defendant.

A. **Information subject to disclosure.** Unless a shorter period of time is ordered by the court, within thirty (30) days after the date of arraignment or filing of a waiver of arraignment the defendant shall disclose or make available to the state the following:

(1) books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody or control of the defendant, and which the defendant intends to introduce in evidence at the trial;

(2) any results or reports of physical or mental examinations and of scientific tests or experiments, including all polygraph examinations of the defendant and witnesses, made in connection with the particular case, or copies thereof, within the possession or control of the defendant, which the defendant intends to introduce in evidence at the trial or which were prepared by a witness whom the defendant intends to call at trial if the results or reports relate to his testimony; and

(3) a list of the names and addresses of the witnesses the defendant intends to call at the trial, identifying any witnesses that will provide expert testimony and indicating the subject area in which they will testify, together with any statement made by the witness.

B. **Examination by state.** The state may examine, photograph or copy any material disclosed pursuant to Paragraph A of this rule.

C. **Information not subject to disclosure.** Except as to scientific or medical reports, this rule does not authorize the discovery or inspection of the following:

(1) reports, memoranda or other internal defense documents made by the defendant, his attorneys or agents, in connection with the investigation or defense of the case; or

(2) statements made by the defendant to his agents or attorneys.

D. **Obtaining expert evaluations, testing, or interviews without disclosure to the state.** When the defendant is being held, pending trial, in the custody of the state at any correctional or detention facility the defendant may present to the court an ex parte motion for transport, certifying that evaluation, testing, or interviewing is reasonably necessary for the preparation of the defense. The motion shall be delivered directly to the chambers of the judge assigned to the case without filing it in the clerk's office.

(1) *Ex parte motion and order requirements*. The motion, and any resulting order that grants the motion, shall specify the following:

(a) the detention facility or other appropriate law enforcement agency responsible for transporting the defendant;

(b) the date and time when the defendant is to be taken to a secure, but private, location for whatever evaluation, testing or interviewing is to be done; and

(c) the date and time that the defendant is to be returned to the detention facility.

(2) *Evaluation, testing or interviewing defined*. As used in this rule, "evaluation, testing or interviewing" refers to performing expert consultations including but not limited to the following:

(a) polygraph examinations;

(b) medical, psychological or psychiatric testing;

(c) evaluations and interviews; and

(d) other types of forensic examinations.

(3) *Security considerations*. The court shall give consideration to whether the location proposed by the defendant is appropriate, including whether the defendant can be appropriately secured by the transport officers without the officers being physically present while the defendant is being evaluated, tested or interviewed, and whether the defendant may have handcuffs or other restraints removed while the defendant completes the evaluation, testing or interviewing so long as the defendant is under the observation of one or more transport officers.

(4) *Ex parte hearing to address concerns*. At any time after being presented with an ex parte motion under this paragraph, the court may conduct an ex parte hearing to address proposed security arrangements, expense involved, or other reasonable concerns. The state's participation in ex parte proceedings under this paragraph is neither required nor allowed.

(5) *Motion resolved by written order; disclosure restricted*. An ex parte motion filed under this paragraph shall be resolved by written order. The motion, and resulting order, shall be filed in the clerk's office by the district judge assigned to the case subject to the nondisclosure requirements in this subparagraph. To effectuate the nondisclosure provisions required by this subparagraph, the court's order shall comply with Subparagraphs (3), (4), (5), and (6) of Paragraph G of Rule 5-123 NMRA. Any transport order granted under this rule shall direct that the transport officers are prohibited from disclosing anything about the contents or execution of the order not directly necessary to its execution. The motion and resulting order shall remain sealed and shall not be disclosed to anyone other than court personnel, the defendant, and defense counsel except that disclosure may be permitted under the following circumstances:

(a) disclosure of the evaluation, testing, or interviewing is required by this rule;

(b) the evaluation, testing or interviewing is used at trial;

(c) the motion, resulting order, evaluation, testing, or interviewing is relevant to a habeas corpus proceeding;

(d) the motion, resulting order, evaluation, testing, or interviewing is relevant to a legal malpractice or disciplinary proceeding filed against the defendant's attorney; or

(e) the motion, resulting order, evaluation, testing, or interviewing is ordered unsealed pursuant to Paragraph I of Rule 5-123 NMRA.

E. **Designation of potential expert witness.** At any time after the filing of an indictment or information the defendant may file a notice designating by name a potential expert witness. Unless and until such designated potential expert is listed by the defendant as a potential witness pursuant to Subparagraph (3) of Paragraph A of

this rule, the state shall not be entitled to interview the designated potential expert regarding the case, nor obtain opinions or documents from the designated potential expert regarding the case.

F. **Certificate of compliance.** The defendant shall file with the clerk of the court at least ten (10) days prior to trial a certificate stating that all information required to be produced pursuant to Paragraph A of this rule has been produced, except as specified. The certificate shall contain an acknowledgment of the continuing duty to disclose additional information. If information specifically excepted from the certificate is furnished by the defendant after the filing of the certificate, a supplemental certificate shall be filed with the court setting forth the material furnished. A copy of the certificate and any supplemental certificate shall be served on the state.

G. **Failure to comply.** If the defendant fails to comply with any of the provisions of this rule, the court may enter an order pursuant to Rule 5-505 NMRA or hold the defendant or the defense counsel in contempt or take other disciplinary action pursuant to Rule 5-112 NMRA.

[As amended by Supreme Court Order No. 11-8300-049, effective for cases filed or pending on or after February 6, 2012; as amended by Supreme Court Order No. 15-8300-010, effective for all cases pending or filed on or after December 31, 2015.]

Committee commentary. — This rule was derived from Rule 16(b) of the Federal Rules of Criminal Procedure. *See generally*, 62 F.R.D. 271, 306, 314-16 (1974); 48 F.R.D. 553, 607-09 (1970). Unlike its federal counterpart, this rule requires an exchange of information without a written request.

Under Subparagraph (2) of Paragraph A of this rule, the defense has a duty to disclose to the state any reports prepared by experts in connection with the defendant's case which the defendant intends to introduce in evidence at the trial or which were prepared by a witness whom the defendant intends to call at trial if the results or reports relate to his testimony.

Although the defendant may not be compelled to produce evidence if it would result in a violation of his privilege against self-incrimination, this rule has been upheld as not contravening the privilege against self-incrimination or the right to due process of law guaranteed by the Fifth Amendment to the United States Constitution. *Gray v. Sanchez*, 86 N.M. 146, 520 P.2d 1091 (1974). *See also, Jones v. Superior Court*, 58 Cal.2d 56, 22 Cal. Rptr. 879, 372 P.2d 919 (1962); *Prudhomme v. Superior Court*, 2 Cal.3d 320, 85 Cal. Rptr. 129, 466 P.2d 673 (1970); *Williams v. Florida*, 399 U.S. 78, 90 S. Ct. 1893, 26 L. Ed. 2d 466 (1970); *Wardius v. Oregon*, 412 U.S. 470 (1973); *United States v. Nobles*, 422 U.S. 232, 955 S. Ct. 2160, 45 L. Ed. 2d 141 (1975).

In 2011, a new Paragraph D was added to provide an explicit mechanism for a defendant to obtain information and evidence potentially necessary for the defense, while maintaining the confidentiality of the theory of the defense concerning the

information and evidence. The needed information and evidence may include various forensic or other interviews, evaluations, or testing of the defendant. Requiring the defendant to make a request in open court may have the practical effect of disclosing the nature of the defense prior to the time it may otherwise have to be disclosed under Paragraph A of the rule. An ex parte proceeding conducted pursuant to this rule does not violate the prohibitions against ex parte communications set forth in the Code of Judicial Conduct.

A new Paragraph E also was added in 2011 to allow a defendant to designate a potential expert witness, and then to protect from disclosure information given to that potential expert as well as opinions and reports generated by that potential expert. If the defendant lists the designated potential expert in the witness list required by Subparagraph (A)(3) or calls the potential expert as a witness at trial, then the items described in Subparagraph (A)(2) must be disclosed; if the defendant does not include the designated potential expert in the witness list required under Subparagraph (A)(3), the matters concerning the designated potential expert remain confidential. The term "the case" in Paragraph E is used to make clear that the person designated as a potential expert is not off limits to any party with regard to any other case or matter.

See Paragraph F of Rule 5-501 NMRA for the definition of "statement" as used in this rule.

[As amended by Supreme Court Order No. 11-8300-049, effective for cases filed or pending on or after February 6, 2012; as amended by Supreme Court Order No. 15-8300-010, effective for all cases pending or filed on or after December 31, 2015.]

ANNOTATIONS

The 2015 amendment, approved by Supreme Court Order No. 15-8300-010, effective December 31, 2015, amended the time by when a defendant must disclose information to the state, placed a duty on defendant to identify, in the defense witness list, any witness that the defense intends to call at trial that will provide expert testimony and to indicate the subject area on which the expert witness will testify; in the introductory sentence of Paragraph A, after "waiver of arraignment", deleted "or not less than ten (10) days before trial, whichever date occurs earlier"; in Subparagraph A(3), after "intends to call at the trial", added "identifying any witnesses that will provide expert testimony and indicating the subject area in which they will testify"; and in the committee commentary, added the second paragraph.

The 2011 amendment, approved by Supreme Court Order No. 11-8300-049, effective for cases filed or pending on or after February 6, 2012, provided a procedure for a defendant in custody to obtain transport for evaluation, testing or interviewing without disclosure to the prosecution and prohibited the prosecution from interviewing or obtaining opinions or documents from a potential defense expert witness until and unless the defendant has filed notice that the witness is a potential expert witness;

added new Paragraphs D and E; relettered the first paragraph of former Paragraph D as Paragraph F; and relettered the last paragraph of former Paragraph D as Paragraph G.

Compiler's notes. — Paragraph C of this rule is similar to Rule 16(b)(2) of the Federal Rules of Criminal Procedure.

Cross references. — For disclosure by government, *see* Rule 5-501 NMRA.

For forms on certificate and supplemental certificate of disclosure of information, *see* Rules 9-412 and 9-413 NMRA.

Defendant has a duty to disclose demonstrative evidence. *State v. Ruiz*, 2007-NMCA-014, 141 N.M. 53, 150 P.3d 1003, cert. denied, 2007-NMCERT-001.

District court did not err in compelling defense to produce evidence originally disclosed by the prosecution. — Where prior to defendant's trial for DWI, the state requested that the defense counsel return a copy of the officer's dashcam video which the state had previously provided to the defense because the state had lost or misplaced its only copy of the video, the district court did not abuse its discretion in compelling defendant to return to the state a copy of the video the state had originally produced, because the video at issue was the state's evidence, produced in compliance with its discovery obligations, and there was no constitutional, statutory, or common law prohibition on disclosure. *State v. Salazar*, 2019-NMCA-021, cert. denied.

Work product. — The criminal procedure rules expressly protect some defense counsel work product but do not expressly protect a prosecutor's work product. *State v. Blackmer*, 2005-NMSC-008, 137 N.M. 258, 110 P.3d 66.

Material that is opinion work product should have the same protection in criminal actions as in civil actions; that material enjoys nearly absolute immunity. *State v. Blackmer*, 2005-NMSC-008, 137 N.M. 258, 110 P.3d 66.

Constitutionality of rule. — This rule is not an unconstitutional violation of U.S. Const., amend. V. *Gray v. Sanchez*, 1974-NMSC-011, 86 N.M. 146, 520 P.2d 1091.

Constitutional to permit disclosure of physician's analysis of polygraph results. — Disclosure of analysis and conclusions of doctor appointed on behalf of defendant to examine results of a polygraph examination would not deny defendant due process, interfere with his right to put on a defense, deny equal protection of the law nor violate his privilege against self-incrimination. *State v. Gallegos*, 1978-NMCA-114, 92 N.M. 370, 588 P.2d 1045, cert. denied, 92 N.M. 353, 588 P.2d 554.

Polygraph test results not discoverable if not to be used at trial. — Polygraph test results are not discoverable by the state absent notice by defendant of an intent to use such evidence at trial. *Tafoya v. Baca*, 1985-NMSC-067, 103 N.M. 56, 702 P.2d 1001.

State may observe tests, conduct own tests. — While a defendant is not required to disclose test results not intended to be introduced at trial, this does not mean that the state cannot observe the testing or conduct its own independent tests. *State v. Baca*, 1993-NMCA-051, 115 N.M. 536, 854 P.2d 363).

Disclosure of transcripts of pre-trial interviews. — As part of discovery, a trial court may enter an order compelling a defendant to turn over to the state transcripts of pre-trial interviews with witnesses for the prosecution. *State v. Stills*, 1998-NMSC-009, 125 N.M. 66, 957 P.2d 51.

Scope of duty to disclose. — The state has a duty to disclose material evidence favorable to the defendant, of which it has knowledge. The defendant also has a corresponding duty to make available to the prosecution his or her list of witnesses and such documents and papers and reports which he or she intends to use as evidence at trial, and there shall be a continuing duty of disclosure on both of the parties. *State v. Stephens*, 1982-NMSC-128, 99 N.M. 32, 653 P.2d 863.

Limiting expert testimony. — A trial court may limit the issues on which an expert witness may testify when the defendant indicates in discovery that the expert will only testify as to certain issues and does not inform the court that the witness will testify as to other issues until after the state's expert witnesses have testified. Limiting such testimony is proper when the court finds that defense counsel is engaging in delaying tactics and that limiting the testimony is necessary to protect the integrity of the judicial system and the efficient administration of justice. *State v. Stills*, 1998-NMSC-009, 125 N.M. 66, 957 P.2d 51.

Defendant had burden of establishing lawyer-client privilege as to doctor's report. — Defendant objecting to discovery of a doctor's report, prepared for defendant's counsel under court order, has the burden of establishing the existence of the lawyer-client privilege. *State v. Gallegos*, 1978-NMCA-114, 92 N.M. 370, 588 P.2d 1045, cert. denied, 92 N.M. 353, 588 P.2d 554.

Disclosure of witnesses. — Where the defendant failed to furnish the state a list of the names and addresses of the witnesses he intended to call at the trial as he had been ordered to do by the trial court pursuant to Subdivision (b) (*see now* Paragraph A(3)), the state objected to calling these witnesses and the trial court granted the state's motion, reserving reconsideration of the matter until the district attorney had spoken to the witnesses, but, without explanation, defendant did not call any of these witnesses to the stand, it was held that he voluntarily abandoned any further effort to have these witnesses appear and that he could not be heard on appeal to complain of error in their exclusion. *State v. Bojorquez*, 1975-NMCA-075, 88 N.M. 154, 538 P.2d 796, cert. denied, 88 N.M. 318, 540 P.2d 248.

Effect of omitting reference to limitation provisions from disclosure order. — Failure to copy into order pertaining to disclosure of evidence and witnesses a reference to Subdivision (c) (*see now* Paragraph C), pertaining to information not subject to

disclosure, does not render the order beyond the jurisdiction of the court. *Gray v. Sanchez*, 1974-NMSC-011, 86 N.M. 146, 520 P.2d 1091.

Absent legal authorization, judge lacks authority to order production of handwriting exemplars on pain of contempt, prior to arrest or charge. *Sanchez v. Attorney Gen.*, 1979-NMCA-081, 93 N.M. 210, 598 P.2d 1170.

Hypnosis of witness must be disclosed. — It is incumbent upon either the prosecution or defense to disclose to opposing counsel that a witness called by a party has undergone hypnosis in order to facilitate memory recall. *State v. Beachum*, 1981-NMCA-137, 97 N.M. 682, 643 P.2d 246.

Voluntary disclosure of the results of a medical examination constituted a waiver of the defendant's right against forced disclosure and also destroyed any privileges claimed by the defense. *State v. Jackson*, 1982-NMSC-022, 97 N.M. 467, 641 P.2d 498.

Where an attorney's notes concerning a witness' statement were used in an effort to impeach the witness, such notes were no longer shielded by the work-product doctrine and the trial court could properly require the disclosure of the notes under Rule 613(a), N.M.R. Evid. (*see now* Rule 11-613 NMRA). *State v. Turner*, 1981-NMCA-144, 97 N.M. 575, 642 P.2d 178.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 1258 to 1262.

Sanctions against defense in criminal case for failure to comply with discovery requirements, 9 A.L.R.4th 837.

Right of prosecution to discovery of case-related notes, statements, and reports - state cases, 23 A.L.R.4th 799.

What is "oral statement" of accused subject to disclosure by government under Rule 16(a)(1)(A), Federal Rules of Criminal Procedure, 39 A.L.R. Fed. 432.

Right of indigent defendant under Rule 17(b) of the Federal Rules of Criminal Procedure to appearance of witnesses necessary to adequate defense, 42 A.L.R. Fed. 233.

22A C.J.S. Criminal Law §§ 508 et seq., 524 et seq.

5-502.1. Discovery; redaction of witness or victim information.

A. **Scope of rule.** This rule applies to documents and other materials subject to disclosure under Rules 5-501 and 5-502 NMRA.

B. **Definitions.** For purposes of this rule the following definitions apply:

(1) “counsel team” means the attorneys representing the parties and their employees or contractors who are participating in the preparation of the prosecution or the defense, provided that “counsel team” does not include the defendant or any members of the public;

(2) “personal contact information” means a person’s home address, home phone number, personal cell phone number, or personal email address;

(3) “protected personal identifier information” means social security number, taxpayer identification number, financial account number, or driver’s license number, and all but the year of a person’s date of birth; and

(4) “public” means any person or entity except members of the counsel team or court personnel.

C. **Redaction of protected personal identifier information.**

(1) An attorney with an obligation to provide discovery to opposing counsel under Rule 5-501 NMRA or Rule 5-502 NMRA may redact protected personal identifier information or personal contact information if the attorney deems it appropriate under the circumstances of the case. To do so, the attorney must

(a) file a notice that redacted and unredacted discovery is being provided to the opposing party; and

(b) provide two versions of documents and materials subject to disclosure as follows:

(i) The first version may have redacted protected personal identifier information or personal contact information. For discovery provided by the state, the defense counsel team may provide the redacted version to the defendant, and the defendant may retain the redacted version in the defendant’s possession.

(ii) The second version shall be an unredacted version of the same discovery and shall be provided to the counsel team for the opposing party to accommodate the need for any conflicts checks and background investigation of victims and witnesses.

(2) If the state has an obligation to provide discovery to a pro se defendant under Rule 5-501 NMRA, the prosecutor may redact protected personal identifier information or personal contact information if the prosecutor deems it appropriate under the circumstances of the case. To do so, the attorney must file a notice that redacted discovery is being provided to the defendant.

(3) If an attorney provides redacted discovery under this rule, unredacted discovery shall not be disclosed to the defendant or a member of the public unless the

court issues a written order finding that the defendant or member of the public has a specific compelling need for the unredacted discovery. The court may issue an order permitting the disclosure of unredacted discovery on motion of a party, including a defendant acting pro se, or on the court's own motion.

D. **Failure to comply.** An attorney receiving discovery that includes redacted protected personal identifier information or personal contact information shall take all reasonable precautions to ensure that the unredacted version of the discovery is not disclosed by the attorney or any member of the counsel team to the defendant or any member of the public. Failure to comply with the provisions of this paragraph may subject the attorney or other person to sanctions, including sanctions for contempt of court, or the initiation of disciplinary proceedings.

[Adopted by Supreme Court Order No. 22-8300-025, effective for all cases pending or filed on or after December 31, 2022.]

Committee commentary. — This rule creates a mechanism for an attorney to redact discovery as needed to protect victims and witnesses from violent crime and identity theft and to encourage their participation in criminal proceedings without compromising the needs of opposing counsel to conduct conflicts checks and background investigations and otherwise fulfill counsel's duty to provide ethical, competent representation. This rule does not alter the disclosure requirements of Rules 5-501 and 5-502 NMRA, nor does it alter any requirement to provide a witness list, *see, e.g.*, Rules 5-503, 5-508, and LR2-308 NMRA. Under Paragraph C, an attorney must provide an unredacted version of documents and materials subject to disclosure. As appropriate, witness lists may be drafted to avoid explicit disclosure of names and addresses by making reference to the unredacted discovery. The definition of "protected personal identifier information" in this rule is consistent with the definition set forth in Rule 5-123 NMRA (Public inspection and sealing of court records), and varies slightly from the definition of "protected personal identifier information" set forth in the Inspection of Public Records Act, NMSA 1978, § 14-2-6(E) (2018).

[Adopted by Supreme Court Order No. 22-8300-025, effective for all cases pending or filed on or after December 31, 2022.]

5-503. Depositions; statements.

A. **Statements.** Any person, other than the defendant, with information which is subject to discovery shall give a statement. A party may obtain the statement of the person by serving a written "notice of statement" upon the person to be examined and upon each party not less than five (5) days before the date scheduled for the statement. The notice shall state the time and place for taking of the statement. A subpoena may also be served to secure the presence of the person to be examined or the materials to be examined during the statement. If a subpoena is served to secure a witness or materials, a copy of the subpoena shall be served upon each party.

B. **Depositions; when allowed.** A deposition may be taken pursuant to this rule upon:

(1) agreement of the parties; or

(2) order of the court at any time after the filing of the indictment or information or complaint in the district court, upon a showing that it is necessary to take the person's deposition to prevent injustice.

C. **Scope of discovery.** Unless otherwise limited by order of the court, parties may obtain discovery regarding any matter, not privileged, which is relevant to the offense charged or the defense of the accused person, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

D. **Time and place of deposition.** Counsel must make reasonable efforts to confer in good faith regarding scheduling of a deposition or statement before serving a notice of deposition or a notice of statement. Unless agreed to by the parties, any deposition allowed under this rule shall be taken at such time and place as ordered by the court. The attendance of witnesses at depositions may be compelled by subpoena as provided in these rules.

E. **Notice of examination: general requirements; special notice; notice of non-appearance; nonstenographic recording; production of documents and things; deposition of organization; deposition by telephone.**

(1) A party taking the deposition of any person upon oral examination pursuant to court order shall give at least ten (10) days notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

(2) The party taking the deposition shall state in the notice the method by which the testimony shall be recorded. Unless the court orders otherwise, it may be recorded by sound, sound-and-visual or stenographic means, and the party taking the deposition shall bear the cost of the recording. Any party may arrange for a transcription or copy of the deposition or statement to be made from the recording of a deposition or statement at the party's expense.

(3) With prior notice to the deponent and other parties, any party may designate another method to record the deponent's testimony in addition to the method specified by the person taking the deposition. The additional record or transcript shall be made at that party's expense unless the court otherwise orders. If the deposition is taken by an official court reporter, the official transcript shall be the transcript prepared by the official court reporter.

(4) Unless otherwise agreed by the parties, a deposition shall be conducted before an officer appointed or designated under Rule 5-503.1 NMRA and shall begin with a statement on the record by the officer that includes:

(a) the officer's name and business address;

(b) the date, time, and place of the deposition;

(c) the name of the deponent;

(d) the administration of the oath or affirmation to the deponent; and

(e) an identification of all persons present. If the deposition is recorded other than stenographically, the officer shall repeat items (a) through (c) at the beginning of each unit of recorded tape or other recording medium. The appearance or demeanor of deponents or attorneys shall not be distorted through camera or sound-recording techniques. At the end of the deposition, the officer shall state on the record that the deposition is complete and shall set forth any stipulations made by counsel concerning the custody of the transcript or recording and the exhibits, or concerning other pertinent matters.

(5) A party may, in the party's notice and in a subpoena, name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors or managing agents or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subparagraph does not preclude taking a deposition by any other procedure authorized in these rules.

(6) The parties may agree in writing or the court may, upon motion, order that a deposition be taken by telephone or other remote electronic means. For the purposes of this rule and Rule 5-503.1(A) NMRA, 5-503.2(A)(1) NMRA and 5-503.2(B)(1) NMRA, a deposition taken by such means is taken in the county and at a place where the witness is to answer questions. The officer taking the deposition must be physically present with the witness.

F. **Depositions; examination and cross-examination; record of examination; oath; objections.** Examination and cross-examination of witnesses in depositions may proceed as permitted at trial under the New Mexico Rules of Evidence, except Rule 11-103 NMRA and Rule 11-615 NMRA. The officer before whom the deposition is to be taken shall put the witness on oath or affirmation and shall personally, or by someone acting under the officer's direction and in the officer's presence, record the testimony of the witness. The testimony shall be taken stenographically or recorded by any other method authorized by Paragraph D(2) of this rule. All objections made at the time of the examination to the qualifications of the officer taking the deposition, to the manner of taking it, to the evidence presented, to the conduct of any party, or to any other aspect of the proceedings, shall be noted by the officer upon the record of the deposition; but the examination shall proceed, with the testimony being taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition and the party taking the deposition shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim.

G. **Statements; depositions; motion to terminate or limit examination.** At any time during a deposition or statement, on motion of a party, the witness or the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass or oppress the witness or the deponent, the court in which the action is pending, or the court in the county where the deposition or statement is being taken, may order the examination to cease or may limit the scope and manner of the taking of the deposition or statement pursuant to Rule 5-507 NMRA. If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party, the witness or the deponent, the taking of the deposition or statement shall be suspended for the time necessary to make a motion for an order.

H. **Depositions; review by witness; changes; signing.** If requested by the deponent or a party before completion of the deposition, the deponent shall have thirty (30) days after being notified by the officer that the transcript or recording is available in which to review the transcript or recording and, if there are changes in form or substance, to sign a statement reciting such changes and the reasons given by the deponent for making them. The officer shall indicate in the certificate prescribed by Paragraph I(1) of this rule whether any review was requested and, if so, shall append any changes made by the deponent during the period allowed.

I. **Certification by officer; exhibits; copies; notice of transcription.**

(1) The officer shall certify on the deposition that the witness was duly sworn by the officer and that the deposition is a true record of the testimony given by the witness. If the deposition is transcribed, the officer shall provide the original of the deposition or statement to the party ordering the transcription and shall give notice thereof to all parties. The party receiving the original shall maintain it, without alteration, until final disposition of the case in which it was taken or other order of the court.

Documents and things produced for inspection during the examination of the witness shall, upon the request of a party, be marked for identification and annexed to and returned with the deposition, and may be inspected and copied by any party, except that if the person producing the materials desires to retain them the person may:

(a) offer copies to be marked for identification and annexed to the deposition or statement and to serve thereafter as originals, if the person affords to all parties fair opportunity to verify the copies by comparison with the originals; or

(b) offer the originals to be marked for identification, after giving to each party an opportunity to inspect and copy them, in which event the materials may then be used in the same manner as if annexed to the deposition. Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case.

(2) Upon payment of reasonable charges therefor, the officer shall furnish a copy of the transcript or other recording of the deposition to any party or to the deponent.

(3) Any party filing a deposition shall give prompt notice of its filing to all other parties.

J. **Final disposition of depositions.** The original deposition may be destroyed as provided in the judicial retention of records schedule.

[As amended, effective July 1, 1973; July 1, 1980; September 1, 1981; October 1, 1983; February 1, 1991; August 1, 1992; May 15, 2000; as amended by Supreme Court Order No. 05-8300-013, effective September 15, 2005.]

Committee commentary. — This rule was derived from Rule 1.220(f) of the Florida Rules of Criminal Procedure. *See* Rule 15 of the Federal Rules of Criminal Procedure. Depositions are to be used in criminal cases only in exceptional circumstances. *McGuinness v. State*, 92 N.M. 441, 589 P.2d 1032 (1979); *State v. Barela*, 86 N.M. 104, 519 P.2d 1185 (Ct. App. 1974). *See also* R. Giron, McGuinness v. State, Limiting the Use of Depositions at Trial, 10 N.M.L. Rev. 207 (1979-1980).

"Statement" as used in Paragraph A of this rule includes any statement given by a witness, including a videotape or recorded statement. The committee considered whether the prosecution or defense could take the deposition of a codefendant who has been granted witness immunity, but left this matter to the supreme court. The committee is of the opinion that any statement made by a codefendant who will become a witness for the state is discoverable under Rule 5-501. See, for example, *State v. Vigil*, 87 N.M. 345, 533 P.2d 578 (Ct. App. 1975); *State v. Herrera*, 84 N.M. 365, 503 P.2d 648 (Ct. App. 1972). *See also* 5-501 for the definition of "statement". See also commentary to Rule 5-116 NMRA.

Paragraph A of this rule requires witnesses to cooperate in the giving of a statement. A witness may not refuse to give a statement because defense counsel or the prosecuting attorney may not be able to be present during the taking of the statement.

Paragraph B of this rule provides for the use of a deposition when the witness may be unable to attend the trial or a hearing.

The court of appeals has indicated that one of the purposes of a deposition is to enable the defense to impeach a witness on cross examination at trial. *State v. Billington*, 86 N.M. 44, 519 P.2d 140 (Ct. App. 1974). However, under Paragraph B of this rule, the right to take the deposition would appear to be limited to the situation where the person will be unable or unwilling to attend the trial or a hearing. *See State v. Billington*, supra, 86 N.M. at 48-49 (dissenting opinion) and *State v. Blakely*, 90 N.M. 744, 568 P.2d 270 (Ct. App. 1977).

The use of a deposition at trial by the state requires strict compliance with Paragraph N of this rule. *See State v. Barela*, supra; State v. Berry, 86 N.M. 138, 520 P.2d 558 (Ct. App. 1974); *State v. De Santos*, 91 N.M. 428, 575 P.2d 612 (Ct. App.), cert. denied, 91 N.M. 491, 596 P.2d 297 (1978). This is an exception to the hearsay rule. Paragraph N of this rule was revised in 1981 to make the New Mexico rules governing depositions consistent with Rule 15 of the Federal Rules of Criminal Procedure and to clarify the relationship between the Rules of Evidence and the Rules of Criminal Procedure governing the use of depositions. *See* Rule 11-802 NMRA and *McGuinness v. State*, supra. *See also*, Subparagraph (1) of Paragraph D of Rule 11-801 NMRA, *California v. Green*, 399 U.S. 149 (1970), and Paragraph A of Rule 11-804 NMRA. The Rules of Evidence relating to the admissibility of evidence are applicable to evidence admitted by deposition.

This rule was amended in 1982 to comply with Supreme Court Miscellaneous Order 8000, June 28, 1982, requiring that the record in all criminal cases be on audio recording devices. *See* Rule 22-303 NMRA. Because depositions may be taken in hospitals or out-of-state or by a video recorder, the committee did not require the use of audio recording devices approved by the administrative office of the courts. Since depositions are for use at trial, it is anticipated that in most cases the trial court will have the deposition taken by an official court reporter or tape monitor on an audio recording device approved by the administrative office of the courts.

ANNOTATIONS

The 2005 amendment, effective September 15, 2005, deleted at the beginning of the second sentence in Paragraph A "If upon request of a party, a person other than the defendant refuses to give a statement" and added the last sentence of Paragraph A relating to service of subpoenas on all parties.

The 2000 amendment, effective May 15, 2000 rewrote the rule to expand the deposition rule to permit the parties to stipulate to the taking of depositions. Procedural amendments were also made to track District Court Civil Rule 1-030 NMRA.

The 1992 amendment, effective for cases filed in the district courts on or after August 1, 1992, made gender neutral substitutions throughout the rule; rewrote Paragraph A; made a stylistic change in Paragraph B; in Paragraph D, deleted "or compelled statement" from the end of the heading and following "any deposition" in the first sentence and deleted the former last sentence, relating to allowance by the court that the compelled statement be taken with only attorneys present; rewrote Paragraph F; substituted "deposition" for "examination" in the heading for Paragraph G; inserted "of deposition and in a subpoena" near the beginning of the first sentence in Paragraph H; in Paragraph J, substituted "of the witness" for "of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass or oppress the deponent or party" and added the third sentence; rewrote Paragraph M; and, in Paragraphs O and R, inserted "Depositions" in the headings.

Compiler's notes. — Paragraphs A to C of this rule are similar to Rule 15(a) and (b) of the Federal Rules of Criminal Procedure.

Paragraph N of this rule is similar to Rule 15(d) of the Federal Rules of Criminal Procedure.

The Florida Rules of Criminal Procedure, referred to in the first sentence in the first paragraph of the committee commentary, were extensively revised in 1972. Rule 3.190(j), presently deals with depositions.

Depositions of defendant are prohibited in habeas corpus proceedings. — Rule 5-503 NMRA precludes a compelled statement or deposition of a criminal defendant, including one who is in the post-conviction habeas corpus phase of a criminal proceeding. *Allen v. LeMaster*, 2012-NMSC-001, 267 P.3d 806.

Where defendant filed a petition for habeas corpus alleging ineffective assistance of counsel; the district court ruled that defendant was subject to deposition on all issues related to the habeas corpus proceedings; when defendant refused to answer any questions, the district court ordered defendant to answer specified questions; and when defendant refused to answer the court-ordered questions, the district court dismissed defendant's petition as a sanction, it was improper for the district court to order defendant to answer questions at a deposition and to dismiss the habeas corpus petition or otherwise sanction defendant for defendant's refusal to answer the questions. *Allen v. LeMaster*, 2012-NMSC-001, 267 P.3d 806.

Discovery of information about confidential informant's prior work. — Where police officers used a confidential informant to purchase methamphetamine; the confidential informant was the only eye witness to the alleged crime; the state's case

rested on the veracity of the confidential informant; the defendant requested disclosure of information about the confidential informant's prior work as a confidential informant; the trial court held an in camera hearing to review the documents the defendant sought to discover; and the trial court ordered defense counsel not to disclose the information to any other person, the trial court did not abuse its discretion in ordering the state to produce the information. *State v. Layne*, 2008-NMCA-103, 144 N.M. 574, 189 P.3d 707.

Defendant failed to justify need for military and medical records of victim. — Where defendant, charged with aggravated battery for shooting and injuring his son, sought disclosure of his son's military and mental health records to show that a fight in the military may have resulted in a less than honorable discharge from military service, that evidence of the fight could be admissible to show his son's propensity for violence, and that the records would be useful for impeachment purposes, the district court did not abuse its discretion in rejecting the request for records, because in self-defense cases, evidence of specific instances of a victim's prior violent conduct would not be admissible as propensity evidence of the victim's violent disposition, the discharge papers would not be admissible to impeach the victim because extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness, and defendant did not justify the need for the victim's confidential medical history. Lastly, defendant failed to request an in camera inspection of any records before the district court. *State v. Branch*, 2018-NMCA-031, *replacing* 2016-NMCA-071, 387 P.3d 250, cert. denied.

Burden on proponent of discovery to demonstrate materiality of records. — Records are normally discoverable if reasonably calculated to lead to the discovery of admissible evidence, and while records need not be admissible to be discoverable, a proponent of discovery may still be required to provide a reasonable basis on which to believe that it is likely the records contain material information. *State v. Branch*, 2016-NMCA-071, 387 P.3d 250, *replaced by* 2018-NMCA-031, and cert. quashed.

Where defendant, charged with aggravated battery with a deadly weapon for shooting his son, requested a court order authorizing the release of the victim's military discharge paperwork, the district court did not abuse its discretion in declining to issue an order authorizing production of the documents where defendant failed to justify the need for those records and failed to request an in camera inspection of any records before the district court. *State v. Branch*, 2016-NMCA-071, 387 P.3d 250, *replaced by* 2018-NMCA-031, and cert. quashed.

Police officer witnesses not under legal process may refuse to be interviewed and may dictate the terms of the interview sought by defense counsel. They have no obligation to subject themselves to trick questions or hassling by defense counsel in voluntary interviews, and the police department may properly adopt a policy that officers should refuse to be interviewed by defense counsel except in the presence of an attorney for the prosecution. *State v. Williams*, 1978-NMCA-065, 91 N.M. 795, 581 P.2d 1290.

Defendant has no constitutional right to depose victim in a criminal case; the right exists solely under this rule. *State v. Herrera*, 1978-NMCA-048, 92 N.M. 7, 582 P.2d 384, cert. denied, 91 N.M. 751, 580 P.2d 972.

Driver license revocation proceedings. — There is no automatic due process right to take prehearing depositions in driver license revocation cases. *Dente v. State Taxation & Revenue Dep't*, 1997-NMCA-099, 124 N.M. 93, 946 P.2d 1104.

Reasonable limitations on questions asked at deposition do not deprive defendant of due process. *State v. Herrera*, 1978-NMCA-048, 92 N.M. 7, 582 P.2d 384, cert. denied, 91 N.M. 751, 580 P.2d 972.

Scope of authority to take depositions. — In criminal cases the trial court has no authority, apart from this rule, to allow the taking of depositions for their use at trial. *State v. Berry*, 1974-NMCA-018,86 N.M. 138, 520 P.2d 558.

Absent legal authorization, judge lacks authority to order production of handwriting exemplars on pain of contempt, prior to arrest or charge. *Sanchez v. Attorney Gen.*, 1979-NMCA-081, 93 N.M. 210, 598 P.2d 1170.

Where deposition not admissible. — As there was no showing that the presence of a witness who was out of the state could not be secured by subpoena or other lawful means, then his deposition is not admissible under this rule. *State v. Berry*, 1974-NMCA-018, 86 N.M. 138, 520 P.2d 558.

Generally as to use of depositions. — While depositions are allowable in criminal cases, the circumstances permitting their use must be exceptional, and the necessity of their use at trial must be clearly established by the prosecution. *McGuinness v. State*, 1979-NMSC-006, 92 N.M. 441, 589 P.2d 1032.

Use of deposition by state at trial requires strict compliance with Subdivision (n) (*see now* Paragraph N). *McGuinness v. State*, 1979-NMSC-006, 92 N.M. 441, 589 P.2d 1032; *State v. Martinez*, 1981-NMSC-005, 95 N.M. 445, 623 P.2d 565, *overruled on other grounds by Fuson v. State*, 1987-NMSC-034, 105 N.M. 632, 735 P.2d 1138.

There must be strict compliance with Subdivision (n) (*see now* Paragraph N). Where deposition of absent witness was admitted absent any showing as to whereabouts of the witness at time of trial, whether he was unable to attend because of illness or infirmity, or whether he was in or out of state, and where district attorney did not attempt to procure his attendance at trial by subpoena, defendant's federal constitutional right to confront witnesses was violated and such admission constituted reversible error. *State v. Barela*, 1974-NMCA-016, 86 N.M. 104, 519 P.2d 1185.

Burden is upon the state to prove the unavailability of its witness. *State v. Ewing*, 1982-NMSC-003, 97 N.M. 235, 638 P.2d 1080, *aff'd in part, rev'd on other grounds*, 1982-NMCA-030, 97 N.M. 484, 641 P.2d 515.

Court considers total circumstances in determining state's diligence. — In determining whether the state was diligent in attempting to produce a witness for trial, the trial court may take into consideration the totality of the circumstances. *State v. Ewing*, 1982-NMSC-003, 97 N.M. 235, 638 P.2d 1080, *aff'd in part, rev'd on other grounds*, 1982-NMCA-030, 97 N.M. 484, 641 P.2d 515.

Unavailability of witness due to claim of constitutional privilege did not render deposition admissible. — Where a witness is excused from testifying on the ground that he cannot do so without incriminating himself, his deposition is not thereby rendered admissible. *McGuinness v. State*, 1979-NMSC-006, 92 N.M. 441, 589 P.2d 1032.

Once a witness is permitted to claim his privilege against self-incrimination, he becomes unavailable as a witness under Rule 804, N.M.R. Evid. (*see now* Rule 11-804 NMRA), and thus his deposition would not be excluded at trial because of the hearsay rule, but that fact does not authorize admission of the deposition if it is excludable because of this rule. *McGuinness v. State*, 1979-NMSC-006, 92 N.M. 441, 589 P.2d 1032.

Sixth amendment right of confrontation not violated by admission of deposition of uncooperative unavailable witness. *Ewing v. Winans*, 749 F.2d 607 (10th Cir. 1984).

Where principal witness is unavailable because she is ill and infirm, it is not error for the trial judge to take the totality of the circumstances into consideration, including the witness' advanced age and the condition of her health, to admit her deposition at trial. *State v. Vialpando*, 1979-NMCA-083, 93 N.M. 289, 599 P.2d 1086, cert. denied, 93 N.M. 172, 598 P.2d 215.

Deposition for civil suit not admissible. — A deposition of the victim for purposes of a civil suit cannot be used in a criminal proceeding when the victim's spouse is being cross-examined. *State v. Cordova*, 1983-NMCA-144, 100 N.M. 643, 674 P.2d 533.

Denial of continuance to allow deposition. — A judge did not abuse his discretion by refusing to order a continuance to allow the defendant to depose a reporter who interviewed the victim and to compel her to disclose her interview notes, since defense counsel had decided not to proceed with a scheduled deposition of the reporter a few days before trial and failed to call the reporter as a witness at trial. *State v. Bobbin*, 1985-NMCA-089, 103 N.M. 375, 707 P.2d 1185.

No error in continuing trial where no abuse of discretion and expert's deposition admitted. — Defendant's contention that the trial court erred in not continuing the trial to a date when an expert witness could testify in person was without merit where there was nothing showing an abuse of discretion in denying a continuance and a deposition of the expert was properly admitted at trial. *State v. De Santos*, 1978-NMCA-012, 91 N.M. 428, 575 P.2d 612.

Law reviews. — For comment, "McGuinness v. State: Limiting the Use of Depositions at Trial," see 10 N.M.L. Rev. 207 (1979-1980).

For annual survey of New Mexico law relating to criminal law, see 12 N.M.L. Rev. 229 (1982).

For annual survey of New Mexico law relating to criminal procedure, see 12 N.M.L. Rev. 271 (1982).

For annual survey of New Mexico law relating to evidence, see 12 N.M.L. Rev. 379 (1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law § 1177; 23 Am. Jur. 2d Depositions and Discovery § 108.

Admissibility of deposition of child of tender years, 30 A.L.R.2d 771.

Sufficiency of showing of grounds for admission of deposition in criminal case, 44 A.L.R.2d 768.

Construction of statute or rule admitting in evidence deposition of witness absent or distant from place of trial, 94 A.L.R.2d 1172.

Admissibility in evidence of deposition as against one not a party at time of its taking, 4 A.L.R.3d 1075.

Disqualification of attorney, otherwise qualified, to take oath or acknowledgment from client, 21 A.L.R.3d 483.

Pretrial testimony or disclosure on discovery by party to personal injury action as to nature of injuries or treatment as waiver of physician-patient privilege, 25 A.L.R.3d 1401.

Accused's right to depose prospective witnesses before trial in state court, 2 A.L.R.4th 704.

Propriety of state court's grant or denial of application for pre-action production or inspection of documents, persons, or other evidence, 12 A.L.R.5th 577.

Accused's right to depose prospective witnesses before trial in federal court under Rule 15(a) of Federal Rules of Criminal Procedure, 43 A.L.R. Fed. 865.

Effect on federal criminal proceeding of unavailability to defendant of alien witness through deportation or other government action, 56 A.L.R. Fed. 698.

Right to perpetuation of testimony under Rule 27 of Federal Rules of Civil Procedure, 60 A.L.R. Fed. 924.

Use, in federal criminal prosecution, of deposition of absent witness taken in foreign country, as affected by Federal Rule of Criminal Procedure 15(b) and (d) requiring presence of accused and that deposition be taken in manner provided in civil actions, 105 A.L.R. Fed. 537.

5-503.1. Persons before whom depositions may be taken.

A. **Within the United States.** Depositions shall be taken before an officer authorized to administer oaths by the laws of the place where the examination is held, or before a person appointed by the court in which the action is pending. A person so appointed has power to administer oaths and take testimony.

B. **In foreign countries.** In a foreign country, depositions may be taken:

(1) on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States;

(2) before a person commissioned by the court, and a person so commissioned shall have the power by virtue of the commission to administer any necessary oath and take testimony; or

(3) pursuant to a letter rogatory. A commission or a letter rogatory shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter rogatory that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter rogatory may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter rogatory may be addressed "To the Appropriate Authority in *(here name the country)*". Evidence obtained in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the United States under these rules.

C. **Disqualification for interest.** Except as agreed to by the parties pursuant to Rule 5-512 NMRA, no deposition shall be taken before a person who is a relative or employee or attorney or counsel of any of the parties, or is a relative or employee of such attorney or counsel, or is financially interested in the action.

As used in this rule, an "employee" means a person who is employed in the office of the defendant, the prosecutor or an attorney representing a defendant in the proceedings.

[Approved, effective May 15, 2000; as amended, effective September 30, 2002.]

ANNOTATIONS

The 2002 amendment, effective September 30, 2002, in Paragraph A, substituted "Depositions" for "Within the United States or within a territory or insular possession subject to the dominion of the United States" at the beginning of the first sentence and deleted "of the United States" following "oaths by the laws" near the middle of the first sentence; and inserted "Except as agreed to by the parties pursuant to Rule 5-512 NMRA" at the beginning of Paragraph C.

5-503.2. Depositions; failure to make discovery; sanctions.

A. **Motion for order compelling discovery.** A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery in depositions as follows:

(1) An application for an order to a deponent who is not a party but whose deposition is being taken within the state or for an order to a party may be made to the court where the action is pending. If a deposition is being taken outside the state this shall not preclude the seeking of appropriate relief in the jurisdiction where the deposition is being taken.

(2) If a deponent fails to answer a question propounded or submitted under Rule 5-503 NMRA, or a corporation or other entity fails to make a designation under Rule 5-503(E)(5) NMRA, or if a party, in response to a request for inspection fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 5-507 NMRA.

(3) For purposes of this paragraph an evasive or incomplete answer is to be treated as a failure to answer.

(4) If the motion is granted, the court may, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

Any motion filed pursuant to this paragraph shall state that counsel has made a good faith effort to resolve the issue with opposing counsel prior to filing a motion to compel discovery.

If the motion is denied, the court may, after opportunity for hearing, require the moving party or the attorney advising the moving party or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

B. **Failure to comply with order.**

(1) If a deponent fails to be sworn or to answer a question after being directed to do so by a court with jurisdiction, the failure may be considered a contempt of that court.

(2) If a party or an officer, director or managing agent of a party or a person designated under Rule 5-503 NMRA to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under Paragraph A of this rule, or if a party fails to obey an order under Rule 5-507 NMRA, the court in which the action is pending may make such orders in regard to the failure as are just.

[Approved, effective May 15, 2000.]

ANNOTATIONS

Exclusion of testimony for refusal to comply with discovery order. — Where police officers used a confidential informant to purchase methamphetamine; the confidential informant was the only eye witness to the alleged crime; the state's case rested on the veracity of the confidential informant; the defendant requested disclosure of information about the confidential informant's prior work as a confidential informant; the trial court held an in camera hearing to review the documents the defendant sought to discover; the trial court ordered defense counsel not to disclose the information to any other person; and the state refused to comply with the discovery order, the trial court did not abuse its discretion in excluding the confidential informant's evidence from trial. *State v. Layne*, 2008-NMCA-103, 144 N.M. 574, 189 P.3d 707.

5-504. Videotaped depositions; testimony of certain minors who are victims of sexual offenses.

A. **When allowed.** Upon motion, and after notice to opposing counsel, at any time after the filing of the indictment, information or complaint in district court charging a

criminal sexual penetration or criminal sexual contact on a child under sixteen (16) years of age, the district court may order the taking of a videotaped deposition of the victim, upon a showing that the child may be unable to testify without suffering unreasonable and unnecessary mental or emotional harm. The district judge must attend any deposition taken pursuant to this paragraph and shall provide such protection of the child as the judge deems necessary.

B. **Use at trial.** At the trial of a defendant charged with criminal sexual penetration or criminal sexual contact on a child under sixteen (16) years of age, any part or all of the videotaped deposition of a child under sixteen (16) years of age taken pursuant to Paragraph A of this rule, may be shown to the trial judge or the jury and admitted as evidence as an additional exception to the hearsay rule of the Rules of Evidence if:

(1) the child is unable to testify before the court without suffering unreasonable and unnecessary mental or emotional harm;

(2) the deposition was presided over by a district judge and the defendant was present and was represented by counsel or waived counsel; and

(3) the defendant was given an adequate opportunity to cross-examine the child, subject to such protection of the child as the judge deems necessary.

C. **Additional use at trial.** In addition to the use of a videotaped deposition as permitted by Paragraph B of this rule, a videotaped deposition may be used for any of the reasons set forth in Paragraph N of Rule 5-503.

[As amended, effective July 1, 1988.]

Committee commentary. — This rule was drafted by the rules committee in response to House Memorial 26, Second Session of the Thirty-Third Legislature, 1978 and Section 30-9-17 NMSA 1978. The purpose of 30-9-17, *supra*, is to protect a child who has been allegedly sexually abused from further mental stress. The committee explored several alternatives prior to preparing this draft.

First of all, the committee explored the possibility of removing all spectators from the courtroom during the child's testimony. This was rejected as it may not be constitutionally permissible to bar wholly the public and the press from the courtroom without the concurrence of the defendant under either the New Mexico Constitution or the United States Constitution. *See Gannett Co. v. DePasquale*, 99 S. Ct. 2898 (1979); *Estes v. Texas*, 381 U.S. 532, 587, 85 S. Ct. 1628, 1662, 14 L. Ed. 2d 543, 583 (1965). Prior to the *Gannett* decision, it was generally recognized that the right to a public trial under the United States Constitution could not even be waived by the defendant. *See Constitution of the United States*, congressional research service, 1973. There is also a right to a public trial under the New Mexico Constitution; however, there are no decisions relating to the waiver of this right.

Next, the committee considered further protections which could be afforded to the child. It was noted that the present rules already provide for the court to protect the child during discovery. *See* Rule 5-507 NMRA.

Several members of the committee had grave concerns about the constitutionality of not requiring an available witness to confront the accused. Section 30-9-17 NMSA 1978 provides only that good cause must be shown for the taking of the videotaped deposition. The rule sets forth specifically what is required to make a showing of good cause for a deposition of an alleged rape victim. Under the rule, the child must be under the age of sixteen and unable to testify without suffering unreasonable and unnecessary mental or emotional harm.

In 1988, the committee was requested to consider proposing amendments to Rule 5-504 NMRA which would further protect the child from unnecessary psychological harm. The committee was advised that in order to show good cause, some children have been subjected to two or three psychological evaluations. These evaluations in themselves have, in some cases, created unnecessary psychological harm to the child defeating the purpose of the statute and court rule. Since the present rule does not require a psychological examination, the committee did not believe that further amendments were necessary. Further, the committee is of the opinion that in the rare case that a psychological examination is necessary to show good cause, the trial judge should appoint an independent psychiatrist or psychologist to examine the child and the report to the court. No other examination should be required. The court's determination that psychological harm may result should be made outside the adversarial process.

The committee is of the opinion that the court should consider the following factors in determining whether a videotaped deposition should be taken to avoid a victim child from suffering unreasonable and unnecessary mental or emotional harm:

(1) the child is unable to testify because of fear;

(2) there is a substantial likelihood, established by expert testimony, that the child would suffer emotional trauma from testifying;

(3) the child suffers a mental or other infirmity; or

(4) conduct by defendant or defense counsel causes the child to be unable to continue testifying.

[Revised, effective May 1, 2002.]

ANNOTATIONS

Use of victim's depositions constitutional. — In a prosecution for criminal sexual contact with a minor, use of the victim's videotaped deposition did not deny the defendant the right of confrontation. The defendant was not deprived of his right to fairly

and fully cross-examine the child during the deposition, and the jury, which heard the child's testimony and viewed the child, via videotape, while she testified, had an adequate opportunity to observe the child's demeanor. *State v. Vigil*, 1985-NMCA-103, 103 N.M. 583, 711 P.2d 28.

In a prosecution for sexual abuse, trial judge did not abuse his discretion in allowing the children to testify by way of depositions that were videotaped outside the presence of the defendant and then shown to the jury, since the judge made the requisite findings that the individualized harm which would otherwise result in the child victims outweighed the defendant's right to a face-to-face confrontation with his accusers. *State v. Fairweather*, 1993-NMSC-065, 116 N.M. 456, 863 P.2d 1077.

Videotaped testimony of deceased witness held admissible. — Where no prejudice was shown by the defendant in indicating which portions of a videotape were objectionable even though Rule 29 (*see now* Rule 5-503 NMRA) was not complied with, a videotape of the testimony of the state's eyewitness, who died prior to trial, was admissible. *State v. Martinez*, 1981-NMSC-005, 95 N.M. 445, 623 P.2d 565, *overruled on other grounds by Fuson v. State*, 1987-NMSC-034, 105 N.M. 632, 735 P.2d 1138 (decided prior to adoption of rule).

Record insufficient to justify denial of right to confront victim. — Where a child was charged with criminal sexual contact with his sister, and, at trial, the victim testified in chambers with only counsel and the judge present and the accused child observed the victim testify on a video monitor located in another room, the procedure was invalid without particularized findings of special harm to the particular child witness which were supported by substantial evidence, because the child's right of confrontation required that he be permitted to confront each of the witnesses against him, including the child victim. *State v. Benny E.*, 1990-NMCA-052, 110 N.M. 237, 794 P.2d 380.

Defendant absent from trial voluntarily. — Since the factors articulated in *State v. Clements*, 1988-NMCA-094, 108 N.M. 13, 765 P.2d 1195, for courts to consider in determining when the public interest is clearly persuasive so that the court may proceed in absentia, are to be applied only when the defendant is absent from trial voluntarily, exclusion of defendant, accused of criminal sexual penetration of a minor, from the courtroom during the child's testimony, because of emotional distress it would have caused the child, was reversible error. *State v. Rodriguez*, 1992-NMCA-088, 114 N.M. 265, 837 P.2d 459.

Child unavailable due to trauma. — Showing a traumatic effect to the child is sufficient to render the child unavailable to testify. *Vigil v. Tansy*, 917 F.2d 1277 (10th Cir. 1990), cert. denied, 498 U.S. 1100, 111 S. Ct. 995, 112 L. Ed. 2d 1078 (1991).

Second deposition allowed. — While it appears that the procedure outlined in Section 30-9-17 NMSA 1978 and this rule contemplates only one deposition, at which defense counsel should be on notice that this is his chance to confront the victim, where the defendant never alerted the trial court why, following a deposition, a new video

deposition was necessary and where he never specifically informed the appellate court, with references to the record, why a new video deposition was necessary, it could not be said that the trial court erred in allowing defendant to take a second deposition and then allowing both the first and second videotaped depositions into evidence. *State v. Larson*, 1988-NMCA-019, 107 N.M. 85, 752 P.2d 1101.

Inaudible videotape resulting in mistrial. — Where videotape of testimony of 11-year-old victim of alleged criminal sexual penetration was inaudible at trial and child was unavailable to testify in person because of illness and possible emotional harm, there existed a "manifest necessity" for declaring a mistrial, so that double jeopardy did not bar defendant's retrial. *State v. Messier*, 1984-NMCA-085, 101 N.M. 582, 686 P.2d 272.

Charging paper not required. — There is nothing in this rule requiring the deposition to be taken pursuant to the charging paper upon which the defendant is ultimately tried. The deposition may be taken pursuant to a complaint and then introduced at a trial on an indictment or information. *State v. Larson*, 1988-NMCA-019, 107 N.M. 85, 752 P.2d 1101.

Waiver of required state showing. — In a prosecution for criminal sexual penetration of a minor, since, in order to gain a continuance, the defendant had agreed to allow the admission of videotaped depositions at trial, he could not complain on appeal that the state failed to make the requisite showing for admissibility of the depositions. *State v. Trujillo*, 1995-NMCA-008, 119 N.M. 772, 895 P.2d 672.

Implicit waiver of right to confrontation. — Where defendant at trial did not file a response to the state's motion for a videotaped deposition, nor did he object at the time of the taking of the deposition or at the time that the district court admitted the deposition tape as evidence, but, to the contrary, defendant relied on both the deposition tape and the interview tape in his opening and closing arguments, defendant's actions indicate that he implicitly waived his right to face-to-face confrontation by conduct. *State v. Herrera*, 2004 NMCA-015, 135 N.M. 79, 84 P.3d 696, cert. denied, 2004-NMCERT-004.

Law reviews. — For annual survey of New Mexico criminal procedure, see 16 N.M.L. Rev. 25 (1986).

For annual survey of criminal procedure in New Mexico, see 18 N.M.L. Rev. 345 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Necessity or permissibility of mental examination to determine competency or credibility of complainant in sexual offense prosecution, 45 A.L.R.4th 310.

5-505. Continuing duty to disclose.

A. **Additional material or witnesses.** If, subsequent to compliance with Rule 5-501 or 5-502, and prior to or during trial, a party discovers additional material or witnesses

which he would have been under a duty to produce or disclose at the time of such previous compliance if it were then known to the party, he shall promptly give written notice to the other party or the party's attorney of the existence of the additional material or witnesses.

B. **Failure to comply.** If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from calling a witness not disclosed, or introducing in evidence the material not disclosed, or it may enter such other order as it deems appropriate under the circumstances, including but not limited to holding an attorney in contempt of court pursuant to Rule 5-112 of these rules.

Committee commentary. — This rule was derived from Rule 16, Part III of the Colorado Rules of Criminal Procedure and Rules 16(c) and (d)(2) of the Federal Rules of Criminal Procedure. *See* 62 F.R.D. 271, 306-07, 316-17 (1974).

In *State v. Billington*, 86 N.M. 44, 519 P.2d 140 (Ct. App. 1974), the court held that the violation of this rule by the state entitled the defendant to a continuance. The court believed that the defendant had a right to take the deposition of a witness whose name was not given under Subparagraph (5) of Paragraph A of Rule 5-501 NMRA or seek other discovery for trial preparation and, therefore, a continuance was required as a matter of law.

In *State v. Quintana*, 86 N.M. 666, 526 P.2d 808 (Ct. App.), cert. denied, 86 N.M. 656, 526 P.2d 798 (1974), the opinion of the court states that an alleged violation of this rule could not be raised on appeal where the defendant did not object to the introduction of evidence on the grounds that this rule was violated. The concurring opinion emphasized that on appeal the defendant had to show that some prejudice resulted from the state's failure to comply with the discovery rules.

ANNOTATIONS

Scope of duty to disclose. — The state has a duty to disclose material evidence favorable to the defendant, of which it has knowledge. The defendant also has a corresponding duty to make available to the prosecution his or her list of witnesses and such documents and papers and reports which he or she intends to use as evidence at trial, and there shall be a continuing duty of disclosure on both of the parties. *State v. Stephens*, 1982-NMSC-128, 99 N.M. 32, 653 P.2d 863.

Dismissal may be appropriate order. — Upon failure to obey a discovery order, the court may enter such order as is appropriate under the circumstances, and dismissal may be an appropriate order. *State v. Doe*, 1978-NMCA-124, 92 N.M. 354, 588 P.2d 555.

Dismissal is not proper remedy for prosecutor's interference with defendant's discovery attempts; it is even less appropriate when the record fails to disclose any discovery violations. *State v. Smallwood*, 1980-NMCA-037, 94 N.M. 225, 608 P.2d 537.

Court conducts in camera hearing to determine whether eyewitness' identity subject to disclosure. — Where an informer's testimony, pursuant to Rule 510(c), R. Evid. (*see now* Rule 11-501 NMRA), discloses the identity of a possible eyewitness to a crime, the trial court, under the disclosure requirements of Rule 27(e) (*see now* Rule 5-501 NMRA) and this rule, should conduct an in camera hearing to determine, first, whether the possible eyewitness would be able to give testimony that is relevant and helpful to the defense of the accused or is necessary to a fair determination of the defendant's guilt or innocence, and, second, whether disclosure would subject the possible eyewitness to a substantial risk of harm outweighing any usefulness of the disclosure to defense counsel. *State v. Gallegos*, 1981-NMCA-047, 96 N.M. 54, 627 P.2d 1253, *overruled on other grounds by State v. Martin*, 1984-NMSC-077, 101 N.M. 595, 686 P.2d 937.

Disclosing name of witness one day before trial. — Defendant was entitled as a matter of law to a continuance to obtain a deposition where state, after having provided defendant with a supposedly complete list of witnesses to appear at trial, sought, over defendant's objections, to add an important witness whose name the state had disclosed to the defendant's attorney by phone the day before. Since the witness's testimony was critical and could not have been reasonably anticipated, failure of trial court to grant such continuance constituted an abuse of discretion and was so prejudicial of the substantial rights of the defendant as to necessitate reversal. *State v. Billington*, 1974-NMCA-010, 86 N.M. 44, 519 P.2d 140.

Sanction for failure to list witness. — Striking a key prosecution witness because of the failure of the state to include his name on pretrial witness lists was not an abuse of discretion. *State v. Martinez*, 1998-NMCA-022, 124 N.M. 721, 954 P.2d 1198.

Where no claim of surprise or inadequate inquiry made. — Where defendants objected to the admission of a letter not disclosed prior to trial by the district attorney, but made no claim of surprise to the trial court, nor did they seek a continuance or ask the trial court to conduct the "adequate inquiry" which on appeal they assert was required, the appellate court would not consider the claim that the trial court's inquiry was inadequate. *State v. Smith*, 1975-NMCA-139, 88 N.M. 541, 543 P.2d 834.

Nondisclosure not established. — Speculation that there might be test results of the defendant's hair in a prosecution for criminal sexual penetration and that the test results might have been exculpatory did not establish a nondisclosure of exculpatory evidence. *State v. Martinez*, 1982-NMCA-053, 98 N.M. 27, 644 P.2d 541.

Trial court did not err in refusing to grant mistrial or continuance because defense counsel lacked an opportunity to interview a witness. *State v. Ewing*, 1982-NMCA-030, 97 N.M. 484, 641 P.2d 515.

Continuing duty to disclosure additional material or witnesses is prescribed by Paragraph A of this rule. *State v. McDaniel*, 2004-NMCA-022, 135 N.M. 84, 84 P.3d 701, cert. denied, 2004-NMCERT-002.

Appellate court's standard for evaluating a trial court's decision to admit evidence disclosed for the first time at trial. — An appellate court's standard for evaluating the trial court's decision to admit evidence disclosed for the first time at trial considers whether the State breached some duty or intentionally deprived the defendant of evidence, whether the improperly non-disclosed evidence was material, whether the non-disclosure of the evidence prejudiced the defendant, and whether the trial court cured the failure to timely disclose the evidence. *State v. Smith*, 2016-NMSC-007.

Where the State's DNA expert notified the State of the need to recalculate certain DNA results and the recalculated DNA data was provided to defendant the same day the report was made, where the trial court cured any adverse consequences due to the untimely disclosure of evidence by allowing for a reasonable delay in the trial proceedings for defense counsel to consult his own DNA expert, and where the recalculated DNA results were favorable to defendant and defense counsel had the opportunity to thoroughly cross-examine the State's DNA expert at trial after consulting with defense counsel's own expert, there was no prejudice to defendant by admitting the recalculated DNA result, and the trial court's decision to admit the evidence was not an abuse of discretion. *State v. Smith*, 2016-NMSC-007.

No breach of duty to disclose. — Where the prosecutor did not violate the continuing duty to disclose or intentionally deprive defendant of evidence but promptly informed defendant about a witness as soon as the witness was located, as required by Paragraph A of this rule, the prosecutor did not act to intentionally deprive defendant of evidence, and there was no breach of the duty to disclose. *State v. McDaniel*, 2004-NMCA-022, 135 N.M. 84, 84 P.3d 701, cert. denied, 2004-NMCERT-002.

Defendant was not prejudiced by late disclosure of witness where defendant has not shown how his cross-examination would have been improved by an earlier disclosure or how he would have prepared differently for trial, in light of a review of the record which showed that the jury had sufficient information to assess the credibility of the witness and her motive for testifying, and during cross-examination, defense counsel repeatedly challenged the neighbor's credibility. *State v. McDaniel*, 2004-NMCA-022, 135 N.M. 84, 84 P.3d 701, cert. denied, 2004-NMCERT-002.

No violation where state did not fail to disclose witness's identity or act in bad faith. — Where defendant, who was charged with aggravated battery with a deadly weapon, sought to suppress the testimony of the only witness to the altercation between defendant and the victim, the district court did not abuse its discretion by refusing to exclude the witness's testimony, because the state filed an updated witness list several years before trial which included the name of the witness and his address at the time, and although the witness moved out of state, the state searched to locate the witness for an interview prior to trial, and defendant was ultimately able to interview the witness

prior to his testimony; the state did not fail to disclose the witness's identity or act in bad faith to conceal the witness's whereabouts. *State v. Lopez*, 2018-NMCA-002, cert. denied.

Late disclosure of evidence not prejudicial. — Where defendant was charged with forgery and identity theft based on allegations of check fraud at Wal-Mart, the trial court did not abuse its discretion in admitting the testimony of a records custodian and in admitting records of database searches for transactions appearing to involve defendant, because the late substitution of the records custodian for another records custodian that had previously been disclosed to defendant did not undermine defendant's preparation for trial, the records produced by the records custodian did not contain any new information not included in an earlier disclosure, and defendant did not demonstrate prejudice when he had the opportunity to interview the late-disclosed witness prior to trial. S*tate v. Imperial*, 2017-NMCA-040, cert. denied.

Motion for mistrial properly denied where district court's remedy for failure to disclose evidence was sufficient. — Where defendant was charged with trafficking a controlled substance, tampering with evidence, resisting, evading, or obstructing an officer, and possession of drug paraphernalia after law enforcement officers conducted a traffic stop, during which defendant was found with a large amount of money and sixty-three small baggies of crack cocaine, and where officers subsequently searched defendant's home, finding a .380 caliber semi-automatic pistol, several small zip-lock baggies, several digital scales, and a brown bag with small zip-lock baggies inside, and where, on the first day of trial, it was revealed that a supplemental police report documenting defendant's arrest had not been disclosed to the defense, the district court did not abuse its discretion in denying defendant's motion for mistrial because the supplemental report was merely cumulative, defendant conceded that he was not prejudiced, and the district court dealt with the failure to disclose by admonishing the prosecution and allowing defendant to recall the officer for cross examination. *State v. Jackson*, 2021-NMCA-059, *cert. denied*.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 1258 to 1262.

Sanctions against defense in criminal case for failure to comply with discovery requirements, 9 A.L.R.4th 837.

22A C.J.S. Criminal Law §§ 532 to 534.

5-506. Grand jury proceedings.

A. **Indictment.** Grand jury indictments shall be public when they are filed with the court. Upon request, the court may order an indictment sealed until arrest.

B. **Sound recording.** A sound recording shall be made of the testimony of all witnesses and any explanation or instructions of the prosecutor and any comments

made by the prosecutor or other persons in the presence of the grand jury. No record shall be made of the deliberations of the grand jury.

C. **Copy of recording.** At any time after indictment, on request of a party, the district court clerk shall furnish a copy of the tape recording of:

(1) the defendant's testimony before the grand jury; and

(2) the entire proceedings, unless the state objects to some portions of the tape, in which case the court shall determine which portions of the proceedings are to be furnished to defendant.

D. **Disclosure.** The district court may prohibit disclosure of that portion of testimony or proceedings which creates substantial risk of harm to some person or which is irrelevant to the defendant.

[As amended, effective August 1, 1989.]

Committee commentary. — This rule provides that the district court shall order the preparation of a copy of the tape recording of testimony of a defendant or a witness on the state's witness list before the grand jury.

Prior to the adoption of this rule and the amendment of Rule 5-501, the prosecution was not required to produce the statement of the defendant before the grand jury. Section 31-6-8 NMSA 1978, enacted by the 1979 legislature, provides that a transcript of testimony before the grand jury is to be made only upon order of the district court.

The rule in New Mexico is that:

"(O)nce the witness has testified at the criminal trial about that which he testified before the grand jury, the accused is entitled to an order permitting examination of that portion of the witness' grand jury testimony relating to the crime for which the defendant is charged". *Valles v. State*, 90 N.M. 347, 563 P.2d 610 (Ct. App. 1977), cert. denied, 90 N.M. 637, 567 P.2d 486, quoting from *State v. Sparks*, 85 N.M. 429, 512 P.2d 1265 (Ct. App. 1973), cert. denied, 92 N.M. 353, 588 P.2d 554 (1978); *State v. Felter*, 85 N.M. 619, 515 P.2d 138 (1973); *State v. Tackett*, 78 N.M. 450, 432 P.2d 415 (1967), cert. denied, 390 U.S. 1026, 20 L. Ed. 2d 283, 88 S. Ct. 1414 (1968); and *State v. Morgan*, 67 N.M. 287, 354 P.2d 1002 (1960), holding that the defendant is entitled to a copy of the transcript of testimony of a witness before the grand jury prior to the time that the witness testifies at trial only on a showing of particularized need.

Paragraph D of this rule addresses the problem that can result from the release of certain information such as the addresses of witnesses and the names of confidential informants. The district court may prohibit such disclosures when consistent with the constitutional right to a fair trial.

ANNOTATIONS

Cross references. — For list and statement of state witnesses, *see* Rule 5-501 NMRA.

For record of grand jury testimony, *see* Section 31-6-8 NMSA 1978.

A record of advisement of elements of crime charged required. — The practice of providing the grand jury with a written manual containing UJI instructions and not indicating on the record that the jury has been at least referred to the appropriate sections of the manual for each crime listed on indictments does not comply with Paragraph B of this rule, Sections 31-6-8 and 31-6-10 NMSA 1978, or UJI 14-8001 NMRA. *State v. Ulibarri*, 1999-NMCA-142, 128 N.M. 546, 994 P.2d 1164, *aff'd*, 2000-NMSC-007, 128 N.M. 686, 997 P.2d 818.

Sufficiency of indictment. — Indictments alleging fraud filed against several defendants were not vague and adequately apprised them of the specific charges against them, where the defendants had access to the grand jury proceedings, the prosecutor notified them that the state's file was open for their examination, and the state filed a statement of facts in response to defendants' motion that it be required to identify those practices, representations, or matters of conduct which were alleged to have been fraudulent. *State v. Crews*, 1989-NMCA-088, 110 N.M. 723, 799 P.2d 592.

Am. Jur. 2d, A.L.R. and C.J.S. references. — What is "judicial proceeding" within Rule 6(e)(3)(C)(i) of the Federal Rules of Criminal Procedure permitting disclosure of matters occurring before grand jury when so directed by court preliminarily to or in connection with such proceeding, 52 A.L.R. Fed. 411.

Relief, remedy, or sanction for violation of Rule 6(e) of Federal Rules of Criminal Procedure, prohibiting disclosure of matters occurring before grand jury, 73 A.L.R. Fed. 112.

5-507. Depositions; statements; protective orders.

A. **Motion.** Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition or statement, the court in the district where the deposition or statement is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, undue burden or expense, the risk of physical harm, intimidation, bribery or economic reprisals. The order may include one or more of the following restrictions:

(1) that the deposition or statement requested not be taken;

(2) that the deposition or statement requested be deferred;

(3) that the deposition or statement may be had only on specified terms and conditions, including a designation of the time or place;

(4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

(5) that the deposition or statement be conducted with no one present except persons designated by the court;

(6) that a deposition or statement after being sealed be opened only by order of the court;

(7) that a trade secret or other confidential research, development or commercial information not be disclosed or be disclosed only in a designated way; and

(8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

B. **Written showing of good cause.** Upon motion, the court may permit the showing of good cause required under Paragraph A of this rule to be in the form of a written statement for inspection by the court in camera, if the court concludes from the statement that there is a substantial need for the in camera showing. If the court does not permit the in camera showing, the written statement shall be returned to the movant upon request. If no such request is made, or if the court enters an order granting the relief sought, the entire text of the statement shall be sealed and preserved in the records of the court to be made available to the appellate court having jurisdiction in the event of an appeal.

C. **Denial of order.** If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery.

[As amended, effective August 1, 1992; May 15, 2000.]

Committee commentary. — This rule provides a protective order procedure only for the taking of depositions. Some of the same criteria for denying a party the opportunity to take a deposition are also used for denying discovery of evidence held by the state under Paragraph E of Rule 5-501 NMRA.

The grounds for the protective order are taken from Paragraph C of Rule 1-026 and American Bar Association Standards Relating to Discovery and Procedure Before Trial, Section 2.5 (Approved Draft 1970). The American Bar Association Special Committee on Federal Rules of Procedure urged that the proposed amendments to Rule 16 of the Federal Rules of Criminal Procedure include the Standards. *See* 52 F.R.D. 87, 98 (1971). However, the Bar Association recommendations were not included in the federal amendments. *See* 62 F.R.D. 271, 307, 316-17 (1974).

ANNOTATIONS

The 2000 amendment, effective May 15, 2000, in Paragraph A, substituted "Motion" for "Restrictions, upon showing of good cause" in the bold heading, substituted "the person from whom discovery is sought" for "a person to be examined pursuant to Rule 5-305" and inserted "alternatively, on matters relating to a deposition or statement" substituted "expense," for "from" preceding "the risk"; inserted "party or" in Paragraph C; and made minor stylistic changes throughout the rule.

The 1992 amendment, effective for cases filed in the district courts on or after August 1, 1992, inserted "statement" in the catchline and "or statement" throughout the rule.

Reasonable limitations on questions asked at deposition do not deprive defendant of due process. *State v. Herrera*, 1978-NMCA-048, 92 N.M. 7, 582 P.2d 384, cert. denied, 91 N.M. 751, 580 P.2d 972 (1978).

Court may limit harassing and intimidating inquiry into victim's past sexual conduct. — Harassment and intimidation are grounds for restricting a deposition, so a trial court may limit inquiry into a victim's past sexual conduct where defendant's reason for the inquiry is to harass the victim and possibly frighten her from appearing as a witness. *State v. Herrera*, 1978-NMCA-048, 92 N.M. 7, 582 P.2d 384, cert. denied, 91 N.M. 751, 580 P.2d 972 (1978).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law § 1177.

5-508. Notice of alibi; entrapment defense.

A. **Notice.** In criminal cases not within magistrate court trial jurisdiction, upon the written demand of the district attorney, specifying as particularly as is known to the district attorney, the place, date and time of the commission of the crime charged, a defendant who intends to offer evidence of an alibi or entrapment as a defense shall, not less than ten (10) days before trial or such other time as the district court may direct, serve upon such district attorney a notice in writing of the defendant's intention to introduce evidence of an alibi or evidence of entrapment.

B. **Content of notice.** A notice of alibi or entrapment shall contain specific information as to the place at which the defendant claims to have been at the time of the alleged offense and, as particularly as known to defendant or the defendant's attorney, the names and addresses of the witnesses by whom the defendant proposes to establish an alibi or raise an issue of entrapment. Not more than five (5) days after receipt of defendant's witness list or at such other time as the district court may direct, the district attorney shall serve upon the defendant the names and addresses, as particularly as known to the district attorney, of the witnesses the state proposes to offer in rebuttal to discredit the defendant's alibi or claim of entrapment at the trial of the cause.

C. **Continuing duty to give notice.** Both the defendant and the district attorney shall be under a continuing duty to promptly disclose the names and addresses of additional witnesses which come to the attention of either party subsequent to filing their respective witness lists as provided in this rule.

D. **Failure to give notice.** If a defendant fails to serve a copy of such notice as herein required, the court may exclude evidence offered by such defendant for the purpose of proving an alibi, except the testimony of the defendant himself. If such notice is given by a defendant, the district court may exclude the testimony of any witness offered by the defendant for the purpose of proving an alibi or entrapment if the name and address of such witness was known to defendant or the defendant's attorney but was not stated in such notice. If the district attorney fails to file a list of witnesses and serve a copy on the defendant as provided in this rule, the court may exclude evidence offered by the state to contradict the defendant's alibi or entrapment evidence. If notice is given by the district attorney, the court may exclude the testimony of any witnesses offered by the district attorney for the purpose of contradicting the defense of alibi or entrapment if the name and address of the witness is known to the district attorney but was not stated in such notice. For good cause shown the court may waive the requirements of this rule.

E. **Admissibility as evidence.** The fact that a notice of alibi was given or anything contained in such notice shall not be admissible as evidence in the trial of the case.

[As amended, effective May 1, 1998; by Supreme Court Order No. 12-8300-027, effective for all cases filed or pending on or after January 7, 2013.]

Committee commentary. — This rule was derived from Rule 3.200 of the Florida Rules of Criminal Procedure. The constitutionality of the Florida rule was upheld in *Williams v. Florida*, 399 U.S. 78, 90 S. Ct. 1893, 26 L. Ed. 2d 446 (1970). In a more recent case, the United States Supreme Court declared the Oregon notice of alibi rule unconstitutional because the Oregon rules fail to give the defendant reciprocal discovery rights. *Wardius v. Oregon*, 412 U.S. 470, 93 S. Ct. 2208, 37 L. Ed. 2d 470 (1973)

A similar rule has now been adopted in the federal rules as Rule 12.1. *See* 62 F.R.D. 271, 292-95 (1974). *See also*, American Bar Association Standards Relating to Discovery and Procedure Before Trial, Section 3.3 (Approved Draft 1970).

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A similar rule has now been adopted in the federal rules as Rule 12.1. *See* 62 F.R.D. 271, 292-95 (1974). *See also*, American Bar Association Standards Relating to Discovery and Procedure Before Trial, Section 3.3 (Approved Draft 1970).

ANNOTATIONS

The 2012 amendment, approved by Supreme Court Order No. 12-8300-027, effective January 7, 2013, provided the maximum time for service of the prosecution's list of rebuttal witnesses; and in Paragraph B, at the beginning of the second sentence, after "Not", deleted "less" and added "more".

The 1998 amendment, effective May 1, 1998, inserted "entrapment defense" in the Rule heading; in Paragraph A, substituted "alibi or entrapment as a defense" for "alibi in his defense" near the middle and "of the defendant's intention to introduce evidence of an alibi or evidence of entrapment" for "of his intention to claim such alibi" near the end of Paragraph A, designated the second and third sentence of Paragraph A as Paragraph B and redesignated the remaining Paragraphs accordingly; in Paragraph B, substituted "A notice of alibi or entrapment" for "Such notice" at the beginning, "the defendant's" for "his", "the defendant" for "he", "an alibi or raise an issue of entrapment" for "such alibi" at the end of the first sentence, and inserted "or claim of entrapment" near the end of the second sentence; in Paragraph D, inserted "or entrapment" throughout the paragraph, substituted "the defendant's" for "his" near the end of the second sentence, deleted "thereof" preceding "on the defendant"; and made minor stylistic changes.

Rule 5-508(E) NMRA applies regardless of whether or not the defendant has elected to abandon his or her alibi defense. *State v. O'Neal*, 2008-NMCA-022, 143 N.M. 437, 176 P.3d 1169.

No prejudice for noncompliance. — Where the district court erred in allowing the State to introduce evidence regarding the defendant's notice of alibi, the defendant was not prejudiced where the defendant never withdrew his notice of alibi and the State's evidence regarding the notice of alibi was consistent with the defendant's alibi theory. *State v. O'Neal*, 2008-NMCA-022, 143 N.M. 437, 176 P.3d 1169.

Failure to give notice of alibi. — Defendant's defense of mistaken identity, which consisted of the argument that because she and her sister bear a close resemblance, the arresting officers mistook the defendant as the one who purchased ingredients used in the manufacture of methamphetamine and that defendant was at her sister's apartment during the time in question, was simply evidence to support an alibi and because defendant failed to give the state notice of her alibi defense, the district court properly refused admission of a photograph of defendant's sister which defendant offered to show the resemblance between the sisters. *State v. Kent*, 2006-NMCA-134, 140 N.M. 606, 145 P.3d 86, cert. denied, 2006-NMCERT-010.

Constitutionality. — Since New Mexico's alibi rule provides for reciprocal discovery rights and provides ample opportunity for an investigation of the facts, it does not violate due process. *State v. Smith*, 1975-NMCA-139, 88 N.M. 541, 543 P.2d 834.

Purpose. — The notice of alibi rule is designed to enhance the search for truth in the criminal trial by insuring both the defendant and the state ample opportunity to investigate certain facts crucial to the determination of guilt or innocence. *State v. Watley*, 1989-NMCA-112, 109 N.M. 619, 788 P.2d 375.

Right to compulsory process not violated. — The alibi rule does not violate the right to compulsory process, since it does not prevent a defendant from compelling the attendance of witnesses, but rather, provides reasonable conditions for the presentation of alibi evidence. *State v. Smith*, 1975-NMCA-139, 88 N.M. 541, 543 P.2d 834.

Improper notice by defendant. — In deciding whether or not to admit alibi evidence when a proper notice has not been served by the defendant, the trial court should balance the potential for prejudice to the prosecution against the impact on the defense and whether the evidence might have been material to the outcome of the trial. Neither the purpose nor intent behind the notice-of-alibi rule appears to have been frustrated in the case at hand where the state had the opportunity to prepare its case by interviewing disclosed witnesses and investigating facts necessary to adjudicate the guilt or innocence of the defendant. *McCarty v. State*, 1988-NMSC-079, 107 N.M. 651, 763 P.2d 360.

Application of rule does not force defendant to incriminate himself. — In applying the alibi rule so as to exclude evidence of alibi not disclosed to the district attorney and thus giving defendant a choice between foregoing the defense or taking the stand himself to present it, the trial court did not violate defendant's privilege against self-incrimination. *State v. Smith*, 1975-NMCA-139, 88 N.M. 541, 543 P.2d 834.

Adequate inquiry into defendant's violation of rule. — The record did not support the claim that the trial court acted arbitrarily and without adequate inquiry into the circumstances surrounding defendant's violation of the notice of alibi rule when it excluded the evidence in question, where it showed the parties were given opportunity to present their contentions to the trial court and after certain exhibits were admitted, attorneys for the parties argued to the court, and where furthermore the contention was not raised in the trial court. *State v. Smith*, 1975-NMCA-139, 88 N.M. 541, 543 P.2d 834.

Defendant found not prejudiced by alleged lack of sufficiency of written demand. — The appellate court did not need to decide whether the lack of sufficiency of the district attorney's written demand of notice of an alibi defense was waived because not raised until after trial, since the record affirmatively showed that the defense had later been provided the information allegedly missing from the original written demand, and thus defendants were not prejudiced by any technical deficiency. *State v. Smith*, 1975-NMCA-139, 88 N.M. 541, 543 P.2d 834.

Prejudicial effect of noncompliance. — In considering the potential for prejudice to the prosecution from the admission of previously undisclosed alibi testimony, the trial court must take into account not only the prejudicial effect of noncompliance with this rule on the immediate case, but also the necessity to enforce the rule to preserve the integrity of the trial process. The trial judge should consider whether noncompliance was a willful attempt to prevent the state from investigating necessary facts. *State v. Watley*, 1989-NMCA-112, 109 N.M. 619, 788 P.2d 375.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 223 to 243.

Validity and construction of statutes requiring defendant in criminal case to disclose matter as to alibi defense, 45 A.L.R.3d 958.

Construction and application of Rule 12.1, Federal Rules of Criminal Procedure, requiring, upon written notice, exchange of names of witnesses to be used to establish or rebut defendant's alibi, 42 A.L.R. Fed. 878.

22A C.J.S. Criminal Law §§ 463, 464.

5-509. Habitual criminal proceedings; notice of attack on prior sentence.

A. **Notice.** If the defense in an habitual criminal sentencing proceeding intends to attack the validity of any prior conviction, unless a shorter period of time is ordered by the court, no later than ten (10) days before the habitual criminal sentencing proceeding, the defendant shall provide the state with a written notice of such intention. The defendant's notice of intent to attack a prior conviction shall contain specific information as to each conviction the defendant intends to attack as invalid and the names and addresses of the witnesses by whom the defendant proposes to establish such defense. Not less than five (5) days after receipt of defendant's witness list or at such other time as the district court may direct, the district attorney shall serve upon the defendant the names and addresses, as particularly as known to the district attorney, of the witnesses the state proposes to offer in rebuttal to discredit the defendant's claim that the prior conviction was invalid.

B. **Continuing duty to give notice.** Both the defendant and the district attorney shall be under a continuing duty to promptly disclose the names and addresses of additional witnesses which come to the attention of either party subsequent to filing their respective witness lists as provided in this rule.

C. **Failure to give notice.** If a defendant fails to serve a copy of such notice as herein required, the court may exclude evidence offered by such defendant for the purpose of proving a prior conviction was invalid, except the testimony of the defendant himself. If such notice is given by a defendant, the district court may exclude the testimony of any witness offered by the defendant for the purpose of proving the

invalidity of a prior conviction if the name and address of such witness was known to defendant or his attorney but was not stated in such notice. If the district attorney fails to file a list of witnesses and serve a copy thereof on the defendant as provided in this rule, the court may exclude evidence offered by the state to contradict the defendant's evidence. If such notice is given by the district attorney, the court may exclude the testimony of any witnesses offered by the district attorney for the purpose of contradicting the defendant's claim that a prior conviction was invalid if the name and address of such witness is known to the district attorney but was not stated in such notice. For good cause shown the court may waive the requirements of this rule.

[As adopted, effective August 1, 1989.]

ANNOTATIONS

Failure to give notice that a conviction will be contested. — Even if the defendant fails to provide the state with notice that the validity of a prior conviction will be contested, the state has the initial burden of showing that the defendant is, in fact, the same person as the person named in the prior conviction. *State v. Clements*, 2009-NMCA-085, 146 N.M. 745, 215 P.3d 54.

5-511. Subpoena.

A. **Form; issuance.**

(1) Every subpoena shall:

(a) state the name of the court from which it is issued;

(b) state the title of the action and its criminal action number;

(c) command each person to whom it is directed to attend and give testimony or to produce and permit inspection and copying of designated books, documents or tangible things in the possession, custody or control of that person, or to permit inspection of premises, at a time and place therein specified; and

(d) be substantially in the form approved by the Supreme Court.

A command to produce evidence or to permit inspection may be joined with a command to appear at trial or hearing, deposition or statement, or may be issued separately.

(2) All subpoenas shall issue from the court for the district in which the matter is pending.

(3) The clerk shall issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall complete it before service. An attorney authorized to practice

law in New Mexico and who represents a party, as an officer of the court, may also issue and sign a subpoena on behalf of the court.

B. **Service; place of examination.**

(1) A subpoena may be served any place within the state.

(2) A subpoena may be served by any person who is not a party and is not less than eighteen (18) years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and, if that person's attendance is commanded:

(a) if the witness is to be paid from funds appropriated by the legislature to the administrative office of the courts for payment of state witnesses or for the payment of witnesses in indigency cases, by processing for payment to such witness the fee and mileage prescribed by regulation of the administrative office of the courts;

(b) for all persons not described in Subparagraph (2)(a) of this paragraph, by tendering to that person the full fee for one day's expenses provided by Subsection A of Section 10-8-4 NMSA 1978 as per diem for nonsalaried public officers attending a board or committee meeting and the mileage provided by Subsection D of Section 10-8-4 NMSA 1978. The fee for per diem expenses shall not be prorated. If attendance is required for more than one day, a full day's expenses shall be paid prior to commencement of each day attendance is required. When the subpoena is issued on behalf of the state or an officer or agency thereof, including the public defender department, fees and mileage need not be tendered.

(3) A person may be required to attend a deposition or statement within one hundred (100) miles of where that person resides, is employed or transacts business in person, or at such other place as is fixed by an order of the court.

(4) A person may be required to attend a hearing or trial at any place within the state.

(5) Proof of service when necessary shall be made by filing with the clerk of the court a return substantially in the form approved by the Supreme Court.

(6) A subpoena may be issued for taking of a deposition within this state in a criminal action pending outside the state pursuant to Section 38-8-1 NMSA 1978 upon the filing of a miscellaneous proceeding in the judicial district in which the subpoena is to be served. Upon the docketing of the miscellaneous proceeding, the subpoena may be issued and shall be served as provided by this rule.

(7) A subpoena may be served in an action pending in this state on a person in another state or country in the manner provided by law or rule of the other state or country.

C. **Protection of persons subject to subpoenas.**

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction.

(2)

(a) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, statement, hearing or trial.

(b) Subject to Subparagraph (2) of Paragraph D of this rule, a person commanded to produce and permit inspection and copying may, within fourteen (14) days after service of the subpoena or before the time specified for compliance if such time is less than fourteen (14) days after service, serve upon all parties written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3)

(a) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it:

(i) fails to allow reasonable time for compliance,

(ii) requires a person who is not a party or an officer of a party to travel to a place more than one hundred (100) miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of Subparagraph (3)(b)(iii) of this paragraph, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(b) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development or commercial information,

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than one hundred (100) miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena.

D. **Duties in responding to subpoena.**

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

E. **Contempt.** Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued. An adequate cause for failure to obey exists when a subpoena purports to require a non-party to attend or produce at a place not within the limits provided in Subparagraph (3)(a)(ii) of Paragraph C of this rule.

[Approved, effective May 15, 2000; as amended by Supreme Court Order No. 16-8300-034, effective for all cases pending or filed on or after December 31, 2016.]

Committee commentary. — *See* the committee commentary following Rule 1-045 NMRA for a discussion of the comparable civil rule governing subpoenas. Prior to the adoption of this rule, Rule 1-045 NMRA governed subpoenas in criminal cases. *See* Rule 5-603 NMRA prior to the May 15, 2000, amendment of that rule.

ANNOTATIONS

The 2016 amendment, approved by Supreme Court Order No. 16-8300-034, effective December 31, 2016, in Subparagraph B(2)(b), after “fees and mileage need not be tendered”, deleted “Prior to or at the same time as service of any subpoena

commanding production of documents and things or inspection of premises before trial, notice shall be served on each party in the manner prescribed by Rule 5-103 NMRA."

Subpoenas may be issued only in connection with pending judicial actions. — It is unlawful for a court or an officer of the court to issue any subpoena in the absence of a pending judicial action. *In re Chavez, cons. with In re Gallegos*, 2017-NMSC-012.

Issuance of unauthorized subpoenas. — Where deputy district attorney issued at least ninety-four subpoenas concerning numerous separate investigations, most of which were directed to various cellular phone providers seeking subscriber information and call activity in order to narrow potential suspects, but several sought medical records, CYFD records, and utility records, and some of which were approved by the district attorney of the Eighth Judicial District, but none of which were issued by a sitting grand jury nor reviewed by any judicial officer and were not connected to any cases before the court, the deputy district attorney and the district attorney violated Rules 5-511(A)(1)(b) and 5-511(A)(2) NMRA, which require that subpoenas be issued only in connection with existing judicial actions, and the Rules of Professional Conduct prohibiting the use of methods that have no substantial purpose other than to burden third parties and the use of methods to obtain evidence that violate the legal rights of a person. *In re Chavez, cons. with In re Gallegos*, 2017-NMSC-012.

Grand jury investigation satisfies the "pending judicial action" requirement. — Where defendant was charged with traveling in interstate commerce for the purpose of engaging in illicit sexual conduct with a person under eighteen years of age, among other offenses, and where defendant filed a motion to suppress evidence, arguing that a grand jury subpoena duces tecum, issued to defendant's cell phone carrier requesting all known information relating to defendant's cell phone number, was unlawful under New Mexico law, it was held that although judicial subpoenas issued unilaterally by the deputy district attorney in the absence of a pending judicial action are unlawful, the subpoena in this case was issued by the grand jury after the presentment of evidence. A pending court case or grand jury investigation satisfies the "pending judicial action" requirement, and pre-indictment subpoenas are routinely issued in connection with grand jury proceedings under 31-6-12 NMSA 1978. *United States v. Streett*, 363 F. Supp.3d 1212 (D. N.M. 2018).

5-511.1. Service of subpoenas and notices of statement.

Prior to or at the same time as service of any notice of a witness statement or subpoena other than a grand jury subpoena, copies of the notice and subpoena shall be served on each party in the manner prescribed by Rule 5-103 NMRA.

[Adopted by Supreme Court Order No. 16-8300-034, effective for all cases pending or filed on or after December 31, 2016.]

5-512. Stipulations regarding discovery procedure.

Unless the court orders otherwise, or previous orders of the court conflict, the parties may by written stipulation:

A. provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions; and

B. modify the procedures provided by these rules for other methods of discovery.

[Approved, effective September 30, 2002.]

ARTICLE 6
Trials

5-601. Motions.

A. **Change of venue.** Change of venue shall be accomplished according to law.

B. **Motions to reconsider.** A party may file a motion to reconsider any ruling made by the district court. The district court may rule on a motion to reconsider with or without a hearing.

C. **Defenses and objections which may be raised.** Any defense, objection or request which is capable of determination without a trial on the merits may be raised before trial by motion.

D. **Defenses and objections which must be raised.** The following defenses or objections must be raised prior to trial:

(1) defenses and objections based on defects in the initiation of the prosecution; or

(2) defenses and objections based on defects in the complaint, indictment or information other than a failure to show jurisdiction in the court or to charge an offense, which objections shall be noticed by the court at any time during the pendency of the proceeding. Failure to present any such defense or objection, other than the failure to show jurisdiction or charge an offense, constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. If any such objection or defense is sustained and is not otherwise remediable, the court shall order the complaint, indictment or information dismissed.

E. **Time for making motions.**

(1) Unless otherwise provided by these rules or ordered by the court, a pretrial motion shall be made at the arraignment or within ninety (90) days thereafter, unless upon good cause shown the court waives the time requirement.

(2) A motion to reconsider may be filed at any time before entry of the judgment and sentence. A motion to reconsider the judgment and sentence or an appealable order entered before or after the judgment and sentence will toll the time to appeal only if the motion is filed within the permissible time for initiating the appeal.

F. **Evidentiary hearing.** If an evidentiary hearing is required, the motion shall be accompanied by a separate written request for an evidentiary hearing, including a statement of the ultimate facts intended to be proven at such an evidentiary hearing. Unless a shorter period of time is ordered by the court, at least five (5) days before the hearing on the motion, each party shall submit to the other party's attorney the names and addresses of the witnesses the party intends to call at the evidentiary hearing, together with any statement subject to discovery made by the witness which has not been previously disclosed pursuant to Rule 5-501 or 5-502.

G. **Ruling of court.** All motions shall be disposed of within a reasonable time after filing.

H. **Defenses and objections not waived.** No defense or objection shall be waived by not being raised or made at arraignment.

I. **Notice of withdrawal of motion.** If a motion is scheduled for hearing, a party shall give at least five (5) days notice of withdrawal of the motion.

[As amended, effective May 1, 1999; as amended by Supreme Court Order No. 19-8300-018, effective for all cases filed or pending on or after December 31, 2019.]

Committee commentary. — *See* NMSA 1978, §§ 38-3-3 to 38-3-7 (1880, as amended through 2003), for the statutes pertaining to change of venue. The original venue for a criminal case is the county in which the crime was committed. NMSA 1978, § 30-1-14 (1963).

Paragraphs C and D of this rule were derived from Rules 12(b)(1) and (2) and 12(f) of the Federal Rules of Criminal Procedure. *See generally* 48 F.R.D. 553, 579 (1970); 62 F.R.D. 571, 287-92 (1974). Unlike the federal rule, Paragraph D of this rule does not include motions to suppress evidence as a matter which must be raised prior to trial. If a motion to suppress is made prior to trial, it is governed by Rule 5-212. Subparagraph (2) of Paragraph D, and Paragraph H of this rule superseded decisions holding that motions to quash an indictment must be raised prior to the arraignment and plea. *See* NMSA 1978, § 31-6-3; *State v. Elam*, 1974-NMCA-075, 86 N.M. 595, 526 P.2d 189.

Paragraph I was added in 1999 to provide an affirmative duty of an attorney to give five days notice of withdrawal of a motion. Failure to provide adequate notice can result in

unnecessary costs. *See State v. Rivera*, 1998-NMSC-024, 125 N.M. 532, 964 P.2d 93. A willful violation of this paragraph can result in contempt of court and the imposition of disciplinary action. *See* Rule 5-112 NMRA. Paragraph I is intended to preclude local rules which may result in imposition of costs incurred by the court because of an alleged negligent failure of the attorney to provide adequate notice of the withdrawal of a motion. The committee is of the opinion that such a rule would have a chilling effect upon the zealous representation of a defendant in a criminal case.

This rule was amended in 2019 to affirmatively provide for motions to reconsider, which have long been recognized in common law though not in our Rules of Criminal Procedure. *See State v. Suskiewich*, 2014-NMSC-040, ¶ 12, 339 P.3d 614 (“Although our procedural rules do not grant the State an express right to file a motion to reconsider a suppression order, the common law has long recognized the validity and utility of motions to reconsider in criminal cases.”). Consistent with Rule 12-201 NMRA, a motion to reconsider filed within the permissible time period for initiating an appeal will toll the time to file an appeal until the motion has been expressly disposed of or withdrawn.

[As amended by Supreme Court Order No. 19-8300-018, effective for all cases filed or pending on or after December 31, 2019.]

ANNOTATIONS

The 2019 amendment, approved by Supreme Court Order No. 19-8300-018, effective in all cases filed or pending on or after December 31, 2019, provided for motions to reconsider, provided that motions to reconsider may be filed at any time before entry of the judgment and sentence, provided that the filing of a motion to reconsider a judgment and sentence within the permissible time period for initiating an appeal will toll the time to file the appeal, and revised the committee commentary; in the heading deleted "Pretrial" and after "motions" deleted "defenses and objections"; added a new Paragraph B and redesignated former Paragraphs B through H as Paragraphs C through I, respectively; in Paragraph E, Subparagraph 1, deleted “All motions”, after “these rules or”, deleted “unless otherwise”, and after “ordered by the court”, added “a pretrial motion”, and added Subparagraph E(2).

The 1999 amendment, effective May 3, 1999, substituted "ninety (90) days" for "twenty (20) days" in Paragraph D, made a stylistic change and inserted "subject to discovery" in the second sentence of Paragraph E, deleted the second sentence of Paragraph F which provided that all motions not ruled upon within 30 days after filing shall be deemed denied, substituted "at arraignment" for "before entering a plea" in Paragraph G, and added Paragraph H.

Court prohibited from evaluating sufficiency of evidence prior to trial. — Where defendants were indicted for intentional or negligent child abuse resulting in great bodily harm with alternative theories that either or both inflicted the abuse or knew, or should have known, that such abuse was being inflicted; defendants were the parents of

children who were determined to have been physically abused; defendants and their children lived with one of the defendants' parents; defendants each filed pretrial motions to dismiss the indictment alleging that the facts of the case were undisputed and that as a purely legal issue there was a lack of substantial evidence that could prove the identity of the perpetrator who caused the injuries to the children; and the district court held a hearing on the motions and after reviewing transcripts of witness interviews, granted the motions to dismiss, the issue of who injured the children was a question of fact for the jury to determine and the district court erred in granting the motions. *State v. LaPietra*, 2010-NMCA-009, 147 N.M. 569, 226 P.3d 668.

***Corpus delicti* of vehicular homicide may be proved by circumstantial evidence.** — Where defendant was charged with vehicular homicide, and where the state sought to establish the *corpus delicti* of vehicular homicide purely from circumstantial evidence and without any expert testimony, and where the state presented circumstantial evidence that defendant was not in the lawful operation of the vehicle, based on his admission that he was in the vehicle, that blood found on the driver's side matched defendant's DNA, and that defendant had a blood alcohol content of .06 and had methamphetamine in his system, along with evidence that the decedent was alive in the vehicle prior to the accident and was found by officers after the accident with visible signs of trauma, the district court erred in dismissing the charges based on its finding that an expert was required as a matter of law to prove cause of death, because the circumstantial evidence to be presented by the state was sufficient to establish the *corpus delicti* of vehicular homicide. *State v. Platero*, 2017-NMCA-083, cert. denied.

As a general rule, a motion to suppress evidence is not required to be made before trial and may be made at trial. *State v. Katrina G.*, 2008-NMCA-069, 144 N.M. 205, 185 P.3d 376.

Failure to request an evidentiary hearing. — Where, two days before trial, the child filed a motion to suppress evidence obtained pursuant to a nighttime search of the child's home pursuant to a search warrant that did not contain a written authorization for a nighttime search, the court determined that testimony at an evidentiary hearing on the motion was required, there was no time or opportunity for an evidentiary hearing before and during trial because a Supreme Court order that extended the time for trial imposed a trial deadline, the child had delayed filing the motion, and the child did not request an evidentiary hearing or propose alternatives to an evidentiary hearing, the trial court did not deny the child her constitutional rights to a hearing by denying the motion to suppress. *State v. Katrina G.*, 2008-NMCA-069, 144 N.M. 205, 185 P.3d 376.

Entrapment. — Where a defendant's claim of entrapment is uncorroborated, the question of the defendant's credibility is best left to the jury to decide and although the district court may determine entrapment as a matter of law, it may decline to do so where facts or credibility are disputed. *State v. Shirley*, 2007-NMCA-137, 142 N.M. 765, 170 P.3d 1003, cert. denied, 2007-NMCERT-010.

Pre-trial exclusion of expert testimony. — The trial court erred when it decided, pre-trial, that the testimony of the state's expert witness was insufficient to relate the defendant's blood alcohol test result back to the time the defendant was driving and that the testimony of the defendant's expert witness was more credible than that of the state's expert witness. *State v. Hughey*, 2007-NMSC-036, 142 N.M. 83, 163 P.3d 470.

Denial of psychological evaluation of victim of sexual abuse. — Where defendant filed motion twelve days before his second trial to allow his expert to conduct forensic psychological evaluations of minor victims of sexual abuse, the motion was not timely and was properly denied and where defendant did not show how a present evaluation for post-traumatic stress disorder could be relevant in regard to whether the post-traumatic stress disorder suffered by the minor victims would be consistent with traumatic events other than or in addition to sexual abuse, there was no prejudice from denial of defendant's motion. *State v. Paiz*, 2006-NMCA-144, 140 N.M. 815, 149 P.3d 579, cert. denied, 2006-NMCERT-011.

Rule does not apply to motions for new trial. *State v. Shirley*, 1985-NMCA-120, 103 N.M. 731, 713 P.2d 1.

Rule does not require findings in connection with pretrial motion. *State v. Blea*, 1978-NMCA-105, 92 N.M. 269, 587 P.2d 47, cert. denied, 92 N.M. 260, 586 P.2d 1089 (1978), 441 U.S. 908, 99 S. Ct. 1999, 60 L. Ed. 2d 377 (1979), *overruled on other grounds by State v. Harrison*, 1980-NMCA-186, 95 N.M. 383, 622 P.2d 288.

Absent legal authorization, judge lacks authority to order production of handwriting exemplars on pain of contempt, prior to arrest or charge. *Sanchez v. Attorney Gen.*, 1979-NMCA-081, 93 N.M. 210, 598 P.2d 1170.

When affidavit for disqualification of judge must be filed. — Denial of the request that the trial judge be disqualified was not error as the disqualification affidavit must be filed before the court has acted judicially on a material issue. *State v. Clark*, 1971-NMCA-176, 83 N.M. 484, 493 P.2d 969, cert. denied, 83 N.M. 473, 493 P.2d 958.

Right to and purpose of change of venue. — All laws for removal of causes from one vicinage to another were passed for the purpose of promoting the ends of justice by getting rid of the influence of some local prejudice which might be supposed to operate detrimentally to the interests and rights of one or the other of the parties to the suit. This is a common-law right belonging to our courts, and as such can be exercised by them in all cases, when not modified or controlled by state constitutional or statutory enactments. *State v. Valdez*, 1972-NMCA-014, 83 N.M. 632, 495 P.2d 1079, *aff'd*, 1972-NMSC-029, 83 N.M. 720, 497 P.2d 231, cert. denied, 409 U.S. 1077, 93 S. Ct. 694, 34 L. Ed. 2d 666.

Right to trial in county of offense is conditional. — The right of a trial by jury as that right was known at the time of the adoption of the constitution did not include an absolute right to a trial by a jury of the county where the offense was committed, but that

the right was conditioned upon the possibility of a fair and impartial trial being had in that county. *State v. Valdez*, 1972-NMCA-014, 83 N.M. 632, 495 P.2d 1079, *aff'd*, 1972-NMSC-029, 83 N.M. 720, 497 P.2d 231, cert. denied, 409 U.S. 1077, 93 S. Ct. 694, 34 L. Ed. 2d 666.

By the common law an accused had the right to be tried in the county in which the offense was alleged to have been committed, where the witnesses were supposed to have been accessible, and where he might have the benefit of his good character if he had established one there, but, if an impartial trial could not be had in such county, it was the practice to change the venue upon application of the people to some other county where such trial could be obtained. *State v. Valdez*, 1972-NMCA-014, 83 N.M. 632, 495 P.2d 1079, *aff'd*, 1972-NMSC-029, 83 N.M. 720, 497 P.2d 231, cert. denied, 409 U.S. 1077, 93 S. Ct. 694, 34 L. Ed. 2d 666.

Change of venue on court's own motion. — Under the facts of the incident out of which the charges against the defendant arose, with the attendant publicity and the fear, unrest and prejudice of the citizens of Rio Arriba and surrounding counties, the trial court's inherent power permitted it to order a change of venue on its own motion. *State v. Valdez*, 1972-NMCA-014, 83 N.M. 632, 495 P.2d 1079, *aff'd*, 1972-NMSC-029, 83 N.M. 720, 497 P.2d 231, cert. denied, 409 U.S. 1077, 93 S. Ct. 694, 34 L. Ed. 2d 666.

There is nothing in the constitution or statutes limiting the inherent power of the court to order a change of venue sua sponte when an impartial trial cannot be had in a particular district. *State v. Valdez*, 1972-NMCA-014, 83 N.M. 632, 495 P.2d 1079, *aff'd*, 1972-NMSC-029, 83 N.M. 720, 497 P.2d 231, cert. denied, 409 U.S. 1077, 93 S. Ct. 694, 34 L. Ed. 2d 666.

The process of determining whether or not the facts necessary for a change of venue exist is the same as that followed in determining any other fact in a case. *State v. Valdez*, 1972-NMCA-014, 83 N.M. 632, 495 P.2d 1079, *aff'd*, 1972-NMSC-029, 83 N.M. 720, 497 P.2d 231, cert. denied, 409 U.S. 1077, 93 S. Ct. 694, 34 L. Ed. 2d 666.

Denial of motion for change of venue found based on substantial evidence. — Where the trial court's ruling is supported by substantial evidence, the trial court did not abuse its discretion in not accepting as true the evidence introduced in support of a motion for change of venue, and the fact that newspaper articles were introduced in support of motion does not change the rule. Even with the newspaper articles in support of the motion, the trial court, on the evidence presented, could properly deny the motion. *State v. Atwood*, 1971-NMCA-171, 83 N.M. 416, 492 P.2d 1279, cert. denied, 83 N.M. 395, 492 P.2d 1258 (1972) (decided under former law).

Specific findings must be requested. — Unless specific findings are requested in denial of motion for change of venue, the absence of findings is waived. *State v. Mosier*, 1971-NMCA-138, 83 N.M. 213, 490 P.2d 471 (decided under former law).

A defense is "capable of determination" under Subdivision (d) (*see now* Paragraph B) if a trial of the facts surrounding the commission of the alleged offense would be of no assistance in determining the validity of the defense. *State v. Mares*, 1979-NMCA-049, 92 N.M. 687, 594 P.2d 347, cert. denied, 92 N.M. 675, 593 P.2d 1078.

Deciding lawfulness of peace officer/defendant's shooting of victim in advance of trial is a violation of Subdivision (d) (*see now* Paragraph B) because lawfulness is not capable of determination without a trial on the merits. *State v. Mares*, 1979-NMCA-049, 92 N.M. 687, 594 P.2d 347, cert. denied, 92 N.M. 675, 593 P.2d 1078.

Court's authority to consider purely legal issue. — The district court had authority to consider, prior to trial, the purely legal issue of whether burglary charges could be predicated on unauthorized entry by climbing over a fence, and had authority to dismiss the charges. *State v. Foulenfont*, 1995-NMCA-028, 119 N.M. 788, 895 P.2d 1329.

When a defendant raises constitutional free speech defense to charges under the Sexual Exploitation of Children Act, 30-6A-1 to -4 NMSA 1978, the district court may conduct a limited pretrial review of the materials upon which charges rest to determine whether the materials meet constitutional requirements; the district court should first review the material to ensure that it meets statutory guidelines, then review the material to ensure that constitutionally protected speech is not prosecuted. *State v. Rendleman*, 2003-NMCA-150, 134 N.M. 744, 82 P.3d 554, cert. denied, 134 N.M. 744, 82 P.3d 554.

On a pretrial motion to dismiss charges alleging violations of the Sexual Exploitation of Children Act, 30-6A-1 to -4 NMSA 1978, the district court may dismiss the charges where, on the undisputed face of the materials before the court, a jury could not find beyond a reasonable doubt that the material meets the elements of the offense as defined by the Act. *State v. Rendleman*, 2003-NMCA-150, 134 N.M. 744, 82 P.3d 554, cert. denied, 134 N.M. 744, 82 P.3d 554.

Motion based on grand jury notice held untimely. — Because defendant did not file his motion to dismiss for failure to provide target notice until eight months after his arraignment, and he did not show any cause below or on appeal for waiving the time limit, the trial court correctly found the motion to be untimely. *State v. Vallejos*, 1998-NMCA-151, 126 N.M. 161, 967 P.2d 836.

Defect in notice of grand jury investigation must be raised before trial. — The issue of whether notice has been given to the target of a grand jury investigation as required by Section 31-6-11B NMSA 1978 is a claimed defect in the initiation of the prosecution; it must be raised prior to trial and, when raised, is to be decided by the trial court inasmuch as it does not involve a trial on the merits. *Rogers v. State*, 1980-NMCA-034, 94 N.M. 218, 608 P.2d 530.

Motion to quash an indictment must be made before arraignment and plea. *State v. Paul*, 1971-NMCA-040, 82 N.M. 619, 485 P.2d 375, cert. denied, 82 N.M. 601, 485 P.2d 357 (decided under former law).

When variance between charge and proof must be raised. — A question of variance between charge and proof cannot be raised for the first time by motion in arrest of judgment. *State v. Mares*, 1956-NMSC-031, 61 N.M. 46, 294 P.2d 284 (decided under former law).

A variance between charge and proof cannot be raised for the first time after verdict by a motion for new trial. *State v. Mares*, 1956-NMSC-031, 61 N.M. 46, 294 P.2d 284 (decided under former law).

Motion to strike jury panel after seeing defendant in handcuffs. — Where defendant moved to strike the entire jury panel because some of them had observed the defendant in handcuffs in the custody of a deputy sheriff in the corridor prior to the commencement of the trial, and where defendant later made a new motion for a mistrial because a number of the jurors observed defendant in handcuffs in the custody of a deputy sheriff returning to the trial, but where it was not contended that defendant was in handcuffs in the courtroom at any time during jury selection or trial, there was no abuse of discretion on the part of the trial judge in denying either or both of defendant's motions. *State v. Gomez*, 1971-NMCA-009, 82 N.M. 333, 481 P.2d 412 (decided under former law).

No prejudice shown when named witness did not testify. — That one of the four persons named was not called to testify where there was nothing to indicate defendant was in any way prejudiced by the failure of the trial court to grant a continuance because this person had been named, but not called, as a witness was not error. *State v. Mora*, 1970-NMCA-072, 81 N.M. 631, 471 P.2d 201, cert. denied, 81 N.M. 668, 472 P.2d 382 (decided under former law).

Burden was upon defendant to demonstrate a lack of jurisdiction in the district court. Having presented no evidence as to lack of jurisdiction, defendant did not meet his burden in connection with the pretrial motion for dismissal on jurisdictional grounds. *State v. Cutnose*, 1974-NMCA-130, 87 N.M. 307, 532 P.2d 896, cert. denied, 87 N.M. 299, 532 P.2d 888.

Unconstitutional statute does not "charge an offense". — Defendant's motion to quash the indictment for failure to charge an offense on grounds of the unconstitutionality of the statute in question fell within this rule's exception "to charge an offense" and thus it was not filed late though filed after arraignment and plea. *State v. Elam*, 1974-NMCA-075, 86 N.M. 595, 526 P.2d 189, cert. denied, 86 N.M. 593, 526 P.2d 187.

Factors to consider when ruling on a motion for continuance. — When reviewing the denial of a motion for continuance, courts shall consider the length of the requested delay, the likelihood that a delay would accomplish the movant’s objectives, the existence of previous continuances in the same matter, the degree of inconvenience to the parties and the court, the legitimacy of the motives in requesting the delay, the fault

of the movant in causing a need for the delay, and the prejudice to the movant in denying the motion. *State v. Gonzales*, 2017-NMCA-080, cert. denied.

Application of factors to consider in evaluating a motion for continuance. — Where defendants were charged with unlawful assault on a jail based on evidence that they, and several other inmates, defied an order to lock down during a shift change of correction officers while incarcerated in the Otero county detention center, and where defendants argued that the district court erred in denying their motion for a continuance, the district court did not abuse its discretion in denying defendants' motion based on the facts that defendants' motion amounted to a lengthy three-month delay, the degree of inconvenience to the parties and the court was significant considering the motion was made on the morning of trial, and defendants did not suffer prejudice in the denial of the motion. *State v. Anderson* and *State v. Wilson*, 2021-NMCA-031, cert. granted.

Trial court did not abuse its discretion in denying motion for continuance. — Where child was charged in delinquency proceedings with unlawful taking of a motor vehicle and reckless driving, and where, during the proceedings, the child's counsel objected to the requirement that witnesses wear face masks due to the COVID-19 pandemic and moved for a continuance until such time as the New Mexico supreme court's COVID-19 operating procedures were relaxed to the point at which witnesses could testify without face masks, the district court did not abuse its discretion in denying the child's motion for continuance because the child's continuance request was one of an indefinite length because the duration of the COVID-19 pandemic was uncertain, and the fact that the child made her request to continue the adjudicatory hearing on the morning it was set to take place was inconvenient to the parties and the court, especially in the context of COVID-19 when the district court had to take additional measures, consistent with the supreme court's operating procedures, to ensure the safety of the adjudicatory hearing participants. *State v. Jesenya O.*, 2021-NMCA-030, 493 P.3d 418, *rev'd on other grounds by* 2022-NMSC-014.

Denial of continuance not an abuse of discretion. — Where defendant's counsel, on the day of defendant's trial for criminal sexual contact, requested a two-week continuance, the trial judge did not abuse its discretion in denying the continuance, because the trial had already been continued two times and by the date of the requested continuance, defense counsel had received an additional three months to prepare for trial, defense counsel's stated concerns regarding evidence were accounted for either months before trial or before the trial judge ruled on the motion, resetting the trial date on the day trial was supposed to begin was inconvenient for the parties and the court, and defense counsel failed to show that a denial of the continuance would prejudice defendant. *State v. Gonzales*, 2017-NMCA-080, cert. denied.

Continuance in order to obtain certain witnesses properly denied. — Where defendant never indicated what particular facts certain requested witnesses would prove, or that he knew of no other witnesses by which such facts could be proved, defendant simply did not present a basis for a continuance, either on the question of a

"sanity hearing" or on the merits of the cause. *State v. Hollowell*, 1969-NMCA-105, 80 N.M. 756, 461 P.2d 238 (decided under former law).

Continuance in order to retain counsel properly denied. — Defendant's request for time to attempt to retain his own counsel in place of court-appointed counsel was denied as it presented no independent basis for a continuance. *State v. Hollowell*, 1969-NMCA-105, 80 N.M. 756, 461 P.2d 238 (decided under former law).

That names of witnesses were not endorsed on information and defendant's alleged surprise at their being called as witnesses are insufficient as a basis for continuance. *State v. Mora*, 1970-NMCA-072, 81 N.M. 631, 471 P.2d 201, cert. denied, 81 N.M. 668, 472 P.2d 382 (decided under former law).

Continuance for polygraph test properly denied. — The trial court's denial of defendant's oral motion, made immediately before the trial began, that the trial setting be vacated so as to enable defendant to have a polygraph examination, where no evidence was offered in support of the motion and the hearing thereon consisted entirely of representations of counsel, on grounds that the examiner chosen by defendant had stated that any examination results would not be meaningful because of pain suffered by defendant as a result of alleged injuries suffered in an automobile accident, and that defendant had had prior opportunities to obtain the examination, was not an abuse of discretion. *State v. Robertson*, 1977-NMCA-044, 90 N.M. 382, 563 P.2d 1175, cert. denied, 90 N.M. 637, 567 P.2d 486.

Denial of motion for continuance where testimony of missing witness is not supportive. — Trial court did not abuse its discretion in denying defendant's motion for continuance sought upon the ground that defendant was unable to secure the presence of a particular witness, where the record disclosed that the testimony expected from the absent witness would not support or aid defendant in his defense. *State v. Sluder*, 1971-NMCA-095, 82 N.M. 755, 487 P.2d 183 (decided under former law).

Matter of continuance of cause rests within sole discretion of trial court and its action will not be questioned unless it appears that there has been an abuse of discretion. *State v. Baca*, 1973-NMCA-054, 85 N.M. 55, 508 P.2d 1352.

A motion for continuance is directed to the discretion of the court and the denial of the motion is not error unless there is a clear abuse of discretion. *State v. Martinez*, 1971-NMCA-115, 83 N.M. 9, 487 P.2d 919 (decided under former law).

The granting or denying of a motion for continuance rests in the sound discretion of the court and unless such discretion is abused will not be reversed. *State v. Paul*, 1971-NMCA-107, 82 N.M. 791, 487 P.2d 493 (decided under former law).

The granting of a motion for continuance lies in the sound discretion of the trial court and the denial of such a motion will not be deemed error unless there is a clear abuse

of discretion. *State v. Deats*, 1971-NMCA-089, 82 N.M. 711, 487 P.2d 139 (decided under former law).

The granting or denying of a motion for continuance rests in the sound discretion of the trial court and will not be interfered with except for abuse. *State v. Tapia*, 1970-NMCA-037, 81 N.M. 365, 467 P.2d 31 (decided under former law).

Where motion for continuance is sufficient there is no room for discretion. — Where there was no objection to the sufficiency of the motion for continuance or its supporting affidavit and the state did not seek to prevent a continuance by an admission that the witness, if present, would testify to the facts stated in the application for continuance, then under these circumstances the defendant was entitled to a continuance as a matter of right and there was no room for the court to exercise any discretion; therefore, the court's failure to grant a continuance was error. *State v. Sibold*, 1972-NMCA-056, 83 N.M. 678, 496 P.2d 738.

The granting or denial of a motion for continuance is within the discretion of the trial court and where no reasons were given showing that the denial of the postponement was prejudicial, or that substantial justice could be more clearly obtained, there was no abuse of discretion. *State v. Garcia*, 1971-NMCA-037, 82 N.M. 482, 483 P.2d 1322.

Continuance denied on grounds that court had a no continuances policy and wanted to maintain its docket was abuse of discretion where defense counsel was unprepared to go to trial; case was new to defense counsel and complex; co-defendant entered a plea agreement with state and agreed to testify for the state on the morning of the trial; state did not oppose the continuance; there was no evidence that the delay would cause any inconvenience to the parties or the court; defendant's motion was the first continuance requested and only three months had elapsed from time of arraignment to the date of trial. *State v. Stefani*, 2006-NMCA-073, 139 N.M. 719, 137 P.3d 659, cert. denied, 2006-NMCERT-006.

Hearing required for issue as to "illegal taint". — Where there is an issue as to an "illegal taint", the issue is to be resolved by a consideration of the totality of the circumstances surrounding the out-of-court identification. This requires an evidentiary hearing. *State v. Turner*, 1970-NMCA-054, 81 N.M. 571, 469 P.2d 720 (decided under former law).

Failure to name specific subsection of statute not claimed in trial court. — Where defendant claims that the charge against him for being an habitual offender was "defective" for failure to name a specific subsection of the statute, but no such claim was made in the trial court, then it will not be considered on appeal. *State v. Jordan*, 1975-NMCA-102, 88 N.M. 230, 539 P.2d 620.

Failure to request statement of facts pursuant to Rule 5-205 NMRA. — Where on the morning of trial defendant moved to quash the indictment on the grounds that he had just learned certain facts from the prosecutor, but defendant had never requested a

statement of facts pursuant to Rule 9 (*see now* Rule 5-205 NMRA), the trial court properly ruled that the motion was not timely filed. *State v. Palmer*, 1976-NMCA-060, 89 N.M. 329, 552 P.2d 231.

Failure to bring motion to suppress to court's attention. — The trial court did not err in failing to conduct a hearing on a pretrial motion to suppress statements made by defendants when the motion was never brought to its attention. *State v. Dosier*, 1975-NMCA-031, 88 N.M. 32, 536 P.2d 1088, cert. denied, 88 N.M. 28, 536 P.2d 1084.

Defendant failed to establish prejudice from untimely motion. — Where habitual offender asserted the trial court erred in granting the prosecutor's motions to fingerprint him on the morning of trial because the motion was untimely, but his claim of prejudice was not supported in the record, the trial court did not abuse its discretion in granting the motion. *State v. Wildenstein*, 1978-NMCA-027, 91 N.M. 550, 577 P.2d 448.

Wrongful termination of diversion agreement is defense which must be raised. — A claim that a prosecutor has wrongly terminated a diversion agreement is a defense to the initiation of a criminal prosecution and must be raised prior to trial. *State v. Trammel*, 1983-NMCA-139, 100 N.M. 543, 673 P.2d 827.

"Reasonable time" rule applies to motion for extending the time for commencement of trial under Rule 5-604 NMRA. — Because Rule 5-604 NMRA does not provide a time within which the applicable court must rule on a timely-filed motion for extending the time for commencement of trial, it must be construed according to other rules of criminal procedure. Specifically, Paragraph F of this rule establishes a general rule that all motions shall be disposed of within a reasonable time after filing and Rule 5-104(B)(1) NMRA recognizes the discretion of the district court to enlarge a time limitation contained in the Rules of Criminal Procedure if requested before the applicable time limitation expires. Under those rules, the district court has reasonable time after filing to rule on a timely-filed petition under Rule 5-604(E) NMRA, regardless of the expiration of the six-month period of Rule 5-604(B) NMRA. *State v. Sandoval*, 2003-NMSC-027, 133 N.M. 399, 62 P.3d 1281.

Motion to dismiss involving factual matters. — Where a defendant’s motion to dismiss involves factual matters that are not capable of resolution without a trial on the merits, the district court lacks authority to grant the motion pretrial. *State v. Gomez*, 2003-NMSC-012, 133 N.M. 763, 70 P.3d 753.

Claim not capable of determination without a trial on the merits. — Where defendant was charged with fraud, and where, prior to the presentation of evidence, defendant moved to dismiss, arguing that the victim had asserted in civil judicial pleadings that he had not relinquished all right, title, and interest in the property allegedly obtained by fraud, the district court erred in granting the motion to dismiss on the ground that the state could not prove that the victim had relied on defendant’s misrepresentations in releasing him from the original purchase agreement, because the fact that the victim continued to maintain his right to payments under the original

purchase agreement in a related civil proceeding is irrelevant to the question of whether defendant obtained the release itself through his alleged misrepresentation. Defendant's motion to dismiss could not be decided without a trial on the merits, and the district court's contrary conclusion was in error. *State v. Pacheco*, 2017-NMCA-014.

Motion to dismiss timely made at trial. — A motion to dismiss on the ground that the information failed to charge an offense is timely made at trial. *State v. Martin*, 1980-NMCA-019, 94 N.M. 251, 609 P.2d 333, cert. denied, 94 N.M. 628, 614 P.2d 545.

Timing of motion to dismiss involving fundamental right. — Defendant's failure to comply with the time limitation of Subdivision (d) (*see now* Paragraph D) did not waive his right to seek dismissal of an indictment on the ground of prosecutorial vindictiveness, which issue involved his fundamental right to due process of law. *State v. Lujan*, 1985-NMCA-111, 103 N.M. 667, 712 P.2d 13.

The district court erred in dismissing defendant's speedy trial claim absent an intentional violation of a deadline set by a court scheduling order. — Where defense counsel filed a motion to dismiss for violation of defendant's right to speedy trial on the afternoon before the scheduled trial date, and where the district court, on the day set for trial, refused to consider and decide the speedy trial motion, finding that defendant's motion was untimely and that the filing violated a deadline set by the court's scheduling order, the district court erred as a matter of law in summarily denying defendant's motion as a sanction for late-filing when its scheduling order did not set a deadline applicable to a speedy trial motion. Absent an intentional violation of a deadline set by a court scheduling order, the district court may not summarily deny a constitutionally-based pretrial motion, and before such a harsh sanction can be imposed, the district court must carefully weigh certain factors, including the culpability of defendant, the prejudice to the state and the court, and the availability of lesser sanctions. *State v. Dirickson*, 2024-NMCA-038.

Failure to request statement of facts deemed waiver. — Where an information charged conspiracy to commit a felony as well as three other separate felonies, it provided sufficient notice of the underlying felony or felonies; and when the defendant did not request a statement of facts, he waived any claim that he did not know which of the three felonies, or whether all of them, constituted the felony he was charged with conspiring to commit. *State v. Martin*, 1980-NMCA-019, 94 N.M. 251, 609 P.2d 333, cert. denied, 94 N.M. 628, 614 P.2d 545.

Any relief available for a Rule 5-201C violation is waived where this violation is raised for the first time on appeal. *State v. Keener*, 1981-NMCA-139, 97 N.M. 295, 639 P.2d 582.

Motion for dismissal under Rule 5-604 NMRA. — A motion seeking a dismissal under Rule 37 (*see now* Rule 5-604 NMRA) for a violation of the right to a speedy trial is not governed by the requirements of Subdivision (e) (*see now* Paragraph D) of this rule. *State v. Aragon*, 1982-NMCA-173, 99 N.M. 190, 656 P.2d 240.

Paragraph D does not modify Paragraph C. *State v. Urban*, 1989-NMCA-053, 108 N.M. 744, 779 P.2d 121.

Determination whether evidentiary hearing required. — The trial court must decide initially whether an evidentiary hearing is required. Ordinarily, that will be based upon the statement of facts intended to be proved. If an evidentiary hearing is not required, the trial court may decide the issues raised by the motion without a hearing. *State v. Urban*, 1989-NMCA-053, 108 N.M. 744, 779 P.2d 121.

Paragraph E seems to provide two steps: (1) upon receipt of a motion and separate written request for an evidentiary hearing, the trial court determines whether an evidentiary hearing is required; and (2) after the motion has been set for a hearing, the parties provide each other with the required information within the time limit of the rule or the alternative time limit provided by the court. *State v. Urban*, 1989-NMCA-053, 108 N.M. 744, 779 P.2d 121.

Speedy trial hearing under Paragraph E. — A defendant is not entitled to an evidentiary hearing under Paragraph E on a speedy trial claim where, although he has been incarcerated, he has not been charged, since the sixth amendment speedy trial guarantee does not apply until charges are pending. *State v. Urban*, 1989-NMCA-053, 108 N.M. 744, 779 P.2d 121.

Selective prosecution claim is an application for dismissal on constitutional grounds, to be decided by the trial judge after evidence is presented at a pretrial hearing. *State v. Cochran*, 1991-NMCA-051, 112 N.M. 190, 812 P.2d 1338.

Pretrial review of death penalty aggravating circumstances. — A motion to dismiss an aggravating circumstance that presents a purely legal question should be granted when the district court finds that the aggravating circumstance does not apply as a matter of law. When the applicability of an aggravating circumstance raises a question of fact or a mixed question of fact and law, the district court should grant the defendant's motion to dismiss the aggravating circumstance only when it finds that there is not probable cause to support the aggravating circumstance. To reach an appropriate decision, the district court may conduct a limited evidentiary hearing on a pretrial motion to dismiss aggravating circumstances when necessary. *State v. Ogden*, 1994-NMSC-029, 118 N.M. 234, 880 P.2d 845, cert. denied, 513 U.S. 936, 115 S. Ct. 336, 130 L. Ed. 2d 294 (1994).

Law reviews. — For survey, "Children's Court Practice in Delinquency and Need of Supervision Cases Under the New Rules," see 6 N.M.L. Rev. 331 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 1109, 1110; 75 Am. Jur. 2d Trial § 91 et seq.

Defendant's appeal from plea conviction as affected by prosecutor's failure or refusal to dismiss other pending charges, pursuant to plea agreement, until expiration of time for appeal, 86 A.L.R.3d 1262.

Validity and effect of criminal defendant's express waiver of right to appeal as part of negotiated plea agreement, 89 A.L.R.3d 864.

Power of state trial court in criminal case to change venue on its own motion, 74 A.L.R.4th 1023.

Actions by state official involving defendant as constituting "outrageous" conduct violating due process guaranties, 18 A.L.R.5th 1.

Availability in federal court of defense of entrapment where accused denies committing acts which constitute offense charged, 54 A.L.R. Fed. 644.

88 C.J.S. Trial § 1 et seq; 89 C.J.S. Trial § 427 et seq.

5-602. Insanity; lack of capacity.

A. **Defense of insanity.**

(1) Notice of the defense of “not guilty by reason of insanity at the time of commission of an offense” must be given at the arraignment or within twenty (20) days thereafter, unless upon good cause shown the court waives the time requirement of this rule.

(2) When the defense of “not guilty by reason of insanity at the time of commission of an offense” is raised, the issue shall be determined in nonjury trials by the court and in jury trials by a special verdict of the jury. If the defendant is acquitted on the ground of insanity, a judgment of acquittal shall be entered, and any proceedings for commitment of the defendant because of any mental disorder or developmental disability shall be pursuant to law as provided in the Mental Health and Developmental Disabilities Code, Sections 43-1-1 to -19 NMSA 1978.

B. **Notice of incapacity to form specific intent.** If the defense intends to call an expert witness on the issue of whether the defendant was incapable of forming the specific intent required as an element of the crime charged, notice of such intention shall be given at the time of arraignment or within twenty (20) days thereafter, unless upon good cause shown, the court waives the time requirement of this rule.

[As amended, effective August 1, 1989; November 1, 1991; as amended by Supreme Court Order No. 18-8300-023, effective for all cases filed on or after February 1, 2019.]

Committee commentary. — The requirement of a notice of the defense of “not guilty by reason of insanity” under Subparagraph (1) of Paragraph A of this rule replaces the

plea of not guilty by reason of insanity, eliminated by the 1982 enactment of Sections 31-9-3 and 31-9-4 NMSA 1978. *See State v. Page*, 100 N.M. 788, 676 P.2d 1353 (Ct. App. 1984). *See also*, Rule 5-303 NMRA for the types of permissible pleas. A similar notice is required by Rule 12.2 of the Federal Rules of Criminal Procedure.

Notice of incapacity to form specific intent pursuant to Paragraph B of this rule does not constitute notice of insanity as a defense under Subparagraph (1) of Paragraph A of this rule. *See State v. Padilla*, 88 N.M. 160, 161, 538 P.2d 802 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975). Also, a motion for psychiatric examination which states that counsel does not know whether defendant was sane when he committed the acts resulting in criminal charges and that the examination is sought for the purpose of making such a determination, does not constitute notice under Subparagraph (1) of Paragraph A of this rule. *State v. Silva*, 88 N.M. 631, 545 P.2d 490 (Ct. App.), cert. denied, 89 N.M. 6, 546 P.2d 71 (1976).

Subparagraph (2) of Paragraph A of this rule replaced former Section 41-13-3, 1953 Comp., which was repealed at the time of the adoption of the rule. In the event that the defendant is found not guilty by reason of insanity, he is acquitted of the crime and may be confined as mentally ill only through the civil commitment procedures.

Notice of incapacity to form specific intent

Paragraph B of this rule requires the defendant to give notice to the state if he intends to call an expert witness on the issue of his ability to form the specific intent element of the crime charged. *Compare* Rule 12.2(b) of the Federal Rules of Criminal Procedure. For a discussion of what crimes include an element of specific intent, *see generally*, Thompson & Gagne, “The Confusing Law of Criminal Intent in New Mexico,” 5 N.M.L. Rev. 63 (1974).

[As revised, September 12, 1991; as amended by Supreme Court Order No. 18-8300-023, effective for all cases filed on or after February 1, 2019.]

ANNOTATIONS

The 2018 amendment, approved by Supreme Court Order No. 18-8300-023, effective February 1, 2019, removed the provisions related to the mental competency of the defendant to stand trial, and revised the committee commentary; in the rule heading, deleted “incompetency”; and deleted former Paragraphs B through D and redesignated former Paragraph F as new Paragraph B.

The 1991 amendment, effective for cases filed on or after November 1, 1991, in Paragraph E, substituted "mental" for "psychiatric" in the heading and near the beginning of the text and added "ability to form specific intent or competency to stand trial" to the end of the paragraph.

Cross references. — For determination of present competency, *see* Sections 31-9-1 to 31-9-2 NMSA 1978.

Failure to determine competency. — Where defense counsel raised the issue of defendant's competency at defendant's preliminary hearing in magistrate court; the case was then transferred to district court; the district court ordered a competency evaluation of defendant; based on the results of the evaluation, defense counsel was satisfied that defendant was competent to stand trial, and the court entered an order finding defendant competent to stand trial; defense counsel again raised the issue of defendant's competency on the day of trial, prior to the start of trial; the court took no action and proceeded to trial; during the trial, defendant made noises, talking to someone who was not present in the courtroom; the court admonished defendant not to disrupt the trial; defense counsel attempted, but the court refused, to allow defense counsel to raise the issue of defendant's competency; the jury returned a verdict of guilty; defense counsel again raised the issue of defendant's competency; the court then permitted defense counsel to fully raise the issue and instructed defense counsel to request a competency evaluation; based on the evaluation, the court found defendant to be incompetent, but declined to dismiss the charges and proceeded to sentence defendant; defendant was denied due process of law, because the court erred when it refused to permit defense counsel to raise the issue of defendant's competency prior to and during trial, when it failed to stay the proceedings pending a determination of whether reasonable doubt existed as to defendant's competency to stand trial, and after finding defendant incompetent. *State v. Montoya*, 2010-NMCA-067, 148 N.M. 495, 238 P.3d 369, cert. denied, 2010-NMCERT-006, 148 N.M. 582, 241 P.3d 180.

Sufficient evidence of competency. — Where the defendant had an understanding of the charges against him and the consequences if he were found guilty; the defendant was able to identify most court participants in pictures of a typical courtroom, knew that witnesses would testify as to what happened, and understood that the defense attorney worked for him, that he should tell the defense attorney what he remembered about the incident for which he was charged, and tell defense attorney if he did not understand something; the defendant understood concepts when they were explained to him in other terms; and the defendant functioned reasonably well in daily life, held the same job for two years, engaged in social interactions with his co-workers, progressed through the eleventh grade, and obtained a driver's license, the evidence was sufficient to support the district court's determination that the defendant was competent to stand trial notwithstanding the fact that the the defendant's expert testified that the defendant was incompetent to stand trial. *State v. Rael*, 2008-NMCA-067, 144 N.M. 170, 184 P.3d 1064.

Submission of competency issue to jury. — Subsection (b) of Rule 5-602(B)(2) NMRA requires a finding by the court of reasonable doubt as to the defendant's competency before the issue may be submitted to the jury. *State v. Rael*, 2008-NMCA-067, 144 N.M. 170, 184 P.3d 1064.

Court may consider defense counsel's observations and opinions, but those observations and opinions alone cannot trigger reasonable doubts about defendant's competency. *State v. Flores*, 2005-NMCA-135, 138 N.M. 636, 124 P.3d 1175, cert. denied, 2005-NMCERT-011.

Expert testimony is not required in order to obtain an evaluation of competency pursuant to Paragraph C of this rule. *State v. Flores*, 2005-NMCA-135, 138 N.M. 636, 124 P.3d 1175, cert. denied, 2005-NMCERT-011.

Competency is not and does not act as an element of an offense. *State v. Flores*, 2005-NMCA-135, 138 N.M. 636, 124 P.3d 1175, cert. denied, 2005-NMCERT-011.

Effect of competency on sentencing. — A competency determination does not enhance or increase a defendant's maximum sentence. *State v. Flores*, 2005-NMCA-135, 138 N.M. 636, 124 P.3d 1175, cert. denied, 2005-NMCERT-011.

Constitutionality of Paragraph B. — The supreme court has power to regulate pleading, practice and procedure, and this power may be applied to regulate the procedure to be followed in securing the right to a jury trial, but it may not be used to prohibit entirely the right to jury trial which, under the constitution, is to remain inviolate. Subdivision (b) (*see now* Paragraph B) of this rule does more than regulate the procedure for securing a jury trial; and to the extent that it eliminates the right to a jury determination on the question of mental capacity to stand trial, it violates N.M. Const., art. II, § 12 and is void. *State v. Chavez*, 1975-NMCA-119, 88 N.M. 451, 541 P.2d 631.

"Insanity". — The insanity defense does not comprehend an insanity which occurs at a crisis and dissipates thereafter. It is a true disease of the mind, that is, any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls, normally extending over a considerable period of time rather large in extent or degree as distinguished from a sort of momentary insanity arising from the pressure of circumstances. *State v. Nagel*, 1975-NMCA-026, 87 N.M. 434, 535 P.2d 641, cert. denied, 87 N.M. 450, 535 P.2d 657.

Capability of understanding proceedings and making rational defense. — It is a generally accepted rule that no person shall be called upon to stand trial or be sentenced who because of mental illness is incapable of understanding the nature and object of the proceedings, or of comprehending his own condition in reference thereto, or of making a rational defense. *State v. Cliett*, 1968-NMCA-099, 79 N.M. 719, 449 P.2d 89 (decided under former law).

Nothing is required for mental competence to stand trial beyond a sufficient present ability to consult with his lawyer with a reasonable degree of rational as well as factual understanding of the proceedings against him. *Gantar v. Cox*, 1964-NMSC-215, 74 N.M. 526, 395 P.2d 354 (decided under former law).

The test as to whether the accused is competent to stand trial is: has the defendant capacity to understand the nature of and object of the proceedings against him, to comprehend his own condition in reference to such proceedings and to make a rational defense? *State v. Armstrong*, 1971-NMSC-031, 82 N.M. 358, 482 P.2d 61 (decided under former law).

In considering the evidence and whether reasonable doubt exists, the court must keep in mind the requirement that defendant must have sufficient present ability to consult and understand as required under due process of law. *State v. Flores*, 2005-NMCA-135, 138 N.M. 636, 124 P.3d 1175, cert. denied, 2005-NMCERT-011.

Determination of sufficient evidence of insanity question of law. — The problem of determining whether there is sufficient evidence of insanity to permit the jury to consider it as a factual question is, in the first instance, a question of law for the court. *State v. Murray*, 1977-NMCA-111, 91 N.M. 154, 571 P.2d 421, cert. denied, 91 N.M. 249, 572 P.2d 1257.

Ordinarily, issue then submitted to jury, but court may rule as matter of law. — If the trial court determines the evidence is sufficient to raise an issue as to defendant's sanity, ordinarily, the issue is submitted to the jury for decision. However, there may be instances where the evidence is so clear that the trial court may rule, as a matter of law, that defendant was insane. *State v. Murray*, 1977-NMCA-111, 91 N.M. 154, 571 P.2d 421, cert. denied, 91 N.M. 249, 572 P.2d 1257.

The trial court is to rule whether a reasonable doubt exists as to the accused's sanity. *State v. Chavez*, 1975-NMCA-119, 88 N.M. 451, 541 P.2d 631.

If court rules affirmatively the issue is to be submitted to jury for determination. *State v. Chavez*, 1975-NMCA-119, 88 N.M. 451, 541 P.2d 631.

If, in the progress of a trial on a criminal charge, the trial judge concludes from observation or otherwise that there is reason to doubt the sanity of the defendant at that time, he should submit that question to the jury along with the principal issue requiring a special verdict on that point. *Territory v. Kennedy*, 1910-NMSC-047, 15 N.M. 556, 110 P. 854 (decided under former law).

The state is not required to affirmatively prove sanity but can rely on the presumption of sanity. *State v. Wilson*, 1973-NMSC-093,85 N.M. 552, 514 P.2d 603.

Except in a case where the evidence of insanity is so clear as to require a directed verdict, i.e., the presumption of sanity is rebutted as a matter of law, the presumption abides with the state throughout the case and continues even after the defendant has made a sufficient showing to procure insanity instructions. *State v. Wilson*, 1973-NMSC-093, 85 N.M. 552, 514 P.2d 603.

Defendant must offer insanity evidence to raise jury question. — A defendant, who claims to have been insane at the time of the commission of the offense with which he is charged, must offer evidence tending to show his insanity at the time in order to create a jury question upon this issue. *State v. Wilson*, 1973-NMSC-093, 85 N.M. 552, 514 P.2d 603.

Unless jury question on this issue is raised by evidence adduced by the state which tends to show such insanity. *State v. Wilson*, 1973-NMSC-093, 85 N.M. 552, 514 P.2d 603.

Burden on defendant to prove mental unsoundness. — The defendant in a criminal case has the burden of proving, by a preponderance of the evidence, that he is too mentally unsound to stand trial. *State v. Armstrong*, 1971-NMSC-031, 82 N.M. 358, 482 P.2d 61.

Burden on defendant to prove incompetency. — When a defendant advances the contention that he is incompetent to stand trial, he has the burden of proving his claim by a preponderance of the evidence. *State v. Santillanes*, 1978-NMCA-051, 91 N.M. 721, 580 P.2d 489.

Court decides issue of competency to stand trial in one of three ways: (1) by deciding that there is no reasonable doubt that the defendant is incompetent to stand trial, in which case further proceedings shall be conducted concerning the question of involuntary hospitalization; (2) by deciding there is a reasonable doubt as to defendant's competency to stand trial, in which case the defendant has a right to have the question submitted to and answered by the same jury which is selected for and tries the case on its merits (via a special interrogatory submitted to the jury at the time the case is submitted to it for its verdict); and (3) by deciding that there is no reasonable doubt as to the defendant's competency to stand trial, in which case there is no question for a jury to decide, and such a determination is only subject to review for abuse of discretion. *State v. Noble*, 1977-NMSC-031, 90 N.M. 360, 563 P.2d 1153.

Whenever a legitimate concern about the present ability of a defendant to consult and understand is brought to the court's attention, the court is required to consider whatever competency-related evidence is before the court and to determine whether there exists a reasonable doubt as the defendant's competency to stand trial. If the court determines that there is reasonable doubt as to defendant's competency, the court must have defendant's competency professionally evaluated by a qualified professional who must submit a report to the court. *State v. Flores*, 2005-NMCA-135, 138 N.M. 636, 124 P.3d 1175, cert. denied, 2005-NMCERT-011.

Permitting court-appointed psychologist to attend independent evaluation of defendant was not an abuse of discretion. — Where defendant was charged as a serious youthful offender with two alternative counts of first-degree felony murder, and where the state requested, and the district court allowed, an independent evaluation of defendant’s alleged mental retardation following a court-appointed psychologist’s

recommendation that defendant be found incompetent to stand trial due to mental retardation, the district court did not abuse its discretion in granting a defense request permitting the court-appointed psychologist to attend the state's independent evaluation, because the district court's decision to order a second evaluation was entirely discretionary and, due to the unnecessary delay that had already occurred in the case, the court-appointed psychologist's attendance would ensure that the proceedings were expedited. *State v. Linares*, 2017-NMSC-014.

Judges may draw own conclusions. — Since judges may weigh evidence as to competency themselves and draw their own conclusions, there was no error in a judge's reasonable interpretation of evidence so as to conclude that a defendant was competent to stand trial, despite the defendant's alleged inability to remember because of amnesia, alcoholic blackout or epileptic seizure. *State v. Coates*, 1985-NMSC-091, 103 N.M. 353, 707 P.2d 1163.

Adjudication of incompetency raises presumption that the defendant is incompetent. The presumption may be rebutted, but inasmuch as defendant has the benefit of the presumption, it is the state which has the burden at a redetermination hearing of going forward with evidence to show that the defendant is competent to stand trial. *State v. Santillanes*, 1978-NMCA-051, 91 N.M. 721, 580 P.2d 489.

Shifts burden to state to prove competency. — Where there is an existing ruling that the defendant is incompetent and incompetency is to be redetermined by the jury, the state has the burden of persuading the fact finder that the defendant is competent to stand trial. *State v. Santillanes*, 1978-NMCA-051, 91 N.M. 721, 580 P.2d 489.

When jury should decide competency. — Where at the conclusion of a hearing the trial court states it cannot determine beyond a reasonable doubt whether the defendant is or is not competent to stand trial, the competency issue properly should be decided by a jury. *State v. Santillanes*, 1978-NMCA-051, 91 N.M. 721, 580 P.2d 489.

The right to have a jury determination of competency attaches only where competency to stand trial is at issue and when a reasonable doubt is raised after the trial has begun but before it has ended; in all other instances, the judge has discretion to make the determination himself or to submit the issue to a nontrial jury. *State v. Nelson*, 1981-NMSC-100, 96 N.M. 654, 634 P.2d 676.

Proof by preponderance of evidence. — The proof required for incompetency has consistently been held to be proof by a preponderance of the evidence, and this same quantum of proof applies to a redetermination of competency. *State v. Santillanes*, 1978-NMCA-051, 91 N.M. 721, 580 P.2d 489; *State v. Sena*, 1979-NMCA-043, 92 N.M. 676, 594 P.2d 336.

Duty to inquire as to present sanity. — Once the issue of "present sanity" is raised, the trial court has a duty to inquire into the matter. *State v. Cliett*, 1968-NMCA-099, 79 N.M. 719, 449 P.2d 89 (decided under former law).

Where a prior record of insanity existed and other evidences of mental disorder, it was an abuse of trial court's discretion to refuse to inquire into the present mental condition of the defendant and submit the issue of sanity to the jury. *State v. Folk*, 1952-NMSC-079, 56 N.M. 583, 247 P.2d 165 (decided under former law).

Incompetency issue may be raised at any stage in the proceedings. — Because the conviction or the sentencing of an incompetent violates due process of law, the question or issue of competency may be raised at any stage of a criminal proceeding where there is a sufficient basis for the question or issue. *State v. Sena*, 1979-NMCA-043, 92 N.M. 676, 594 P.2d 336.

The issue of competency to stand trial may be raised by motion at any stage of the proceedings. *State v. Flores*, 2005-NMCA-135, 138 N.M. 636, 124 P.3d 1175, cert. denied, 2005-NMCERT-011.

Untimely notice of expert testimony. — Where defendant was arraigned on an open charge of murder in May 2008; trial was set to commence in May 2009; one month before trial, defendant gave the court and the prosecution notice of a trial witness list that included a previously undisclosed forensic psychologist and disclosed the expert's written report, dated March 2009, that was based on an evaluation of defendant that had occurred in November 2008 in which the expert concluded that defendant had the capacity to form specific intent to kill; when the state interviewed the expert nine days before trial, the expert stated that the expert had changed the expert's opinion and would testify that defendant was not able to commit deliberate first-degree murder; and two days after the state interviewed the expert, defendant filed a notice of intent to present testimony on the lack of specific intent, the court did not abuse its discretion in denying the admission of the expert's testimony. *State v. Guerra,* 2012-NMSC-014, 278 P.3d 1031.

No right to jury trial on competency issue raised after trial. — There is no right to a jury trial on the issue of defendant's competency when the matter is first raised at any time after trial. *State v. Baca*, 1980-NMCA-124, 95 N.M. 205, 619 P.2d 1249.

When issue first raised at sentencing hearing. *State v. Sena*, 1979-NMCA-043, 92 N.M. 676, 594 P.2d 336.

There is no right to a jury trial on the issue of competency to stand trial when that issue is first raised at the sentencing hearing. *State v. Nelson*, 1981-NMSC-100, 96 N.M. 654, 634 P.2d 676.

Rule not applicable to habitual offender proceeding. — The habitual offender proceeding is not a trial in the constitutional sense for purposes of making a determination as to competency, and this rule does not apply to such proceedings. *State v. Nelson*, 1981-NMSC-100, 96 N.M. 654, 634 P.2d 676.

Motion for examination must show good cause. — In a prosecution for possession of heroin defendant's motion for a psychiatric examination was properly denied where the record was silent on any attempt of defendant to show good cause for a mental examination. *State v. Jaramillo*, 1975-NMCA-091, 88 N.M. 179, 538 P.2d 1201.

While Paragraph C employs mandatory language, i.e., "court shall order a mental examination," limiting this provision to the movant's showing of good cause effectively invokes the district court's exercise of its discretion. *State v. Garcia*, 2000-NMCA-014, 128 N.M. 721, 998 P.2d 186.

Good cause for mental examination not shown. — Evidence of defendant's alcoholism and refusal to plea bargain is insufficient to show good cause for an order of a mental examination under Subdivision (c) (*see now* Paragraph C). *State v. Chacon*, 1983-NMCA-151, 100 N.M. 704, 675 P.2d 1003.

The state's mere allegation that a psychiatric evaluator failed to inquire as to defendant's "dangerousness" did not per se render the original mental evaluation insufficient such that "good cause" existed for a second examination. *State v. Garcia*, 2000-NMCA-014, 128 N.M. 721, 998 P.2d 186.

Motion for examination does not constitute notice of insanity defense. — Motion for a psychiatric examination stating that counsel did not know whether defendant was sane when he committed the acts resulting in criminal charges and that the examination was sought for the purpose of making such a determination could not be construed as giving notice within the time provided by this rule that an insanity defense would be raised. *State v. Silva*, 1976-NMCA-003, 88 N.M. 631, 545 P.2d 490, cert. denied, 89 N.M. 6, 546 P.2d 71.

A motion by the defendant for a court-ordered mental examination to determine competency gives no notice of an insanity defense. *State v. Young*, 1978-NMCA-040, 91 N.M. 647, 579 P.2d 179, cert. denied, 91 N.M. 751, 580 P.2d 972, and cert. denied, 439 U.S. 957, 99 S. Ct. 357, 58 L. Ed. 2d 348 (1978).

Defendant must allege specific factual basis for relief sought when alleging incapacity to stand trial by reason of incompetency. *State v. Cliett*, 1968-NMCA-099, 79 N.M. 719, 449 P.2d 89 (decided under former law).

Procedure when defendant moves for jury trial on question of competency. — Where defendant moved for a jury trial on the question of his competency, the trial court should have determined, after an evidentiary hearing, whether there was reasonable doubt as to defendant's competency, and if the trial court ruled there was reasonable doubt, the issue was for the jury to decide. *State v. Chavez*, 1975-NMCA-119, 88 N.M. 451, 541 P.2d 631.

Expert testimony on issue of insanity is not binding of the fact finder and the jury may believe or disbelieve expert testimony as it chooses. Thus, such evidence presents

a question of fact which is properly submitted to the jury to decide. *State v. Noble*, 1977-NMSC-031, 90 N.M. 360, 563 P.2d 1153.

It is for the jury to reach a conclusion as to the sanity or insanity of the accused. The province of the experts is to aid the jury in reaching a conclusion. Their opinions are not to be taken as conclusive. The judgments of experts or the inferences of skilled witnesses, even when unanimous and uncontroverted, are not necessarily conclusive. The testimony of an expert is purely his opinion and is not testimony as to facts and is not conclusive, even when uncontradicted. *State v. James*, 1973-NMCA-077, 85 N.M. 230, 511 P.2d 556, cert. denied, 85 N.M. 228, 511 P.2d 554.

Recent confinement in mental institution as raising issue of competency to plead. — Allegations of post-conviction confinement in a mental institution in 1962 and early 1963 when sufficiently close to the date of the defendant's plea raise a factual issue concerning his mental competency to plead. *State v. Guy*, 1968-NMCA-020, 79 N.M. 128, 440 P.2d 803 (decided under former law).

Allegations of post-conviction confinement in a mental institution and diagnosis as a psychotic are sufficiently close to the date of his plea to raise a factual issue concerning his competency to plead. *State v. Cliett*, 1968-NMCA-099, 79 N.M. 719, 449 P.2d 89 (decided under former law).

Record of insanity proceeding. — There is no objection to introduction of the record of insanity proceeding or one for appointment of guardian or a committee to handle the estate of an incompetent person where it is sought to establish that person as a defendant in a criminal prosecution is either insane at time of trial, or was insane at the time the crime was committed, if the earlier proceeding was had at a time not too remote, which question would go to its weight and not to its competency. *State v. Folk*, 1952-NMSC-079, 56 N.M. 583, 247 P.2d 165 (decided under former law).

Demeanor at trial not sufficient to dispense with sanity hearing. — While defendant's demeanor at trial might be relevant to the ultimate decision as to his sanity, it cannot be relied upon to dispense with a hearing on that very issue. *State v. Guy*, 1968-NMCA-020, 79 N.M. 128, 440 P.2d 803 (decided under former law).

Insanity defense raised only after prosecution rests case in chief excluded. — Where the defendant attempts to raise an insanity defense for the first time after the prosecution rests its case in chief but no issue is raised as to defendant's competency to stand trial, and the defendant knew of an insanity defense the day before trial at latest, the prosecution would be prejudiced by allowing the insanity defense to be raised, and there is no abuse of discretion in excluding the tendered testimony. *State v. Young*, 1978-NMCA-040, 91 N.M. 647, 579 P.2d 179, cert. denied, 91 N.M. 751, 580 P.2d 972, and cert. denied, 439 U.S. 957, 99 S. Ct. 357, 58 L. Ed. 2d 348 (1978), cert. denied, 91 N.M. 751, 580 P.2d 972 (1978), 439 U.S. 957, 99 S. Ct. 357, 58 L. Ed. 2d 348 (1978).

Relief in post-conviction proceeding not barred by earlier failure to plead incompetence. — Where at the time of a guilty plea, neither defendant nor his counsel suggested that defendant was mentally incompetent to plead, this failure, in and of itself, does not bar relief in a post-conviction proceeding. *State v. Guy*, 1968-NMCA-020, 79 N.M. 128, 440 P.2d 803 (decided under former law).

Issue of insanity decided at first trial found to bar issue at second trial. — Where the issue of defendant's sanity was an issue of fact in the first trial, insanity having been raised as an affirmative defense, it was actually litigated, and it was absolutely necessary to a decision in that trial, and the identical issue of fact, the sanity of the defendant, was raised in the second trial between the same parties (the state and the defendant) for offenses committed some 16 hours prior to the crime which was the subject of the first trial, it was held that the issue of insanity which was decided in defendant's favor at the first trial was the same issue of fact as the issue of insanity at the second trial and therefore collateral estoppel was a bar to the second trial. *State v. Nagel*, 1975-NMCA-026, 87 N.M. 434, 535 P.2d 641, cert. denied, 87 N.M. 450, 535 P.2d 657.

Error found in counsel's waiver of issue of competency. — The trial court erred in refusing to grant defendant a new trial on grounds that her attorney's stipulation to the prosecution's facts and waiver of the issue of competency were the result of a plea bargain with the result that the issue of defendant's competency was never clearly determined or considered. *State v. Romero*, 1974-NMSC-042, 86 N.M. 244, 522 P.2d 579.

Opinion as to sanity based partly on statements of third persons. — The opinion of a medical expert as to the sanity of a defendant in a criminal proceeding based partly upon the statements of third persons out of court is generally considered inadmissible. *State v. Chambers*, 1972-NMSC-069, 84 N.M. 309, 502 P.2d 999.

Standard of review for refusal to submit competency issue to jury. — Where the court decides that there is no reasonable doubt as to the defendant's competency to stand trial, in which case there is no question for the jury to decide, such a determination is only subject to review for abuse of discretion. *State v. Montano*, 1979-NMCA-101, 93 N.M. 436, 601 P.2d 69, cert. denied, 93 N.M. 683, 604 P.2d 821.

Intoxication. — In light of defense attorney's representations that defendant was competent and not impaired, and, in the absence of evidence that defendant did not understand the proceedings or charges, or could not assist in his defense, the trial court's implicit determination that there was no reasonable doubt as to defendant's competence, or sobriety, did not constitute an abuse of discretion. *State v. Padilla*, 1994-NMCA-067, 118 N.M. 189, 879 P.2d 1208.

No abuse found in failing to submit competency issue to jury. — Where there was no conflict in the testimony presented at the hearing concerning the defendant's competency to stand trial, and no further pursuit of that question was made by

defendant, the trial court did not abuse its discretion in not submitting the issue of competency to the jury. *State v. Noble*, 1977-NMSC-031, 90 N.M. 360, 563 P.2d 1153.

Insufficient proof of incompetence. — Defense counsel's statements regarding his observations of defendant's unwillingness or possible inability to communicate with him and help in his own defense, regarding pretrial incarceration did not comprise sufficient testimony to support the defendant's contention that he was incompetent to stand trial. *State v. Najar*, 1986-NMCA-068, 104 N.M. 540, 724 P.2d 249.

The court did not abuse its discretion in determining that the defendant was competent to stand trial based on its consideration of the testimony of four experts, three of whom opined that the defendant was competent. *State v. Duarte*, 1996-NMCA-038, 121 N.M. 553, 915 P.2d 309.

Law reviews. — For article, "Survey of New Mexico Law, 1979-80: Criminal Law and Procedure," see 11 N.M.L. Rev. 85 (1981).

For article, "The Guilty But Mentally Ill Verdict and Plea in New Mexico," see 13 N.M.L. Rev. 99 (1983).

For annual survey of New Mexico law relating to criminal procedure, see 13 N.M.L. Rev. 341 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 34 to 44, 46, 47, 49 to 61.

Validity and construction of statutes providing for psychiatric examination of accused to determine mental condition, 32 A.L.R.2d 434.

Modern status of rules as to burden and sufficiency of proof of mental irresponsibility in criminal case, 17 A.L.R.3d 146.

Mental or emotional condition as diminishing responsibility for crime, 22 A.L.R.3d 1228.

Necessity or propriety of bifurcated criminal trial on issue of insanity defense, 1 A.L.R.4th 884.

Mental subnormality of accused as affecting voluntariness or admissibility of confession, 8 A.L.R.4th 16.

Adequacy of defense counsel's representation of criminal client regarding incompetency, insanity, and related issues, 17 A.L.R.4th 575.

Power of court, in absence of statute, to order psychiatric examination of accused for purpose of determining mental condition at time of alleged offense, 17 A.L.R.4th 1274.

Competency to stand trial of criminal defendant diagnosed as "mentally retarded" - modern cases, 23 A.L.R.4th 493.

Competency to stand trial of criminal defendant diagnosed as "schizophrenic" - modern state cases, 33 A.L.R.4th 1062.

Admissibility of results of computer analysis of defendant's mental state, 37 A.L.R.4th 510.

Pyromania and the criminal law, 51 A.L.R.4th 1243.

Probation revocation: Insanity as defense, 56 A.L.R.4th 1178.

Instructions in state criminal case in which defendant pleads insanity as to hospital confinement in event of acquittal, 81 A.L.R.4th 659.

Propriety of transferring patient found not guilty by reason of insanity to less restrictive confinement, 43 A.L.R.5th 777.

Necessity and sufficiency of competency hearings, as judged by federal constitutional standards, in federal cases involving validity of guilty pleas entered by allegedly mentally incompetent state convicts, 37 A.L.R. Fed. 356.

Compliance with federal constitutional requirement that guilty pleas be made voluntarily and with understanding, in federal cases involving allegedly mentally incompetent state convicts, 38 A.L.R. Fed. 238.

Notice to government of defense based upon defendant's mental condition at time of alleged crime, and court-ordered psychiatric examination thereon, under Rule 12.2, Federal Rules of Criminal Procedure, 63 A.L.R. Fed. 552.

Competency to stand trial of criminal defendant diagnosed as "schizophrenic" - modern federal cases, 63 A.L.R. Fed. 696.

Pathological gambling as basis of defense of insanity in federal criminal case, 76 A.L.R. Fed. 749.

Construction and application of 18 USCS § 17, providing for insanity defense in federal criminal prosecutions, 118 A.L.R. Fed. 265.

57 C.J.S. Mental Health § 254 et seq.

5-602.1. Competency.

A. **Purpose; scope.** This rule is intended to provide a timely, efficient, and accurate procedure for resolving whether a defendant is competent to stand trial. Competency to

stand trial is distinct from other questions about a defendant's mental health that may be relevant in a criminal proceeding, such as the substantive defenses of not guilty by reason of insanity at the time of commission of an offense and incapacity to form specific intent.

B. **Definitions.** For purposes of this rule, the following definitions shall apply.

(1) ***Competency*.** The terms competency, competence, and competent are used interchangeably throughout this rule and refer to whether the defendant has,

(a) sufficient present ability to consult with the defendant's lawyer with a reasonable degree of rational understanding,

(b) a rational as well as factual understanding of the proceedings against the defendant, and

(c) the capacity to assist in the defendant's own defense and to comprehend the reasons for punishment.

(2) ***Competency evaluation*.** A competency evaluation is an examination of the defendant by a qualified mental health professional, appointed by and acting on behalf of the court, limited to determining whether the defendant is competent to stand trial. A competency evaluation shall be limited to a determination of the defendant's competency and shall not state opinions about other matters including the defendant's sanity at the time of the offense or ability to form a specific intent.

C. **Raising a question of competency; who may raise.** A question of the defendant's competency to stand trial shall be raised whenever it appears that the defendant may not be competent to stand trial. The question shall be raised by a motion for a competency evaluation and may be raised by a party or upon the court's own motion at any stage of the proceedings.

D. **Motion for competency evaluation; contents.**

(1) ***By motion of a party*.** When a question of competence is raised by a party, a motion for a competency evaluation shall be in writing and shall contain the following:

(a) a statement that the motion is based on a good faith belief that the defendant may not be competent to stand trial;

(b) a description of the facts and observations about the defendant that have formed the basis for the motion. If filed by defense counsel, the motion shall contain such information without violating the attorney–client privilege;

(c) a statement that the motion is not filed for purposes of delay;

(d) a statement of whether the motion is opposed as provided in Rule 5-120 NMRA;

(e) a completed defendant information sheet, substantially in the form approved by the Supreme Court; and

(f) a request for a competency evaluation.

(2) ***Upon the court's own motion*.** When raised by the court, the court shall make a record of the specific facts or observations about the defendant that form the basis for the motion.

E. **Suspension of proceedings.** Upon the filing of a motion for a competency evaluation, further proceedings in the case shall be suspended until the motion is denied or, if the motion is granted, until the issue of the defendant's competency is determined. Suspension of proceedings under this paragraph shall not affect a court's authority to set or review conditions of release under Rule 5-401 NMRA or to rule on a motion for pretrial detention under Rule 5-409 NMRA and shall not preclude further judicial action, defense motions, or discovery proceedings which may fairly be conducted without the personal participation of the defendant.

F. **Resolution of motion; reasonable belief.** In considering a motion for a competency evaluation, the court shall comply with the following procedures.

(1) ***Unopposed*.** Within two (2) days of the filing of a motion that is unopposed under Subparagraph (D)(1)(d) of this rule, the court shall file an order substantially in the form approved by the Supreme Court finding whether the motion is supported by a reasonable belief that the defendant may not be competent to stand trial. The determination shall be based upon the allegations in the motion or upon the court's own observations of the defendant.

(2) ***Opposed*.** A response in opposition to a motion for a competency evaluation shall be in writing, shall cite specific facts in opposition to the motion, and shall be filed within five (5) days of the filing of the motion or be deemed waived. Upon the filing of a response in opposition, the court shall do one of the following:

(a) file an order substantially in the form approved by the Supreme Court within two (2) days finding whether the motion is supported by a reasonable belief that the defendant may not be competent to stand trial; or

(b) hold a hearing on the motion and file an order substantially in the form approved by the Supreme Court within five (5) days of the filing of a response under this Subparagraph finding whether there is a reasonable belief that the defendant may not be competent to stand trial.

G. **Evaluation order.** An order finding a reasonable belief under Paragraph F of this rule shall order the defendant to undergo a competency evaluation. Within two (2) days of filing the order, the court shall deliver a copy of the evaluation order, motion for a competency evaluation, and response, if any, to the evaluator designated to perform the evaluation. The order shall be in a form substantially approved by the Supreme Court and shall include the following:

(1) the name of the evaluator;

(2) a provision requiring the evaluator to file a written report with the court in accordance with Paragraph H of this rule within thirty (30) days of the entry of the order, unless the court orders the report to be filed at another time; and

(3) if the motion for a competency evaluation was filed before the start of a trial by jury, a provision requiring the parties to return to court for a hearing on the question of the defendant's competency within forty-five (45) days of the entry of the order.

H. **Report; contents; disclosure.** The report ordered under Subparagraph (G)(2) of this rule shall be filed with the court.

(1) ***Contents of report*.** The report shall include the following:

(a) a description of the procedures, tests, and methods used by the evaluator;

(b) a clear statement of the evaluator's clinical findings and opinions about the defendant's competency;

(c) a description of the sources of information and the factual basis for the evaluator's clinical findings and opinions, provided that the report shall not include information or opinions concerning the defendant's mental condition at the time of the alleged crime or any statements made by the defendant regarding the alleged crime or any other crime; and

(d) the reasoning by which the evaluator used the information to reach the clinical findings and opinions.

(2) ***Disclosure*.** Within two (2) days of the filing of the report, the court shall provide a copy to the defendant and to the state. Prior to disclosure, the court shall excise any statements made by the defendant regarding the alleged crime or any other crime. The court shall notify the parties when information has been withheld under this subparagraph and that any excised information shall be sealed, preserved in the records of the court, and made available to the appellate court in the event of an appeal.

I. **Effect of report; final resolution of competency.**

(1) ***Motion filed before the start of a trial by jury*.** If the motion for a competency evaluation was filed before the start of a trial by jury, the court and the parties shall proceed as follows after receiving the report filed under Paragraph H of this rule.

(a) *Stipulations; objections*. Within seven (7) days of the filing of the report, the parties shall confer and file with the court one of the following:

(i) a joint motion to adopt the conclusion set forth in the report; or

(ii) the specific, written objections of either party.

(b) *Hearing*. The court shall hold a hearing on the question of the defendant's competency as ordered under Subparagraph (G)(3) of this rule, subject to the following procedures.

(i) If the parties agree with and the court concurs in the conclusion set forth in the report, the court may vacate the hearing and proceed under Subparagraph (1)(c) of this paragraph.

(ii) If a hearing is necessary, the purpose of the hearing shall be to determine based upon a preponderance of the evidence whether the defendant is not competent to stand trial.

(iii) The conclusion set forth in the report shall be prima facie evidence about the defendant's competency, subject to rebuttal by the party challenging the report.

(c) *Final order on competency*. Within three (3) days of the conclusion of the hearing held under Subparagraph (1)(b) of this paragraph, the court shall file an order resolving the question of the defendant's competency. Upon request of the parties, the order shall include findings of fact and conclusions of law and may incorporate by reference the report filed under Paragraph H of this rule. If the court concludes that the defendant is not competent, the court shall proceed under Paragraph J of this rule.

(2) ***Motion filed after the start of a trial by jury*.** If the motion for a competency evaluation was filed after the start of a trial by jury, the court shall submit the question to the jury at the close of evidence. The jury shall decide by a preponderance of the evidence if the defendant is not competent to stand trial before considering the defendant's guilt or innocence beyond a reasonable doubt.

J. **Defendant found not competent to stand trial.**

(1) If the defendant's competency is raised before the start of a trial by jury and the court finds that the defendant is not competent to stand trial, the court shall proceed under Rule 5-602.2 NMRA.

(2) If the defendant's competency is raised after the start of a trial by jury and the jury finds that the defendant is not competent to stand trial, the court shall declare a mistrial and proceed under Rule 5-602.2 NMRA.

K. **Extensions of time.** The time limits provided in this rule may be extended by the court for good cause shown, provided that the aggregate of all extensions granted by the court shall not exceed ninety (90) days from the day that the motion for a competency evaluation is filed, except upon a showing of exceptional circumstances. An order extending time shall be in writing and shall state the reasons supporting the extension. An order extending time beyond the ninety (90)-day limit set forth in this paragraph shall not rely on circumstances that were used to support a previous extension.

L. **Effect of noncompliance with time limits.**

(1) The court may deny an untimely motion for extension of time or may grant it and impose other sanctions or remedial measures, as the court may deem appropriate in the circumstances.

(2) In the event the question of the defendant's competence is not resolved within the time limits provided in this rule, including any court-ordered extensions, the case shall be subject to review and dismissal without prejudice at the discretion of the court.

M. **Cases transferred to the district court; remand.** In a case transferred to the district court under Rules 6-507.1 or 8-507.1 NMRA, the court shall do the following:

(1) open a case and order a competency evaluation under Paragraph G of this rule within (5) days of receiving the order transferring the case;

(2) proceed under this rule to determine whether the defendant is competent to stand trial, and

(a) if the defendant is found competent, remand the case within two (2) days to the court in which the case is pending; or

(b) if the defendant is found not competent, remand the case to the court in which the case is pending within two (2) days after a determination that further proceedings under Rule 5-602.2 NMRA are inapplicable.

N. **Statements and other information inadmissible.** Any statements or other information elicited from a defendant or any other person for the purpose of determining the defendant's competency shall not be admissible or used against the defendant in any criminal proceeding on any issue other than the defendant's competency to stand trial.

O. **Automatic sealing of court records.** Any motion, response, report, or other paper filed under this rule shall be automatically sealed without motion or order of the court as provided in Rule 5-123(C)(2) NMRA. An order for a competency evaluation under Paragraph G of this rule and a final order on competency under Paragraph I of this rule shall not be sealed except upon motion and order under Rule 5-123 NMRA.

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

Committee commentary. — "It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial." *Drope v. Missouri*, 420 U.S. 162, 171 (1975); *see also State v. Rotherham*, 1996-NMSC-048, ¶ 13, 122 N.M. 246, 923 P.2d 1131. ("The law has long recognized that it is a violation of due process to prosecute a defendant who is incompetent to stand trial."). Unlike affirmative defenses that implicate questions of culpability, deterrence, and punishment for an individual defendant, *see e.g.*, Rule 5-602(A) NMRA (setting forth procedures for raising the defense of not guilty by reason of insanity at the time of the commission of the offense), the prohibition against trying an incompetent defendant is integral to the legitimacy of the criminal justice system itself. *See Drope*, 420 U.S. at 172 ("[T]he prohibition is fundamental to an adversary system of justice."); *see also Rotherham*, 1996-NMSC-048, ¶ 13 ("Suspension of the criminal process where the defendant is incompetent is fundamental to assuring the fairness, accuracy, and dignity of the trial."). As such, all participants in a criminal proceeding—including the court acting sua sponte—have a shared duty to inquire into the defendant's competency whenever circumstances suggest that the defendant, "though physically present in the courtroom, is in reality afforded no opportunity to defend himself." *Drope*, 420 U.S. at 171 (internal quotation marks and citation omitted). This rule should be interpreted to effectuate that common purpose.

The procedures set forth in this rule for determining whether a defendant is incompetent to stand trial were substantially amended and recompiled from Rule 5-602 NMRA. The amended rule is intended to address concerns about the delays and costs associated with raising a question of the defendant's competency in a criminal proceeding. The rule addresses these concerns in several ways. First, the rule limits the scope of the evaluation that may be ordered when competency is raised to a determination of whether the defendant is competent to stand trial; other questions about the defendant's mental health that may be relevant to the defense should be raised and evaluated separately. *See, e.g.*, Rule 5-502(D) NMRA (setting forth ex parte procedures for a motion to transport the defendant for evaluation, testing, or interviewing when "reasonably necessary for the preparation of the defense"). Second, the rule formalizes and streamlines the process for raising a question about the defendant's competency and determining whether an evaluation is necessary. Third, the rule requires the appointment of a neutral evaluator and establishes a rebuttable presumption in favor of the evaluator's conclusion about the defendant's competency. And fourth, the rule

imposes aggressive time limits on the court, the parties, and the evaluator to ensure that the question of the defendant's competency is resolved as efficiently as possible.

Paragraph A

The procedures set forth in this rule are intended to be used only to determine whether the defendant is competent to stand trial. This rule therefore may not be used to obtain an evaluation of other aspects of the defendant's mental health, such as the availability of defenses under Rule 5-602 NMRA (setting forth procedures for raising the defenses of not guilty by reason of insanity at the time of the commission of the offense and incapacity to form specific intent). Similarly, the procedures set forth in this rule may not be used for purposes unrelated to assessing the defendant's competency, including the following:

Neither party should move for an evaluation of competence in the absence of a good faith doubt that the defendant is competent to proceed. Nor should either party use the incompetence process for purposes unrelated to assessing and adjudicating the defendant's competence to proceed, such as to obtain information for mitigation of sentence, obtain a favorable plea negotiation, or delay the proceedings against the defendant. Nor should the process be used to obtain treatment unrelated to the defendant's competence to proceed . . . .

Criminal Justice Standards on Mental Health, § 7-4.3(e) (Am. Bar Ass'n 2016).

Paragraph B

Definition of competency.

The definition of competency set forth in Subparagraph (B)(1) is taken from *State v. Linares*, 2017-NMSC-014, ¶ 34, 393 P.3d 691 (quoting *Rotherham*, 1996-NMSC-048, ¶ 13). As the Supreme Court has noted, UJI 14-5104 NMRA sets forth a "different formulation of the conditions necessary to be deemed competent." *Linares*, 2017-NMSC-014, ¶ 34 n.8. *Compare id*. ¶ 34 ("A person is competent to stand trial when he or she has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding, a rational as well as factual understanding of the proceedings against him, and the capacity to assist in his own defense and to comprehend the reasons for punishment." (internal quotation marks and alterations omitted)), *with* UJI 14-5104 NMRA (setting forth the elements of competency as (1) understanding the nature and significance of the criminal proceedings, (2) having a factual understanding of the criminal charges, and (3) being able to assist the attorney with the defense). The committee considers the standard set forth in *Linares* to be controlling.

Definition of competency evaluation.

The evaluation that may be ordered under this rule is limited to a determination of the defendant's competency. Such an evaluation shall be performed by a neutral, court-

appointed evaluator, selected from a list of evaluators provided by the Administrative Office of the Courts under NMSA 1978, Section 31-9-2, or by the Human Services Department on behalf of the Department of Health under NMSA 1978, Section 43-1-1. As a court-appointed expert, the evaluator acts on behalf of the court and not on behalf of any party. *Cf. State v. Garcia*, 2000-NMCA-014, ¶ 32, 128 N.M. 721, 998 P.2d 186 ("[T]hat the State would not have chosen [the court-appointed evaluator] to perform the evaluation is of no moment to this Court. . . . The record indicates that [the court-appointed evaluator] was selected by the New Mexico Department of Health, *not* Defendant, and that she was further selected as the court's expert, *not* Defendant's.").

A competency evaluation should not address whether a defendant is "dangerous" and therefore may be subject to commitment to attain treatment to competency. *Cf. State v. Gallegos*, 1990-NMCA-104, ¶ 24, 111 N.M. 110, 802 P.2d 15 (explaining that the competency evaluations "made prior to a Section 31-9-1.5 hearing" are not "for the purpose of assessing [the] defendant's dangerousness"). The term "dangerous" is defined by statute and is not a clinical diagnosis. *See* NMSA 1978, § 31-9-1.2 (D) ("'[D]angerous' means that, if released, the defendant presents a serious threat of inflicting great bodily harm on another or of violating Section 30-9-11 [criminal sexual penetration] or 30-9-13 [criminal sexual contact of a minor] NMSA 1978."). Further, the need to consider a defendant's dangerousness arises only after a court has held that a defendant is not competent to stand trial and only if the defendant is charged with a felony. *See* § 31-9-1.2(B); *see also Garcia*, 2000-NMCA-014, ¶ 31 ("'Dangerousness' is a consideration secondary to the initial determination of competency." (citing Rule 5-602(B)(3)(b) NMRA (1991))).

Paragraph C

"The law has long recognized that it is a violation of due process to prosecute a defendant who is incompetent to stand trial." *Rotherham*, 1996-NMSC-048, ¶ 13. The rule therefore permits the issue of the defendant's competency to be raised by a motion for a competency evaluation at any point in the proceedings by the parties or the court. *Cf. Pate v. Robinson*, 383 U.S. 375, 385 (1966) (holding that the court's failure to hold a hearing sua sponte on the question of the defendant's competence violated his constitutional right to a fair trial). Once a question of the defendant's competency is raised, the court "does not possess the discretion to ignore the issue" and must make "a determination on the record" about whether the defendant is competent to stand trial. *See State v. Montoya*, 2010-NMCA-067, ¶¶ 14, 18, 148 N.M. 495, 238 P.3d 369 (decided under Rule 5-602 NMRA (1991)). Similarly, the question, once raised, cannot be waived by the defendant. *See Pate*, 383 U.S. at 384 ("[I]t is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial.").

Paragraph D

This paragraph sets forth specific requirements for requesting a competency evaluation. A motion under this paragraph must be in writing and must include certain information

and statements to satisfy the court that the motion is well-taken and should be granted. *Cf., e.g., State v. Flores*, 2005-NMCA-135, ¶ 29, 138 N.M. 636, 124 P.3d 1175 ("[A] court may consider defense counsel's observations and opinions, but . . . those observations and opinions alone cannot trigger reasonable doubt about the defendant's competency."); *State v. Hovey*, 1969-NMCA-049, ¶¶ 21-22, 80 N.M. 373, 456 P.2d 206 (holding that the district court did not abuse its discretion in denying a motion for a mental examination when defense counsel only "wondered about" the defendant's competency and never asserted that the defendant was incompetent). Together with the reasonable belief standard set forth under Paragraph F for ordering a competency evaluation, these provisions are intended to speed the court's determination of whether an evaluation should be ordered. In most cases, the court should have sufficient information from the motion and any response in opposition to rule on the motion without an evidentiary hearing.

A motion for a competency evaluation must include "a description of the facts and observations about the defendant that have formed the basis for the motion." This requirement may be satisfied by the first-hand knowledge of the movant or, for example, by attaching "an affidavit from someone who has observed the defendant and formulated an opinion about his or her competency, such as a corrections officer or defense counsel's paralegal." *Flores*, 2005-NMCA-135, ¶ 31. When a motion is filed by defense counsel, this requirement must be met without disclosing the substance of confidential communications with the defendant or violating the attorney–client privilege. *Accord Criminal Justice Standards on Mental Health*, § 7-4.3(f).

Paragraph E

The automatic suspension of proceedings under Paragraph E is consistent with NMSA 1978, Section 31-9-1, and applies to any proceeding for which the defendant's personal participation is fairly required. As such, the suspension required by the rule does not stay all proceedings, and matters that do not require the defendant's personal participation may proceed, including setting or reviewing conditions of release and considering motions that raise purely legal issues. Nothing in this rule is intended to limit a court's inherent authority to stay proceedings upon motion. *See, e.g., Belser v. O'Cleireachain*, 2005-NMCA-073, ¶ 3, 137 N.M. 623, 114 P.3d 303 ("The authority to stay proceedings is incidental to the court's inherent management authority.").

Granting a motion for a competency evaluation necessarily delays the proceedings against the defendant. *See, e.g., State v. Serros*, 2016-NMSC-008, ¶ 62, 366 P.3d 1121 (finding support for the district court's finding that defense counsel delayed the defendant's case "by raising the question of . . . competency and then failing to pursue an evaluation once the case had been stayed"). In extreme cases, the delay following an order for a competency evaluation can be substantial. *See, e.g., State v. Stock*, 2006-NMCA-140, ¶ 20, 140 N.M. 676, 147 P.3d 885 (noting that the defendant's case was delayed "for nearly two and one-half years" following an order for a competency evaluation). When ordering a competency evaluation, the court should be mindful of the

defendant's conditions of release, including whether the defendant is in custody, and schedule a hearing to set or review conditions of release if appropriate.

Paragraph F

This paragraph sets forth procedures and time limits for ruling on a motion for a competency evaluation. When a motion is unopposed, the court shall review the motion and any supporting documentation within two days of its filing to determine if the motion is supported by a reasonable belief that the defendant may not be competent to stand trial.

When a motion for a competency evaluation is opposed, the rule sets forth an expedited process for considering the motion. The court must allow five days for a response in opposition. If a timely response is not submitted, the court shall review the motion to determine whether it is supported by a reasonable belief that the defendant may not be competent and shall rule on the motion within two days. If a response is submitted, the court may rule on the pleadings or may hold an expedited hearing to determine whether the motion is supported by a reasonable belief that the defendant may not be competent to stand trial.

The reasonable belief standard is not the standard previously set forth in Rule 5-602 NMRA for ordering a competency evaluation. *See* Rule 5-602(B)(2)(a) NMRA (1991) (requiring an evaluation when the court finds a "reasonable doubt as to the defendant's competency"); Rule 5-602(C) NMRA (1991) (requiring an evaluation "upon motion and good cause shown"). The former "reasonable doubt" and "good cause" standards invited decades of litigation about the quantum of evidence necessary to support an order for an evaluation. *See, e.g., Flores*, 2005-NMCA-135, ¶¶ 26-29 (reviewing cases considering whether enough evidence had been offered "to pass the reasonable doubt and good cause tests"). This litigation is often misplaced and delays the ultimate determination of the substantive issue at hand: whether the defendant is not competent to stand trial. Whether to order an evaluation is a threshold issue and therefore should not require proof that the defendant is actually incompetent. *See Mitchell v. United States*, 316 F.2d 354, 360 (D.C. Cir. 1963) ("It cannot reasonably be supposed that Congress intended to require the accused to produce, in order to get a mental examination, enough evidence to prove that he is incompetent or irresponsible. That is what the examination itself may, or may not, produce. If the accused already had such evidence, there would be little need for the examination."); *see also Flores*, 2005-NMCA-135, ¶ 31 ("We do not read the case law as requiring expert testimony in order to obtain an evaluation of his or her competency . . . .").

The reasonable belief standard therefore requires the court to consider only whether the movant's subjective, good faith belief that the defendant may not be competent to stand trial is objectively reasonable. *Cf. Kestenbaum v. Pennzoil Co*., 1988-NMSC-092, ¶ 27, 108 N.M. 20, 766 P.2d 280 (discussing the difference between a "subjective good faith belief as opposed to an objective standard of reasonable belief"). In making this determination, the court should evaluate whether the motion demonstrates that the

movant's good faith belief is supported by specific, articulable facts that would lead a reasonable person to believe that the defendant may not be competent to stand trial. *Cf. State v. Martinez*, 2018-NMSC-007, ¶ 10, 410 P.3d 186 ("An officer obtains reasonable suspicion when the officer becomes aware of specific articulable facts that, judged objectively, would lead a reasonable person to believe criminal activity occurred or was occurring." (internal citation and quotation marks omitted)). This is not a heavy burden, and in most circumstances a motion that meets the requirements of Paragraph D of this rule will satisfy the reasonable belief standard without the need for an evidentiary hearing. Without such a showing, however, a motion for a competency evaluation—whether opposed or unopposed—should be denied. *Cf. Hovey*, 1969-NMCA-049, ¶ 18 ("[T]here must be a showing of reasonable cause for the belief that an accused is not competent to stand trial.").

Paragraph G

An evaluation ordered under Paragraph G of this rule shall be provided at no cost to an indigent defendant as provided by Sections 31-9-2 and 43-1-1.

Paragraph H

Contents of report.

Subparagraph (H)(1) identifies the information that must be included in the report filed with the court after the defendant's competency evaluation. *Accord Criminal Justice Standards on Mental Health*, § 7-3.6(b). Paragraph (H)(1)(b), in particular, requires the report to include "a clear statement of the evaluator's clinical findings and opinions about the defendant's competency." This requirement is intended to discourage the use of qualifiers such as "marginally" or "minimally" competent, which are not helpful and invite further litigation and delay. If the expert is not confident about the conclusion, the expert should perform further testing until a clear conclusion can be reached.

Disclosure after review.

Within two days of the filing of the report, the court shall review the report and provide a copy to the defendant and the state. Prior to disclosure, the court must review the report and excise any information or opinions unrelated to the defendant's present competency before delivering copies of the report to the parties. *Criminal Justice Standards on Mental Health*, § 7-3.7(a) ("The report should not contain information or opinions concerning either the defendant's mental condition at the time of the alleged offense or any statements made by the defendant regarding the alleged offense or any other offense."). If information is excised, the court must notify the parties and ensure that the information is sealed in the record and preserved for appellate review. *Accord Standards for Criminal Justice: Discovery and Trial by Jury*, § 11-6.6 (Am. Bar Ass'n 3d ed. 1996) (setting forth procedures for withholding information that is not discoverable and preserving the record for appellate review).

Paragraph I

Paragraph I sets forth the procedures for resolving the question of the defendant's competency after the report is filed by the evaluator and distributed to the parties. Within seven days of the filing of the report, the parties are required to confer and file either a stipulated motion to adopt the conclusion set forth in the report or the specific objections of either party.

The final question of the defendant's competency should be decided at the hearing ordered under Subparagraph (G)(3), unless the parties stipulate to, and the court agrees with, the conclusion set forth in the report. If a hearing is necessary, the court shall determine by a preponderance of the evidence whether the defendant is not competent to stand trial. Subparagraph (I)(1)(b)(iii) provides that the conclusion set forth in the report shall be prima facie evidence about the defendant's competency, subject to rebuttal by the party challenging the report. Favoring the conclusion set forth in the report reflects the evaluator's role as the court's neutral expert.

The presumption in favor of the report does not change the burden of persuasion, which is on the party asserting that the defendant is not competent. *See, e.g., State v. Chavez*, 2008-NMSC-001, ¶ 11, 143 N.M. 205, 174 P.3d 988 ("With respect to the initial determination of competency, it is well established that the defendant in a criminal case bears the initial burden of proving his or her incompetence by a preponderance of the evidence standard."). Rather, the presumption imposes a burden of production on the party challenging the conclusion set forth in the report. *See Mortg. Inv. Co. v. Griego*, 1989-NMSC-014, ¶ 13, 108 N.M. 240, 771 P.2d 173 ("[Rule 11-301 NMRA] imposes only a burden of production on the party against whom the presumption is directed."); Rule 11-301 NMRA ("In a civil case, unless a state statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally."); *see also* UJI 14-5104 NMRA committee commentary ("[P]roceedings to ascertain the competency to stand trial are civil proceedings."). Either party may challenge the report by producing evidence, for example, that the evaluation was flawed or incomplete. Without evidence tending to undermine the reliability of the report, however, the evaluator's conclusion about the defendant's competency ordinarily should be dispositive. *Cf. Bell v. Skillicorn*, 1892-NMSC-007, ¶ 4, 6 N.M. 399, 28 P. 768 ("Where the party having the burden of proof establishes a prima facie case, and no proof to the contrary is offered, he would prevail.").

When a motion for a competency evaluation is filed after the start of a trial by jury, the court shall submit the issue to the jury, unless the court finds that "there is no reasonable doubt as to the defendant's competency to stand trial, in which case there is no question for a jury to decide." *See State v. Noble*, 1977-NMSC-031, ¶ 7, 90 N.M. 360, 563 P.2d 1153; *see also* UJI 14-5104 NMRA. This requirement is rooted in the constitutional right to a trial by jury. *See* N.M. Const. art. II, § 12 ("The right of trial by jury as it has heretofore existed shall be secured to all and remain inviolate."); *see also*

generally State v. Chavez, 1975-NMCA-119, 88 N.M. 451, 541 P.2d 631 (tracing the development of the constitutional right to a trial by jury on the question of a defendant's competency). When decided by a jury, a verdict on the issue of the defendant's competency need not be unanimous. *See* UJI 14-5104 NMRA.

Paragraph J

Rule 5-602.2 NMRA sets forth procedures that must be followed after a finding of incompetency.

Paragraph K

The court may extend any of the time limits in this rule for good cause shown, provided that the ultimate issue of the defendant's competency shall be resolved within ninety days of the filing of the motion for a competency evaluation. The court shall not grant an extension that exceeds the ninety-day limit except upon a showing of exceptional circumstances. In addition to granting an extension of time, the court should consider whether the use of the court's coercive powers may be appropriate.

Paragraph L

A dismissal for failure to comply with the time limits set forth in this rule is distinct from a dismissal for violation of the defendant's right to a speedy trial under the Sixth Amendment to the United States Constitution. Like the speedy trial analysis, however, the reasons for the delay may be relevant when deciding whether to dismiss a case under Subparagraph (L)(2) of this rule. *See, e.g., State v. Ochoa*, 2017-NMSC-031, ¶ 18, 406 P.3d 505 (discussing four types of delay and how they weigh against the defendant and the state). The court also may consider whether the use of the court's coercive powers, rather than dismissal, would be appropriate.

An order of dismissal under this rule is a final, appealable order. *See, e.g., State v. Lucero*, 2017-NMCA-079, ¶ 11, 406 P.3d 530 (holding that the state has the right to appeal a district court order dismissing a criminal complaint, indictment, or information "even if the dismissal is without prejudice").

Paragraph N

This paragraph is derived from Standard 7-4.7(a) of the ABA Mental Health Standards. *See also* Rule 11-504 NMRA (providing that communications between a patient and the patient's physician, psychotherapist, or state or nationally licensed mental-health therapist for the purpose of diagnosis or treatment are privileged). Information elicited from the defendant or any other person for the purpose of determining the defendant's competency is immaterial to the defendant's guilt or innocence and therefore is inadmissible against the defendant in a criminal proceeding unless the defendant waives the privilege. *See Criminal Justice Standards on Mental Health*, § 7-4.7(b) ("The defendant waives the privilege . . . by using or indicating an intent to use the report or

parts thereof for any other purpose."). The privilege may not be used to shield evidence that would be otherwise admissible in a criminal proceeding.

Courtroom closure

Hearings under this rule may be closed only upon motion and order of the court. *See* Rule 5-124(A) NMRA ("All courtroom proceedings shall be open to the public unless the courtroom is closed by an order of the court entered under this rule."); *see also* Rule 5-124 committee commentary ("[I]f a party believes that courtroom closure is warranted for any reason, including the protection of confidential information, such party may file a motion for courtroom closure under Subparagraph (B)(2) of this rule.").

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

ANNOTATIONS

Cross references. — For the order on motion for a competency evaluation, see Form 9-514 NMRA.

5-602.2. Proceedings after a finding of incompetency.

A. **Scope.** This rule governs proceedings after a defendant has been found incompetent to stand trial under Rule 5-602.1 NMRA. This rule does not apply to a defendant charged with a felony whose incompetency is believed to be due to developmental or intellectual disability. Those proceedings are governed by Rule 5-602.3 NMRA.

B. **Definitions.** For purposes of this rule, the following definitions shall apply.

(1) ***Competency.*** The terms competency, competence, and competent are used interchangeably throughout this rule and refer to whether the defendant has,

(a) sufficient present ability to consult with the defendant's lawyer with a reasonable degree of rational understanding,

(b) a rational as well as factual understanding of the proceedings against the defendant, and

(c) the capacity to assist in the defendant's own defense and to comprehend the reasons for punishment.

(2) ***Dangerous.*** The terms dangerous or dangerousness mean that, if released, the defendant presents a serious threat of inflicting great bodily harm on another or of violating Section 30-9-11 or Section 30-9-13 NMSA 1978. Dangerousness

is not a clinical diagnosis; therefore, a finding of dangerousness need not be based on a psychological evaluation or on expert testimony.

(3) ***Department.*** The term Department means the New Mexico Department of Health.

C. **Defendant not charged with a felony.** If the incompetent defendant has not been charged with a felony, the following provisions shall apply.

(1) ***Case transferred to district court.*** If the case was transferred to the district court under Rule 6-507.1 NMRA or Rule 8-507.1 NMRA, the court shall remand the case within two (2) days to the court in which the case is pending as provided in Rule 5-602.1(M)(2)(b) NMRA.

(2) ***Case originally filed in district court.*** If the case was originally filed in the district court, the court may dismiss the case without prejudice in the interests of justice. On dismissal, the court may advise the district attorney to consider initiation of proceedings under Section 43-1-10 or 43-1-11 NMSA 1978 of the Mental Health and Developmental Disabilities Code. In the alternative, the court may advise the attorneys in the matter to consider referral to an appropriate person authorized under Section 43-1B-4 NMSA 1978 to file a petition for assisted outpatient treatment.

D. **Defendant charged with a felony; dangerousness determination.** If the incompetent defendant is charged with a felony, the court shall consider whether there is clear and convincing evidence that the defendant is dangerous as that term is defined by Section 31-9-1.2(D) NMSA 1978 and this rule. A determination of the defendant's dangerousness shall take into account only evidence relevant to whether the defendant presents a serious threat of inflicting great bodily harm on another or of violating Section 30-9-11 or Section 30-9-13 NMSA 1978.

E. **No finding of dangerousness.** If the court does not find that the incompetent defendant is dangerous under Paragraph D of this rule, the court may dismiss the case without prejudice in the interests of justice. On dismissal, the court may advise the district attorney to consider initiation of proceedings under Section 43-1-10 or 43-1-11 NMSA 1978 of the Mental Health and Developmental Disabilities Code and order the defendant confined for a maximum of seven (7) days to facilitate preparation and initiation of a petition under that code. In the alternative, the court may advise the attorneys in the matter to consider referral to an appropriate person authorized under Section 43-1B-4 NMSA 1978 to file a petition for assisted outpatient treatment.

F. **Finding of dangerousness.**

(1) ***Commitment for treatment to attain competency.*** If the court finds that an incompetent defendant charged with a felony is dangerous, the court shall commit the defendant for treatment to attain competency to stand trial. The order of commitment shall order the defendant transported to a secure, locked facility where the

defendant shall remain under the supervision of the Department. The order also shall provide for return of the defendant to the local facilities of the court on completion of the treatment.

(2) ***Inability to treat defendant.*** If after an investigation the Department determines that it does not have the ability to meet the medical needs of the defendant, the Department may refuse admission and certify to the court and parties the Department's inability to meet the medical needs of the defendant. The certification shall be made within fourteen (14) days of receipt of the court's order of commitment and receipt of necessary and available documents reasonably required for admission. Within ten (10) days of receipt of the certification, the court shall set a hearing to determine disposition of the criminal case.

(3) ***Initial assessment and report.*** Unless the Department certifies that it is unable to meet the medical needs of the defendant, within thirty (30) days of the defendant's admission to undergo treatment to attain competency, the person supervising the defendant's treatment shall file with the court and serve on the state and the defendant the following:

(a) an initial assessment and treatment plan;

(b) a report on the defendant's amenability to treatment to competency;

(c) an assessment of the facility's capacity to provide treatment for the defendant; and

(d) an opinion about the probability of the defendant's attaining competency within nine (9) months from the date of the finding of incompetency.

(4) **Status-review hearing.** Within ninety (90) days of the finding of incompetency, the court shall hold a hearing, unless waived by the defense, to review whether the defendant has attained competency, and if not, whether the defendant is making progress under treatment towards attaining competency within nine (9) months of the finding of incompetency and whether the defendant remains dangerous.

(a) If the court finds the defendant competent, the court shall set the matter for trial.

(b) If the court finds the defendant is not competent but is making progress toward attaining competency, the court may continue or modify its original order entered under Subparagraph (F)(1) of this rule, but the court shall review the defendant's competency again no later than nine (9) months after the original finding of incompetency.

(c) If the court finds that the defendant remains incompetent and is not making progress towards attaining competency, and that there is not a substantial

probability that the defendant will attain competency within nine (9) months of the original finding of incompetency, the court shall proceed under Paragraph G of this rule.

G. **Treatment ineffective for defendant.** If at any time the court determines that a defendant ordered to undergo treatment to attain competency is not likely to attain competency within nine (9) months from the original finding of incompetency, the court shall do either of the following:

(1) proceed under Paragraph H of this rule if the defendant is charged with any of the following:

(a) a felony that involves the infliction of great bodily harm on another person;

(b) a felony that involves the use of a firearm;

(c) aggravated arson as provided in Section 30-17-6 NMSA 1978;

(d) criminal sexual penetration as provided in Section 30-9-11 NMSA 1978; or

(e) criminal sexual contact of a minor as provided in Section 30-9-13 NMSA 1978; or

(2) if the defendant is not charged with an offense set forth in Subparagraph (1) of this paragraph,

(a) dismiss the case with prejudice; or

(b) dismiss the case without prejudice in the interest of justice. On dismissal, if the treatment supervisor has issued a report finding that the defendant satisfies the criteria for involuntary commitment under the Mental Health and Developmental Disabilities Code, the Department shall commence proceedings under Section 43-1-10 or 43-1-11 NMSA 1978, and the court may order the defendant confined for a maximum of seven (7) days to facilitate preparation and initiation of a petition under that code. The court may advise the district attorney to consider initiation of proceedings under Section 43-1-10 or 43-1-11 NMSA 1978. In the alternative, the court may advise the attorneys in the matter to consider referral to an appropriate person authorized under Section 43-1B-4 NMSA 1978 to file a petition for assisted outpatient treatment.

H. **Commitment; hearing.** If the court determines that a defendant charged with an offense set forth in Subparagraph (G)(1) of this rule is not likely to attain competency within nine (9) months of the original finding of incompetency, the court shall hold a hearing to determine whether there is clear and convincing evidence that the defendant committed the criminal act charged. The court shall decide the issue without a jury, and may admit hearsay or affidavit evidence on secondary matters as permitted by law.

(1) If the court does not find clear and convincing evidence that the defendant committed the criminal act, the court shall dismiss the case with prejudice. On dismissal, the court may advise the district attorney to consider initiation of proceedings under Section 43-1-10 or 43-1-11 NMSA 1978 of the Mental Health and Developmental Disabilities Code and order the defendant confined for a maximum of seven (7) days to facilitate preparation and initiation of a petition under that code. In the alternative, the court may advise the attorneys in the matter to consider referral to an appropriate person authorized under Section 43-1B-4 NMSA 1978 to file a petition for assisted outpatient treatment.

(2) If the court finds clear and convincing evidence that the defendant committed the criminal act but does not find that the defendant is dangerous, the court shall dismiss the case without prejudice. On dismissal, the court may advise the district attorney to consider initiation of proceedings under Section 43-1-10 or 43-1-11 NMSA 1978 of the Mental Health and Developmental Disabilities Code and order the defendant confined for a maximum of seven (7) days to facilitate preparation and initiation of a petition under that code. In the alternative, the court may advise the attorneys in the matter to consider referral to an appropriate person authorized under Section 43-1B-4 NMSA 1978 to file a petition for assisted outpatient treatment.

(3) If the court finds clear and convincing evidence that the defendant committed the criminal act and enters a finding that the defendant remains incompetent and dangerous, the court shall,

(a) order that the defendant shall be detained by the Department in a secure, locked facility until further order of the court or until the expiration of the period of time equal to the maximum sentence to which the defendant would have been subjected had the defendant been convicted in a criminal proceeding;

(b) order the Department to report to the district court and the parties any significant changes in the defendant’s condition, including but not limited to competency and dangerousness; and

(c) on notice to the parties and to the Department, conduct a hearing at least every two (2) years to review whether the defendant remains incompetent and dangerous.

(i) If the court finds that the defendant is competent, the court shall continue with the criminal proceeding.

(ii) If the court finds that the defendant continues to be incompetent and dangerous, the court shall review the defendant’s competency every two (2) years until expiration of the period of commitment equal to the maximum sentence to which the defendant would have been subject had the defendant been convicted in a criminal proceeding.

(iii) If the defendant is not committed under this rule or if the court finds on its two (2)-year review that the defendant is no longer dangerous, the defendant shall be released.

I. **Automatic sealing of court records.** Any motion, response, assessment, treatment plan, report, or other paper filed under this rule shall be automatically sealed without motion or order of the court as provided in Rule 5-123(C)(2) NMRA. An order issued under this rule shall not be sealed except on motion and order under Rule 5-123 NMRA.

[Approved 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. S-1-RCR-2023-00053, effective for all cases pending or filed on or after February 23, 2024.]

Committee commentary. —

Dangerous(ness)

Dangerousness is not a clinical diagnosis or condition. The definition of "dangerous" is taken from NMSA 1978, Section 39-1-1.2(D) and applies to a person who, if released, presents a serious threat of inflicting great bodily harm on another or of violating NMSA 1978, Section 30-9-11 or 30-9-13. A determination of dangerousness is analogous to the inquiry to determine which conditions of release will "reasonably ensure . . . the safety of any other person or the community." Rule 5-401(C) NMRA; *see State v. Rotherham*, 1996-NMSC-048, ¶ 53, 122 N.M. 246, 923 P.2d 1131 (*citing United States v. Salerno*, 481 U.S. 739, 747 (1987)) ("[B]ecause the state seeks to treat an incompetent [defendant] and to protect the community from danger, detention serves a regulatory rather than a punitive function."). As such, a finding of dangerousness need not be supported by a psychological evaluation or expert testimony. *Cf. State v. Gallegos*, 1990-NMCA-104, ¶ 24, 111 N.M. 110, 802 P.2d 15 (explaining that the competency evaluations "made prior to a Section 31-9-1.5 hearing" are not "for the purpose of assessing [the] defendant's dangerousness"); *cf. also State ex rel. Torrez v. Whitaker*, 2018-NMSC-005, ¶¶ 97-103, 410 P.3d 201 (providing guidance about "evaluating evidentiary presentations" in pretrial detention proceedings, including evidence of "one's character traits based on patterns of past conduct").

Dangerousness is a term of art defined under NMSA 1978, Chapter 31, Article 9 and is not equivalent to "likelihood of harm to self or others" as used in the Mental Health and Developmental Disabilities Code. *Compare* NMSA 1978, § 31-9-1.2(D) ("As used in Sections 31-9-1 through 31-9-1.5 NMSA 1978, 'dangerous' means that, if released, the defendant presents a serious threat of inflicting great bodily harm on another or of violating Section 30-9-11 or 30-9-13 NMSA 1978.") *with* NMSA 1978, § 43-1-3(M) ("'likelihood of serious harm to oneself' means that it is more likely than not that in the near future the person will attempt to commit suicide or will cause serious bodily harm to the person's self by violent or other self-destructive means, including grave passive neglect"), *and* NMSA 1978, § 43-1-3(N) ("'likelihood of serious harm to others' means

that it is more likely than not that in the near future a person will inflict serious, unjustified bodily harm on another person or commit a criminal sexual offense, as evidenced by behavior causing, attempting or threatening such harm, which behavior gives rise to a reasonable fear of such harm from the person"). *See also, e.g*., NMSA 1978, § 43-1-11(E)(1) (providing that an adult may be involuntarily committed for evaluation and treatment not to exceed thirty days based upon a finding, *inter alia*, that "as a result of a mental disorder, the [adult] presents a likelihood of serious harm to the [adult's] self or others").

The question of whether a defendant is "dangerous" arises only after a court has held that a defendant is not competent to stand trial and only if the defendant is charged with a felony. *See* NMSA 1978, § 31-9-1.2(B); *see also State v. Garcia*, 2000-NMCA-014, ¶ 31, 128 N.M. 721, 998 P.2d 186 ("'Dangerousness' is a consideration secondary to the initial determination of competency." (citing Rule 5-602(B)(3)(b) NMRA (1991))).

Clear and convincing evidence of dangerousness

Paragraph D of this rule requires clear and convincing evidence of a defendant's dangerousness to support a commitment for treatment to attain competency. Application of the clear and convincing standard is consistent with other proceedings, including mental health proceedings, that may result in a deprivation of a person's liberty. *See, e.g*.,§ 43-1-11(E) (requiring clear and convincing evidence to support the involuntary commitment of an adult for evaluation and treatment); NMSA 1978, § 43-1-12(E) (requiring clear and convincing evidence to support an extended commitment of an adult for treatment); NMSA 1978, § 43-1-15(E) (requiring clear and convincing evidence to support the appointment of a treatment guardian for an adult); NMSA 1978, § 31-9-1.5(D) (requiring clear and convincing evidence to support detaining an incompetent defendant who is not likely to attain competency); Rule 5-409(G) NMRA (requiring clear and convincing evidence to support pretrial detention of a criminal defendant).

Commitment hearing

The purpose of a hearing under Paragraph H of this rule is to determine whether an incompetent defendant committed the criminal act charged. *See Rotherham*, 1996-NMSC-048, ¶ 58 ("[T]he hearing [under Section 31-9-1.5(A) is not a trial to establish criminal culpability, for which evidence relating to both *actus reus* and *mens rea* clearly would be relevant. Rather, to justify further commitment for treatment, the hearing is to determine whether the defendant committed the criminal *act*. Hence, any evidence relating to the defendant's state of mind at the time the criminal act was committed is irrelevant."); *but see State v. Taylor*, 2000-NMCA-072, ¶ 15, 129 N.M. 376, 8 P.3d 863 ("[T]aken in context, when the Supreme Court characterized 'state of mind' as irrelevant, it was using the term as it pertained to the issue before it: the irrelevancy of the defendant's ability to form a specific intent." (citing *Rotherham*, 1996-NMSC-048, ¶ 58)). The defendant therefore may not assert the defenses of insanity or inability to form specific intent. *See Rotherham*, 1996-NMSC-048, ¶ 58.

In addition, Paragraph H provides that the court may admit hearsay or affidavit evidence at the commitment hearing on secondary matters as permitted by law. *Accord* § 31-9-1.5(A) ("The district court may admit hearsay or affidavit evidence on secondary matters such as testimony to establish the chain of possession of physical evidence, laboratory reports, authentication of transcripts taken by official reporters, district court and business records and public documents."). In determining whether to admit such evidence, the court should be mindful that a person who is the subject of a commitment proceeding ordinarily is entitled to certain minimum procedural safeguards as a matter of due process. *See Vitek v. Jones*, 445 U.S. 480, 494-95 (1980). Among those safeguards is the right to confront and cross-examine government witnesses except upon a showing of good cause. *See id*. (holding that an inmate had the right, *inter alia*, to confront the state's witnesses against him in a proceeding to transfer him to a mental hospital, "except upon a finding, not arbitrarily made, of good cause for not permitting such presentation, confrontation, or cross-examination"). To that end, the New Mexico Supreme Court has identified "certain principles" that are useful in determining "what it means to establish good cause for not allowing confrontation" in the related context of a probation revocation proceeding. *See State v. Guthrie*, 2011-NMSC-014, ¶ 33, 150 N.M. 84, 257 P.3d 904 (internal quotation marks and citation omitted); *see also Vitek*, 445 U.S. at 495-96 (holding that a prisoner "facing involuntary transfer to a mental hospital" is entitled to due process protections similar to those required in a probation revocation proceeding). Those principles include (1) whether the evidence is offered to prove an assertion that is "central" or "collateral" to the proceeding; (2) whether the assertion is contested, or whether the state "is being asked to produce a witness to establish something that is essentially uncontroverted"; (3) whether the evidence is inherently reliable due to its source and the circumstances surrounding its introduction; and (4) whether live testimony and confrontation would be useful to test the truthfulness and credibility of the evidence. *Guthrie*, 2011-NMSC-014, ¶¶ 33-39.

Treatment

Treatment ordered under this rule must include competency restoration treatment and may include general healthcare and mental healthcare treatment. *See Rotherham*, 1996-NMSC-048, ¶ 79 (Minzner, J., specially concurring) ("During such a commitment, as a matter of substantive due process, those involuntarily committed under Section 31-9-1.5 have a right to be treated not only for competency, but to alleviate their dangerousness and accompanying mental illness or disability.").

Courtroom closure

Hearings under this rule may be closed only upon motion and order of the court. *See* Rule 5-124(A) NMRA ("All courtroom proceedings shall be open to the public unless the courtroom is closed by an order of the court entered under this rule."); *see also* Rule 5-124 committee commentary ("[I]f a party believes that courtroom closure is warranted for any reason, including the protection of confidential information, such party may file a motion for courtroom closure under Subparagraph (B)(2) of this rule.").

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

ANNOTATIONS

The 2024 amendment, approved by Supreme Court Order No. S-1-RCR-2023-00053, effective February 23, 2024, replaced the term "mental retardation" with the term "developmental or intellectual disability," and made certain technical, nonsubstantive amendments; and in Paragraph A, after "believed to be due to", deleted "mental retardation" and added "developmental or intellectual disability".

Rules of evidence apply to dangerousness hearings. — Where defendant was charged by criminal information with battery upon a peace officer and assault upon a peace officer, and where, while released from jail on the condition that she report to pretrial services, defendant was re-arrested and charged with another count of battery upon a peace officer, and where the State moved to revoke defendant's conditions of release based on the new charge and the failure to comply with conditions of release, and where the district court amended the conditions of release but denied the motion to revoke, and where, pending trial, defendant moved for, and was granted, a competency evaluation to determine if she was competent to stand trial, and where, upon completion and receipt of defendant's competency evaluation, the district court found defendant incompetent to proceed to trial, and where the State filed a notice of intent to raise dangerousness, and where, prior to the dangerousness hearing, defendant was charged in a third case with two counts of indecent exposure, and where, at the dangerousness hearing, the State attempted to introduce into evidence copies of defendant's three criminal complaints and a printout of defendant's criminal history, and where defendant objected to the use of the State's exhibits, claiming that the criminal complaints constituted hearsay with no foundation in sworn testimony and that their introduction would violate the New Mexico Rules of Evidence, and where the State argued that the Rules of Evidence did not apply to competency or dangerousness hearings, the district court did not err excluding the State's proposed evidence and finding that the New Mexico Rules of Evidence apply to all criminal proceedings under Rule 11-1101(B) NMRA, because under the plain language of Rule 11-1101(B), the Rules of Evidence apply unless a dangerousness hearing falls into one of the listed exceptions, and the plain language of the exceptions listed in Rule 11-1101(D) do not include a dangerousness hearing under NMSA 1978, § 31-9-1.2 or Rule 5-602.2 NMRA. *State v. Archuleta*, 2023-NMCA-077, cert. denied.

5-602.3. Incompetency due to developmental or intellectual disability.

A. **Definitions.** The following definitions shall apply for purposes of this rule.

(1) ***Department.*** "Department" means the New Mexico Department of Health.

(2) ***Developmental or intellectual disability.*** Developmental or intellectual disability means significant subaverage intellectual functioning existing concurrently with deficits in adaptive behavior. An intelligence quotient of seventy (70) or below on a reliably administered intelligence quotient test shall be presumptive evidence of developmental or intellectual disability.

B. **Hearing to determine developmental or intellectual disability.** If a defendant is charged with a felony and found incompetent to stand trial, on motion of the defense, the court shall hold a hearing to determine if the defendant's incompetency is due to developmental or intellectual disability. The purpose of the hearing shall be to determine whether there is a preponderance of the evidence of the following:

(1) the defendant has developmental or intellectual disability; and

(2) there is not a substantial probability that the defendant will become competent to proceed in a criminal case within a reasonable time, not to exceed nine (9) months from the original finding of incompetency.

C. **Department evaluation; notice of Department's findings.** If the court makes the findings set forth in Paragraph B of this rule, the court shall order the Department to perform an evaluation within sixty (60) days of service of the order to determine whether the defendant presents a likelihood of serious harm to self or others. At the completion of the evaluation, the Department shall promptly notify the court and the parties of its findings.

D. **Proceedings under Chapter 43, Article 1 NMSA 1978.** If the evaluation ordered under Paragraph C of this rule results in a finding by the Department that the defendant presents a likelihood of serious harm to self or others,

(1) the Department shall commence proceedings under Chapter 43, Article 1 NMSA 1978 within sixty (60) days of the evaluation if the defendant has been charged in the initial proceedings with one or more of the following offenses:

(a) murder in the first degree;

(b) first degree criminal sexual penetration;

(c) criminal sexual contact of a minor; or

(d) arson; or

(2) the Department may commence proceedings under Chapter 43, Article 1 NMSA 1978 within sixty (60) days of the evaluation if the defendant has not been charged with an offense enumerated in Subparagraph (1) of this paragraph.

E. **Notice.**

(1) The Department shall notify the court if it commences proceedings under Chapter 43, Article 1 NMSA 1978 and Paragraph D of this rule.

(2) The Department shall notify the court as soon as practicable if the Department does not intend to commence proceedings under Paragraph (D)(2) of this rule.

F. **Disposition of criminal charges.** Unless the court dismisses the charges at an earlier time, the criminal charges against the defendant shall be dismissed without prejudice on the first of the following to occur:

(1) the hearing under Chapter 43, Article 1 NMSA 1978; or

(2) the expiration of fourteen (14) months from the court's initial determination that the defendant is incompetent to proceed in a criminal case.

G. **Automatic sealing of court records.** Any motion, response, assessment, treatment plan, report, or other paper filed under this rule shall be automatically sealed without motion or order of the court as provided in Rule 5-123(C)(2) NMRA. An order issued under this rule shall not be sealed except on motion and order under Rule 5-123 NMRA.

[Approved 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. S-1-RCR-2023-00053, effective for all cases pending or filed on or after February 23, 2024.]

Committee commentary. — Until June 16, 2023, NMSA 1978, Section 31-9-1.6 (1999, amended 2023) used a disfavored term. Old cases used that term in deference to the statute, despite the term not being otherwise acceptable. With the amendment of the statute, this rule has been updated to use the appropriate term of developmental or intellectual disability.

The legal definition of developmental or intellectual disability under this rule and Section 31-9-1.6(E) is not equivalent to a clinical finding of developmental or intellectual disability. *See State v. Trujillo*, 2009-NMSC-012, ¶ 13, 146 N.M. 14, 206 P.3d 125. A clinical determination of intellectual or developmental disability requires a finding that the issue arose before a person's eighteenth birthday. *See id.* ¶ 10 (citing Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders-IV-TR* 41 (2000)). Age of onset, however, is not a factor in a legal determination of developmental or intellectual disability for purposes of incompetency. *See Trujillo*, 2009-NMSC-012, ¶ 12 ("[T]he Legislature's decision to exclude the age of onset factor is logical given that what is legally relevant are the symptoms probative of culpability at the time of the alleged crime and coherence at the time of trial, not the age at which those symptoms started to affect the individual.").

The discretion given to the Department under Subparagraph (D)(2) of this rule is consistent with Section 31-9-1.6(C) as it was originally enacted. Before it was amended in 1999, Subsection 31-9-1.6(C) provided as follows:

C. If the department evaluation results in a finding that the defendant presents a likelihood of serious harm to himself or a likelihood of serious harm to others, within sixty days of the department's evaluation the department:

(1) shall commence proceedings under Chapter 43, Article 1 NMSA 1978 if the defendant was charged with first degree homicide, first degree sexual penetration, criminal sexual contact of a minor or arson in the initial proceedings, and the court presiding over the initial proceedings shall enter a finding that the respondent presents a likelihood of harm to others; or

(2) may commence proceedings under Chapter 43, Article 1 NMSA 1978 if the defendant was charged with any crime other than first degree homicide, first degree sexual penetration, criminal sexual contact of a minor or arson in the initial proceedings from which he was referred under this section to the department.

1997 N.M. Laws, ch. 153. Although the 1999 amendments to Section 31-9-1.6 deleted Subsection (C)(2), see 1999 N.M. Laws, ch. 149, the Supreme Court has observed that the deletion "is not dispositive of legislative intent and may only represent a housekeeping deletion of a provision the Legislature deemed superfluous." *Trujillo*, 2009-NMSC-012, ¶ 27.

Subparagraph (D)(2) of the rule therefore clarifies that the Department has discretion to initiate proceedings under NMSA 1978, Chapter 43, Article 1 for a defendant who has not been charged with an enumerated offense when the Department's evaluation results in a finding that the defendant presents a likelihood of serious harm to self or others. See Trujillo, 2009-NMSC-012, ¶ 28 (holding the 1999 amendments to Section 31-9-1.6 were not "intended to restrict the State from civilly committing defendants . . . accused of a crime other than the four enumerated in Section 31-9-1.6(C)").

Courtroom closure

Hearings under this rule may be closed only on motion and order of the court. See Rule 5-124(A) NMRA ("All courtroom proceedings shall be open to the public unless the courtroom is closed by an order of the court entered under this rule."); *see also* Rule 5-124 committee commentary ("[I]f a party believes that courtroom closure is warranted for any reason, including the protection of confidential information, such party may file a motion for courtroom closure under Subparagraph (B)(2) of this rule.").

[Approved 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. S-1-RCR-2023-00053, effective for all cases pending or filed on or after February 23, 2024.]

ANNOTATIONS

The 2024 amendment, approved by Supreme Court Order No. S-1-RCR-2023-00053, effective February 23, 2024, replaced the term “mental retardation” with the term “developmental or intellectual disability,” made certain technical, nonsubstantive amendments, and revised the committee commentary; in the rule heading, deleted “mental retardation” and added “developmental or intellectual disability”; and in Paragraphs A and B, substituted each occurrence of “mental retardation” with “developmental or intellectual disability”.

5-603. Pretrial hearing.

At any time after the filing of the information or indictment, the court may order the attorneys to appear before it for a hearing, at which the defendant shall have the right to be present, to consider:

A. the simplification of the issues;

B. the possibility of obtaining admissions of fact and documents which will avoid unnecessary proof;

C. the number of expert witnesses, character witnesses or other witnesses who are to give testimony of a cumulative nature; and

D. such other matters as may aid in the disposition of the trial.

Upon request of any party, a record shall be made of a hearing, or any part thereof, held pursuant to this rule.

The court shall make an order reciting the agreements made and matters determined which shall be signed by the court and the attorneys for the parties, and when entered shall control the subsequent course of the proceedings, unless thereafter modified.

This rule shall not be invoked in the case of any defendant who is not represented by counsel.

Committee commentary. — This rule gives the court the authority to order a pretrial hearing to simplify the issues. The American Bar Association Standards Relating to Discovery and Procedure Before Trial recommend pretrial conferences be held in the following cases:

(1) when the anticipated trial is likely to be protracted;

(2) when the anticipated trial is otherwise likely to be complicated; and

(3) when counsel concur in requesting the conference. American Bar Association Standards Relating to Discovery and Procedure Before Trial, Section 5.4, Commentary (Approved Draft, 1970).

Some of the matters recommended to be considered at a pretrial conference include:

(1) making stipulations as to facts about which there can be no dispute;

(2) marking for identification various documents and other exhibits of the parties;

(3) waivers of foundation as to such documents;

(4) severance of defendants or offenses;

(5) seating arrangements for defendants and counsel;

(6) use of jurors and questionnaires;

(7) conduct of voir dire;

(8) number and use of peremptory challenges;

(9) procedure on objections where there are multiple counsel;

(10) order of presentation of evidence and arguments where there are multiple defendants;

(11) order of cross-examination where there are multiple defendants; and

(12) temporary absence of defense counsel during trial. American Bar Association Standards Relating to Discovery and Procedure Before Trial, Section 5.4(a) (Approved Draft, 1970).

With the adoption of UJI 14-5101 was amended to provide that the district court may order the parties to tender requested jury instructions prior to the close of the defendant's case. It is suggested that in complex cases, the pretrial hearing may be the appropriate time for a discussion of the applicable jury instructions.

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Compiler's notes. — This rule is similar to Rule 17.1 of the Federal Rules of Criminal Procedure.

Absent legal authorization, judge lacks authority to order production of handwriting exemplars or be held in contempt, prior to arrest or charge. *Sanchez v. Attorney Gen.*, 1979-NMCA-081, 93 N.M. 210, 598 P.2d 1170.

Furnishing free transcript of hearing to indigents. — As defendant had extensive notes of the preliminary hearing and although defendant claimed indigency insofar as being able to pay for the transcript, he made no reasonable showing in support of this claim, and defendant's attorney was employed counsel, these circumstances do not warrant defendant's being furnished with a free transcript. *State v. Apodaca*, 1969-NMCA-038, 80 N.M. 244, 453 P.2d 764 (decided under former law).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 550, 555 to 559.

Guilty plea safeguards as applicable to stipulation allegedly amounting to guilty plea in state criminal trial, 17 A.L.R.4th 61.

22 C.J.S. Criminal Law § 340 et seq.

5-604. Time of commencement of trial for cases of concurrent trial jurisdiction originally filed in the magistrate, metropolitan, or municipal court.

A. **Refiling of cases previously dismissed in a lower court.** For cases of concurrent trial jurisdiction originally filed in the magistrate, metropolitan, or municipal court that are subsequently dismissed and refiled in the district court, the initiatory pleading in the district court shall state in the caption that it is a refiled case and shall state the following in the first paragraph:

(1) the date of the initial filing in the lower court;

(2) the date of the dismissal;

(3) the deadline for trial in the lower court under Rule 6-506 NMRA, Rule 7-506 NMRA, or Rule 8-506 NMRA; and

(4) the reason for the dismissal and refiling.

B. **Initial trial setting and continuances; motions to assert speedy trial rights.** If the district court does not initially schedule a refiled case within the trial deadline that would have been applicable had the case remained in the lower court, or if the court grants a continuance beyond that deadline, the defendant may move that the court consider whether the case should be dismissed for violation of the defendant’s right to speedy trial, taking into consideration the following factors:

(1) the complexity of the case;

(2) the length of the delay in bringing the defendant to trial;

(3) the reason for the delay in bringing the defendant to trial;

(4) whether the defendant has asserted the right to a speedy trial or has acquiesced in some or all of the delay; and

(5) the extent of prejudice, if any, from the delay. This paragraph does not prohibit a defendant from filing a motion to dismiss for violation of the right to a speedy trial even if a trial is scheduled within the trial deadline that would have been applicable had the case remained in the lower court.

C. **Applicability.** This rule shall not apply to the following:

(1) cases on appeal from the metropolitan, magistrate or municipal court;

(2) cases originally filed in the district court; and

(3) cases within the exclusive trial jurisdiction of the district court.

[As amended, effective September 1, 1998; May 1, 2000; as amended by Supreme Court Order No. 07-8300-018, effective August 13, 2007; by Supreme Court Order No. 08-8300-052, effective November 24, 2008; as amended, provisionally for one year, by Supreme Court Order No. 09-8300-032, effective September 1, 2009, for all petitions for extension of time pending in the district court or Supreme Court; by Supreme Court Order No. 11-8300-019, Paragraph A is effective for all cases refiled in the district court on or after May 1, 2011; Paragraphs B and C are effective immediately for all cases pending in the municipal, magistrate, metropolitan, district and appellate courts on or after March 23, 2011.]

Committee commentary. — The 2011 amendments to this rule are intended to codify the Supreme Court's ruling in *State v. Savedra*, 2010-NMSC-025, 148 N.M. 301, 236 P.3d 20. Accordingly, the six-month rule provisions previously applicable to cases originally filed in the district court have been withdrawn. While there is no longer a "six-month rule" for cases that originate in the district court, the district court should remain mindful of the defendant's right to a speedy trial. The arraignment provision in Paragraph A of the prior version of this rule has been moved to Paragraph A of Rule 5-303 NMRA.

This rule now deals exclusively with cases falling within the concurrent trial jurisdiction of the magistrate, metropolitan, or municipal court and the district court that are originally filed in a limited jurisdiction court and later dismissed and refiled in the district court. Under Paragraph A of the rule, when such cases are refiled in district court, the prosecution must indicate that the case is refiled in the caption of the initiatory pleading filed in the district. Paragraph A also sets forth information the prosecution must set forth in the first paragraph of the initiatory pleading.

Paragraph B recognizes that if the district court does not set the case for trial within the trial deadline that would have applied had the case remained in the lower court, or grants a continuance beyond that deadline, the defendant may file a motion asking the

district court to consider whether the case should be dismissed based on a consideration of the speedy trial factors. But even if the case is set for trial within the trial deadline that would have applied in the lower court, Paragraph B also recognizes that dismissal on speedy trial grounds is not necessarily precluded if the defendant moves for such relief and consideration of the speedy trial factors warrants dismissal.

[Commentary as amended, provisionally for one year, by Supreme Court Order No. 09-8300-032, effective September 1, 2009, for all petitions for extension of time pending in the district court or Supreme Court; as amended by Supreme Court Order No. 11-8300-019, effective March 23, 2011.]

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The 2011 amendment, approved by Supreme Court Order No. 11-8300-019, effective May 1, 2011, rewrote the rule to eliminate the six-month rule provisions and to provide for the refilling of cases previously dismissed in the magistrate, metropolitan, and municipal courts and the consideration of the defendant's right to a speedy trial in refiled cases.

The 2009 amendment, approved provisionally for one year by Supreme Court Order No. 09-8300-032, effective September 1, 2009, for all petitions for extension of time pending in the district court or Supreme Court, in Paragraph C, at the end of the first sentence, added "for six (6) months"; added the second sentence, including Subparagraphs (1) through (5); and deleted the phrase which stated that the aggregate of all extensions granted by the district court may not exceed six (6) months; deleted former Paragraph D which provided that for good cause shown, the time for extension of trial may be extended by the Supreme Court or a justice of the Supreme Court; re-lettered former Paragraphs E through G as Paragraphs D through F; in re-lettered Paragraph D, deleted the former second and third sentences which provided that if the petition is filed in the Supreme Court, the statement for good cause shall include a statement of a definite trial date and that upon request, the district court shall provide the parties with a trial date; in Paragraph E, deleted the former first sentence which provided that if the trial did not commence within six (6) months or within the period of any extension, the information or indictment may be dismissed with prejudice or the court may impose other appropriate sanctions; and added Subparagraphs (1) and (2).

The 2008 amendment, approved by Supreme Court Order No. 08-8300-052, effective November 24, 2008, in Paragraph F, changed "the information or indictment filed against such person shall be dismissed" to "the information or indictment filed against such person may be dismissed" and added the provision at the end of the sentence that the court may consider other sanctions as appropriate.

The 2000 amendment, effective for extension petitions filed on and after May 1, 2000, substituted "to determine the competency of the defendant" for "on a finding of incompetency" in Paragraph B(2), substituted "if the defendant is arrested or surrenders in this state for failure to appear, the date of arrest or surrender of the defendant" for

"the date of arrest of the defendant for failure to appear", redesignated former Paragraphs B(6) and B(7) as present Paragraphs B(7) and B(8) and added Paragraph B(6).

The 1998 amendment, effective for extension petitions filed on and after September 1, 1998, added present Paragraph C; designated the provisions of former Paragraph C as present Paragraphs D and E; in Paragraph D, inserted "For good cause shown" at the beginning, and deleted "or a judge designated by the Supreme Court, for good cause shown" at the end; in Paragraph E, added the heading, substituted "court" for "Supreme Court" in the first sentence, substituted "applicable time limits prescribed by this rule" and "applicable time limits", twice, for "six (6) month period" in the second sentence, substituted "court" for "Supreme Court" in the fifth sentence, and, in the sixth sentence, substituted "court" for "Supreme Court", "applicable time limit" for "six (6) month period", and "trial must commence" for "defendant must be tried"; redesignated former Paragraph D as Paragraph F, inserted "the" preceding "event" near the beginning; and redesignated former Paragraph E as Paragraph G, deleted "children's court proceedings or to" preceding "cases" and "metropolitan" preceding "magistrate"; and made minor stylistic changes throughout the section.

Delay in enforcing sentence. — The right to a speedy trial does not include delays after a defendant has been sentenced. *State v. Calabaza*, 2011-NMCA-053, 149 N.M. 612, 252 P.3d 836.

Reappointment of counsel. — Where defendant, who was initially represented by counsel, requested that defendant be allowed to appear pro se; the trial court thoroughly and adequately advised defendant of the risks of self-representation and defendant understood the risks; defendant had the benefit of previously appointed counsel who assisted defendant before defendant appeared pro se; months later, defendant moved to reappoint counsel on the day before trial; defendant did not articulate why defendant needed additional assistance to prepare a defense; the case was a routine stolen property matter and defendant never expressed any concern regarding the nature or complexity of the case; and reappointing counsel would have caused the court and the prosecution significant inconvenience, the court did not abuse its discretion in denying defendant's motion. *State v. Archuleta*, 2012-NMCA-007, 269 P.3d 924, cert. denied, 2011-NMCERT-012.

Dismissal of cases in courts of limited jurisdiction and refiling in district court. — When charges are dismissed in courts of limited jurisdiction, which include magistrate, metropolitan, and municipal courts, and later refiled in district court, the triggering event for six-month purposes is the triggering event that occurred in the court of limited jurisdiction, and the six-month time period is not automatically reset upon the refiling. Any inquiry into the state's reasons for dismissing and refiling in district court should be done within the context of any speedy trial challenge defendant may raise after the case is refiled in district court. *State v. Savedra*, 2010-NMSC-025, 148 N.M. 301, 236 P.3d 20, *aff'g State v. Yates*, 2008-NMCA-129, 144 N.M. 859, 192 P.3d 1236.

Withdrawal of rule. — Effective for all cases pending as of May 12, 2010, the court withdraws the six-month rule provisions set forth in Rule 5-604(B)-(E) NMRA. *State v. Savedra*, 2010-NMSC-025, 148 N.M. 301, 236 P.3d 20, ***aff'g*** *State v. Yates*, 2008-NMCA-129, 144 N.M. 859, 192 P.3d 1236.

Withdrawal of the six-month rule is not an ex post facto law. — The retroactive withdrawal of the six-month rule from Rule 5-604 NMRA, which was a procedural rule, is not an unconstitutional ex post facto law under the United States Constitution. *State v. Romero*, 2011-NMSC-013, 150 N.M. 80, 257 P.3d 900.

Withdrawal of the six-month rule did not violate due process as an ex post facto law. — Where the district court dismissed defendant's case under the six-month rule without engaging in a speedy trial analysis because the state had failed to show exceptional circumstances for filing a motion for an extension of time to commence trial well beyond the deadlines required under Rule 5-604 NMRA; and the state's appeal from the order of dismissal was pending on May 12, 2010, the withdrawal of the six-month rule in defendant's case did not violate due process as an ex post facto law. *State v. Romero*, 2011-NMSC-013, 150 N.M. 80, 257 P.3d 900.

Withdrawal of six-month trial rule did not violate Article IV, Section 34 of the Constitution. — Article IV, Section 34 does not apply to the retroactive withdrawal of the six-month rule from Rule 5-604 NMRA. *State v. Romero*, 2011-NMSC-013, 150 N.M. 80, 257 P.3d 900.

Application of *Savedra*. — The withdrawal of the six-month rule by the court in *State v. Savedra*, 2010-NMSC-025, 148 N.M. 301, 236 P.3d 20, applies to all pending cases in which a judgment of conviction has not been rendered, the availability of appeal has not been exhausted, and the time for a petition for certiorari has not elapsed or a petition for certiorari has not been finally denied as of May 12, 2011. *State v. Martinez*, 2011-NMSC-010, 149 N.M. 370, 249 P.3d 82, *rev'g* 2010-NMCA-003, 147 N.M. 500, 226 P.3d 14.

Where the district court dismissed all charges against defendant because of a violation of the six-month rule, defendant's case was still pending on May 12, 2010, and the six-month rule did not apply to defendant's case. *State v. Martinez*, 2011-NMSC-010, 149 N.M. 370, 249 P.3d 82, *rev'g* 2010-NMCA-003, 147 N.M. 500, 226 P.3d 14.

Dismissal of cases in magistrate court and refiling in district court. — Where the state dismissed defendants' magistrate charges for DWI and refiled the same charges in district court pursuant to a policy in which the prosecutor would dismiss a case in magistrate court once it became apparent that there would be no plea agreement and then refile the same charges in district court, and the state offered no other reason for the dismissals and subsequent refilings, the state failed to meet its burden to show why the dismissals and refilings were done for reasons other than to circumvent the six-month rule, defendants' six-month rule time period commenced with either the arraignment or waive of arraignment in magistrate court and continued to run until they

expired, and a new six-month rule time period did not commence once the cases were refiled in district court. *State v. Savedra*, 2010-NMSC-025, 148 N.M. 301, 236 P.3d 20, *aff'g State v. Yates*, 2008-NMCA-129, 144 N.M. 859, 192 P.3d 1236.

Defendant's failure to appear at a docketing call and the district court's oral statement that a warrant would issue are not tolling events. — Where defendant failed to appear in court for a docket call; the prosecutor requested that a bench warrant be issued for defendant's failure to appear; the district court stated that a bench warrant would issue; the bench warrant was not issued until eleven days after the six-month rule date expired and twenty-nine days after defendant's failure to appear, the district court did not err in dismissing the charges against defendant pursuant to Rule 5-604 NMRA. *State v. Martinez*, 2010-NMCA-003, 147 N.M. 500, 226 P.3d 14, cert. granted, 2009-NMCERT-012.

Oral extension of time. — Where a pretrial conference occurred at a time when defendant had not employed new counsel after defendant's first counsel had withdrawn; neither defendant nor counsel for defendant appeared at the pretrial conference; the prosecutor orally requested an extension to the six-month rule to allow defendant and defendant's new counsel to prepare for trial; the district court orally granted a three-month extension; the extension was never filed with the district court or entered into the record; at hearings on defendant's motion to dismiss for violation of the six-month rule date, the state did not argue that the district court had granted an extension of the six-month rule date; and the state had forty-nine days to file an extension before the expiration of the six-month rule date and ninety-one days before defendant filed motions to dismiss, the court would not reverse the dismissal of the charges against defendant under a fundamental error analysis on the ground that the district court orally granted a time extension. *State v. Martinez*, 2010-NMCA-003, 147 N.M. 500, 226 P.3d 14, cert. granted, 2009-NMCERT-012.

Refiling to avoid discovery sanction. — Where the magistrate court suppressed the results of the breath test administered to the defendant because the state had failed to timely disclose the appropriate machine certification, the failure to produce the certification was prima facie evidence of the state's lack of preparedness and does not entitle the state to the benefit of a new six-month rule period. *State v. Rayburns*, 2008-NMCA-050, 143 N.M. 803, 182 P. 3d 786.

Forfeiture of right to seek an extension of time. — Where the state failed to request an extension of time to commence trial from the Supreme Court until twenty-eight days after the expiration of the prior extension of time granted by the district court and failed to establish exceptional circumstances justifying its untimely petition, the state forfeited its right to seek an extension of time from the Supreme Court and dismissal of the charges against the defendant with prejudice was mandatory. *Duran v. Eichwald*, 2009-NMSC-030, 146 N.M. 341, 210 P.3d 238.

Withdrawal of plea. — Where the district court orally allowed the defendant to withdraw the defendant's plea, the six month period commenced to run on the date of

the court's oral ruling, not on the date a written order allowing the defendant to withdraw the plea was filed. *State v. Enlow*, 2009-NMCA-038, 146 N.M. 52, 206 P.3d 163.

Refiling early in the six month period. — Where the district attorney investigated the possibility of disposing of the case in magistrate court at or before the pretrial conference, early in the six-month period, and the district attorney's policy of refilling cases that could not be resolved quickly in the magistrate court was intended to resolve the cases as quickly as possible, the dismissal of the case in magistrate court and refilling in district court was not done for bad reasons or to circumvent the six-month rule. *State v. Lozano*, 2008-NMCA-082, 144 N.M. 250, 185 P.3d 1100.

Exceptional circumstances did not exist to justify the granting of the state's petition for an extension to commence trial that was filed one day after the six-month time period expired where the state did not seek the extension earlier because of its heavy caseload, defense counsel failed to respond to the prosecutor's phone call with a position on the extension until after the district court closed on the last day of the rule period, and the docket of the district court necessitated rescheduling the trial. *State v. Dominguez*, 2007-NMCA-132, 142 N.M. 631, 168 P.3d 761.

For the six-month rule to apply to a new, identical case, the district court must enter an order of dismissal, or the state must file a nolle prosequi, to properly close the original case. *State v. Lucero*, 2007-NMCA-096, 142 N.M. 315, 164 P.3d 1014

Application to consecutive, identical criminal information. — Where the district court rejected a plea agreement and ordered the remand of the case to magistrate court for a preliminary hearing, the case was not closed by the order for remand, and the state subsequently filed an identical criminal information in district court, the district court correctly applied the six-month rule to the first case. *State v. Lucero*, 2007-NMCA-096, 142 N.M. 315, 164 P.3d 1014

Delay due to state being unaware of defendant's location. — Where the state claims that the delay in bringing the defendant to trial was because the state was unaware of the defendant's location, the state must do more than merely claim that it was unaware of the defendant's location, the state must affirmatively explain why it could not reasonably have been expected to bring the defendant to trial during that time. *State v. Maddox*, 2007-NMCA-102, 142 N.M. 400, 166 P.3d 461, cert. granted, 2007-NMCERT-008.

Delay due to plea negotiations. — Absent an agreement by the defendant to suspend proceedings or waive his speedy trial right, plea negotiations do not obviate the state's duty to bring the defendant to trial in a timely fashion and does not alone constitute a valid reason for a delay. *State v. Maddox*, 2007-NMCA-102, 142 N.M. 400, 166 P.3d 461, cert. granted, 2007-NMCERT-008.

Waiver. — Where the defendant filed a motion for a continuance of his trial and then stipulated to a second extension, the defendant waived the six-month rule. *State v.*

Collins, 2007-NMCA-106, 142 N.M. 419, 166 P.3d 480, cert. denied, 2007-NMCERT-008.

No time frame on the filing of speedy trial motions in refiled concurrent jurisdiction cases. — Where defendant was charged in magistrate court with aggravated driving under the influence of intoxicating liquor, and where the state dismissed the magistrate court case and refiled the charge in district court, the district court did not err in considering the merits of defendant's motion to dismiss, despite the *Garza* twelve-month benchmark not having been met, because for refiled concurrent jurisdiction cases, a defendant may assert a speedy trial challenge whenever the district court fails to schedule a refiled case within the trial deadline that would have been applicable in the court of limited jurisdiction. *State v. Radler*, 2019-NMCA-052.

Right to speedy trial not violated. — Where defendant was charged in magistrate court with aggravated driving under the influence of intoxicating liquor, and where the state dismissed the magistrate court case and refiled the charge in district court, the district court erred in concluding that defendant's right to a speedy trial was violated, because although the reasons for delay and assertion of the right factors weighed slightly in defendant's favor, the length of delay and prejudice factors weighed against him, and where a defendant has failed to establish particularized prejudice, there is no speedy trial violation. *State v. Radler*, 2019-NMCA-052.

Where defendant was arraigned in magistrate court for DWI on April 23, 2008; defendant was subsequently indicted for felony DWI and the state dismissed the magistrate court case; and defendant's trial occurred on January 8, 2009, defendant was not denied the right to a speedy trial. *State v. Loya*, 2011-NMCA-077, 150 N.M. 373, 258 P.3d 1165, cert. denied, 2011-NMCERT-006, 150 N.M. 763, 266 P.3d 632.

Twenty-six month delay. — Defendant's right to a speedy trial was violated where the defendant's trial was delayed for twenty-six months because the state failed to make its witnesses available for pretrial interviews, despite repeated promises that it would do so and despite repeated extensions from the district court and the Supreme Court to permit the state to do so. *State v. Johnson*, 2007-NMCA-107, 142 N.M. 377, 165 P.3d 1153, cert. denied, 2007-NMCERT-008.

Right to speedy trial violated. - Where defendant's trial was delayed for nearly three and one-half years because defense counsel failed to pursue the issue of defendant's competency and the state failed to ascertain what was happening in the case or to move it forward, defendant was incarcerated during the delay, defendant's diminished intellectual capacity prevented him from asserting the right to a speedy trial and defense counsel was not in a position to make a speedy trail claim on defendant's behalf because of defense counsel's unmanageable caseload, and five years had passed since the crime was committed and the state offered no evidence to rebut defendant's allegation that the child victim's memory and therapy during the five-year period would make it difficult to determine what really happened in the case, defendant's right to a

speedy trial was violated. *State v. Stock*, 2006-NMCA-140, 140 N.M. 676, 147 P.3d 885, cert. granted, 2006-NMCERT-011.

State duty. — The state has a duty to monitor a case and ensure that steps are being taken to bring defendant to trial in a timely manner. *State v. Stock*, 2006-NMCA-140, 140 N.M. 676, 147 P.3d 885, cert. granted, 2006-NMCERT-011.

Neglect of defense counsel. — Although the general rule is that a defendant must be held accountable for actions of his or her attorney, delays caused by the neglect of court-appointed counsel cannot be held against a defendant for speedy trial purposes. *State v. Stock*, 2006-NMCA-140, 140 N.M. 676, 147 P.3d 885, cert. granted, 2006-NMCERT-011.

Rule compared regarding noncompliance with time limits. — Despite notable similarities of their provisions, this rule, Rule 10-226 NMRA and Rule 10-320 NMRA, each has an additional provision that Rule 10-229 NMRA does not have. These rules all provide that noncompliance with the time limits of the rules or with the time limits of any extensions granted shall result in dismissal with prejudice of the charges against the accused, and Rule 10-229 NMRA has no such provision. *State v. Stephen F.*, 2005-NMCA-048, 137 N.M. 409, 112 P.3d 270, cert. granted, 2005-NMCERT-004.

Defendant had right to prompt trial under this rule. *State v. Guzman*, 2004-NMCA-097, 136 N.M. 253, 96 P.3d 1173, cert. denied, 2004-NMCERT-008.

Purpose of rule. — This rule was adopted to assure the prompt trial and disposition of criminal cases, not to effect dismissals by a technical application. This rule is to be read with common sense. *State v. Flores*, 1982-NMSC-132, 99 N.M. 44, 653 P.2d 875; *State v. Eden*, 1989-NMCA-038, 108 N.M. 737, 779 P.2d 114.

The rule accomplishes its purpose by requiring trial to commence within six months of various events, failing which dismissal of the charges is required unless an extension of time has been properly obtained. *State v. Jaramillo*, 2004-NMCA-041, 135 N.M. 322, 88 P.3d 264, cert. denied, 2004-NMCERT-004.

Effect of common sense. — Court has refused to read the six-month rule or view the facts relating to issues arising under it in such a manner that would require a dismissal when common sense would indicate otherwise. *State v. Jaramillo*, 2004-NMCA-041, 135 N.M. 322, 88 P.3d 264, cert. denied, 2004-NMCERT-004.

State law requires that criminal cases be tried within six months. LaVoy v. Snedeker, ____ F.Supp. ___ (D.N.M. 2004).

Cases before magistrate. — District court erred in reversing defendant's convictions on grounds that this rule was violated; because the case was heard before a magistrate, this rule was inapplicable and Rule 6-703 NMRA should have been applied. *State v. Wilson*, 1998-NMCA-084, 125 N.M. 390, 962 P.2d 636.

When the state dismisses a case in magistrate court in order to preserve its right to appeal an order suppressing evidence and refiles in district court, a new six-month period, measured as provided in the rule, applies to the charges in district court. *State v. Heinsen*, 2005-NMSC-035, 138 N.M. 441, 121 P.3d 1040.

Right arises upon initiation of formal proceedings. — Constitutional right to a speedy trial arises, or becomes applicable, only upon the initiation of formal prosecution proceedings. *State v. Crump*, 1971-NMSC-051, 82 N.M. 487, 484 P.2d 329 (decided under former law).

Where a defendant was first "accused" of criminal damage to property under an indictment in February 1988 and he was tried in May, three months later, such a delay cannot give rise to a speedy trial claim in view of the six-month time limit on commencement of criminal trials. *State v. Haar*, 1990-NMCA-076, 110 N.M. 517, 797 P.2d 306, cert. denied, 110 N.M. 330, 795 P.2d 1022.

Verified petition required by rule ensures that the judge has the information necessary to determine if an extension is proper. *State v. Guzman*, 2004-NMCA-097, 136 N.M. 253, 96 P.3d 1173, cert. denied, 2004-NMCERT-008.

Filing of charging papers does not begin six-month period. — This rule provides that the time at which the six-month rule starts to run begins with the latest of several events. None of them is the filing of the charging papers. *State v. Larson*, 1988-NMCA-019, 107 N.M. 85, 752 P.2d 1101.

Filing of amended complaint. — The filing of an amended complaint is not an event that triggers the running of the six-month period regarding the trial of a criminal case or an habitual criminal proceeding. *State v. Jacquez*, 1994-NMCA-166, 119 N.M. 127, 888 P.2d 1009.

Period prior to filing of indictment is not to be considered in determining whether there was a violation of defendant's constitutional right to a speedy trial. *State v. Crump*, 1971-NMSC-051, 82 N.M. 487, 484 P.2d 329 (decided under former law).

Defendant may waive requirements of this rule. *State v. Guzman*, 2004-NMCA-097, 136 N.M. 253, 96 P.3d 1173, cert. denied, 2004-NMCERT-008.

The six-month time limit applies to youthful offender proceedings in which probable cause is found, notwithstanding the language in the rule stating that it does not apply to children's court proceedings. *State v. Michael S.*, 1998-NMCA-041, 124 N.M. 732, 955 P.2d 201.

Six-month period starts when defendant waives arraignment. — Since the defendant was originally indicted for numerous offenses, was diverted into a preprosecution diversion program (PDP), after which the state dismissed the indictment, was later terminated from the program because she had violated the terms of PDP

contract, was reindicted on the same charges for which she had previously been indicted, and waived her arraignment on the charges in the second indictment, the six-month time period for commencement of trial pursuant to Paragraph B was calculated from the date the defendant waived arraignment on the second complaint, and not from the date the defendant was terminated from the PDP, because there was no evidence that the dismissal of the initial indictment and the defendant's later reindictment were carried out for purposes of delay or an attempt to circumvent Paragraph B(6). *State v. Altherr*, 1994-NMCA-029, 117 N.M. 403, 872 P.2d 376.

Commencement of trial. — For purposes of the six-month time limit of Paragraph B of this rule, a trial commences on the date that a petit jury is selected. *State v. Rackley*, 2000-NMCA-027, 128 N.M. 761, 998 P.2d 1212, cert. denied, 128 N.M. 689, 997 P.2d 821.

Time for ruling on timely motion filed under Paragraph E. — Because this rule does not provide a time within which the applicable court must rule on a timely-filed motion for extending the time for commencement of trial, this rule must be construed according to other rules of criminal procedure. Specifically, Rule 5-601(F) NMRA establishes a general rule that all motions shall be disposed of within a reasonable time after filing and Rule 5-104(B)(1) NMRA recognizes the discretion of the district court to enlarge a time limitation contained in the Rules of Criminal Procedure if requested before the applicable time limitation expires. Under those rules, the district court has reasonable time after filing to rule on a timely-filed petition under Paragraph E of this rule, regardless of the expiration of the six-month period of Paragraph B of this rule. *State v. Sandoval*, 2003-NMSC-027, 133 N.M. 399, 62 P.3d 1281.

Extension of trial date by agreement of parties. — Where an extension of the trial date was obtained within six months of the defendant’s arraignment and through agreement of the parties, the timing of the defendant’s trial did not violate Paragraph B of this rule. *State v. Gutierrez*, 2003-NMCA-077, 133 N.M. 797, 70 P.3d 787, cert. denied, 133 N.M. 771, 70 P.3d 761.

Plea negotiation period. — Subparagraph (7) of Paragraph B does not apply to suspend the six-month rule for plea negotiations, as such; the appropriate inquiry is whether, before the rule expired, an oral or written agreement was reached or there was a clear understanding that the action against the defendant was being held in abeyance. *State v. Eskridge*, 1997-NMCA-106, 124 N.M. 227, 947 P.2d 502.

Defendant affirmatively waived right to timely trial under this rule where he apparently made a strategic decision that he needed more time for discovery and filed a stipulated motion for continuance of his trial; defendant did not challenge that there was good cause shown for the continuance nor did he state how the temporary inability to locate the victim caused him prejudice. *State v. Bennett*, 2003-NMCA-147, 134 N.M. 705, 82 P.3d 72, cert. denied, 2003-NMCERT-003.

Where, although defendant did not agree to an extension under this rule, she stipulated to a joint motion for continuance which, as she conceded set forth good cause for an extension, and when the time came for her to take action to assert her rights under this rule, she did not do so and she did not even act within a reasonable time after the prosecutor and the judge took action to correct the oversight that resulted in the passing of the rule date, defendant waived her rights under this rule by her actions. *State v. Guzman*, 2004-NMCA-097, 136 N.M. 253, 96 P.3d 1173, cert. denied, 2004-NMCERT-008.

Defendant waived six-month limit for plea hearing. — Evidence that the defendant's attorney orally agreed to a plea, and affirmatively represented to the state that setting the plea hearing after the six-month rule expired was "no problem," was sufficient to show that the defendant waived the rule. *State v. Eskridge*, 1997-NMCA-106, 124 N.M. 227, 947 P.2d 502.

Acquiescence in delay. — Where defendant participated in at least four pretrial conferences and hearings without making any objection to the delay in his trial, defendant acquiesced in the delay. *State v. Lobato*, 2006-NMCA-051, 139 N.M. 431, 134 P.3d 122, cert. denied, 2006-NMCERT-004.

Entry of voluntary plea of guilty constitutes waiver of whatever right a defendant may have had to a speedy trial. *Salazar v. State*, 1973-NMCA-097, 85 N.M. 372, 512 P.2d 700.

Delay arising prior to grant of extension of time. — The court of appeals may consider a speedy trial claim where the alleged delay arose prior to, and was not the result of, the supreme court's grant of an extension of time within which to proceed to trial. *State v. Garcia*, 1990-NMCA-065, 110 N.M. 419, 796 P.2d 1115, *overruling State v. Apodaca*, 1987-NMCA-033, 105 N.M. 650, 735 P.2d 1156 to the extent it holds otherwise.

Conclusion of trial within extension period. — An extension extends the time for trial to commence; it does not require that the trial be concluded within the extension period. *State v. Higgins*, 1988-NMCA-072, 107 N.M. 617, 762 P.2d 904.

When period begins to run where there is improper delay between filing and arrest. — Although six-month period would not normally begin until defendant's arrest, the period began to run when information was filed in situation where defendant had sought dismissal after a 10 and one-half month delay between filing of information and arrest on grounds that a course of procedure had been followed to circumvent this rule. Under such circumstances the state was required by proof to demonstrate that such course had not been followed to delay defendant's trial beyond the six-month period, and where it failed to meet that burden, defendant's motion to dismiss was properly granted. *State v. Lucero*, 1977-NMCA-108, 91 N.M. 26, 569 P.2d 952.

Delay in arraignment not caused intentionally by state. — Since the late arraignment was due to the district court's arraignment schedule and the reassignment of the case to a different judge within the district, and the defendant did not allege that the state intentionally sought to have the arraignment delayed, the provision requiring commencement of the trial within six months was literally applied. *State v. Coburn*, 1995-NMCA-063, 120 N.M. 214, 900 P.2d 963.

Trial commenced within six months of denial of interlocutory appeal. — Trial commenced within six months of the issuance of an appellate court's mandate denying an application for interlocutory appeal was commenced within the time provided for by the rule. *State v. Eden*, 1989-NMCA-038, 108 N.M. 737, 779 P.2d 114.

The filing of an interlocutory appeal by defendant interrupted the running of the six-month rule, and the six-month time period was triggered anew on the date when the appellate court's mandate disposing of the interlocutory appeal was filed in the district court. *State v. Mayfield*, 1996-NMCA-093, 122 N.M. 298, 923 P.2d 1183.

Trial after mistrial. — This rule clearly contemplates permitting an additional six months to try a case after declaration of a mistrial and, although it states that the six-month period commences when the "order is filed," it does not require that the order be entered contemporaneously with the discharge of the jury. *State v. Reyes-Arreola*, 1999-NMCA-086, 127 N.M. 528, 984 P.2d 775, cert. denied, 127 N.M. 390, 981 P.2d 1208.

Declaration of mistrial. — The rule does not make a distinction between those orders declaring mistrial that are later found to be proper and those that are not. An order declaring mistrial operates to restart the six-month rule even if the order of mistrial is erroneous. *State v. Lobato*, 2006-NMCA-051, 139 N.M. 431, 134 P.3d 122, cert. denied, 2006-NMCERT-004.

Where there is transfer from children's court to district court and information is filed there, the six-month rule of Subsection (b) (*see now* Paragraph B) begins with the filing in the district court of the information or indictment or the date of arrest, whichever is later. *State v. Howell*, 1976-NMCA-020, 89 N.M. 10, 546 P.2d 858.

Failure to sever multiple counts not error where defendant not prejudiced. — Where the strength and quality of the evidence on the various counts convinces the appellate court that a defendant was not prejudiced by the failure to sever multiple counts submitted to the jury, the trial court did not err in refusing to sever. *State v. Montano*, 1979-NMCA-101, 93 N.M. 436, 601 P.2d 69, cert. denied, 93 N.M. 683, 604 P.2d 821.

Second indictment after termination of first cause. — Under the previous rule, Rule 95, N.M.R. Civ. P. (*see now* Rule 1-095 NMRA), where the indictments were obtained following the termination of the first cause as a result of newly obtained evidence which presumably came to light after the filing of the nolle prosequi, the six-month time

limitation began to run with the second indictment. *State ex rel. Delgado v. Stanley*, 1972-NMSC-024, 83 N.M. 626, 495 P.2d 1073.

When the defendants alleged without contradiction by the state that the first charges against them were dismissed on the eve of trial as the six-month rule was about to run, this put the burden on the state to demonstrate its good faith and show that it did not take its actions to circumvent the six-month rule or for other bad reasons. *State v. Bolton*, 1997-NMCA-007, 122 N.M. 831, 932 P.2d 1075.

Second indictment after termination of first cause. — Because the state filed a nolle prosequi and then re-indicted defendant with additional charges following a mistrial, the six-month time limit for his second trial did not begin to run until after he was arraigned on the second indictment. *State v. Foster*, 1999-NMSC-007, 126 N.M. 646, 974 P.2d 140.

Where wrong person arrested. — Where the police mistakenly arrested an innocent man whose name and description were similar to those of a fugitive defendant, the trial court erred in dismissing the indictment against the fugitive defendant based on a finding that the innocent man had been arrested and not brought to trial within the time period required by the six-month rule. The wrongful arrest of an innocent man cannot inure to the benefit of a fugitive who has not had his rights abridged and who is not before the court. *State v. Portillo*, 1990-NMSC-055, 110 N.M. 135, 793 P.2d 265 (1990).

Amended information charging a new and different offense supersedes the abandoned original information, and the six-month rule commences running on the date the amended information is filed. *State v. Benally*, 1983-NMCA-014, 99 N.M. 415, 658 P.2d 1142.

Amended information may start six-month period. — An amended supplemental criminal information, charging the defendant with being an habitual offender, was sufficiently different from the original supplemental information to start a new six-month period within which the habitual criminal proceeding had to be commenced, since a different subsection of Section 31-18-17 NMSA 1978, the habitual offender statute, was involved, an additional prior conviction was alleged, and the defendant was arraigned for a second time. *State v. Chacon*, 1985-NMSC-082, 103 N.M. 288, 706 P.2d 152.

Recommencement of the six-month period following a stay to determine competency is consistent with the intent of this rule. *State v. Mendoza*, 1989-NMSC-032, 108 N.M. 446, 774 P.2d 440.

The time during which a defendant's competency to enter into a plea agreement is being assessed suspends the proceedings and the six-month period begins anew after the plea is assessed; when the plea is rejected, the period begins from that date. *State v. Lucas*, 1990-NMCA-056, 110 N.M. 272, 794 P.2d 1201.

Diversion program notification recommenced six month period. — The district court improperly determined that the state had failed to comply with paragraph B, because the six-month period recommenced when the district attorney's office notified defendant that he was not acceptable for its preprosecution diversion program. *State v. Hastings*, 1993-NMCA-111, 116 N.M. 344, 862 P.2d 452.

Motion seeking a dismissal under this rule for a violation of the right to a speedy trial is not governed by the requirements of Rule 33(e) (*see now* Rule 5-601 NMRA), which specifies that motions shall be raised at arraignment or within 20 days thereafter unless upon good cause the court waives the time requirement. *State v. Aragon*, 1982-NMCA-173, 99 N.M. 190, 656 P.2d 240.

Factors considered in determining denial of right to speedy trial. — Whenever there is a delay of more than six months between the time of arraignment and the date of the trial, four factors are to be considered in determining whether a defendant has been denied the right to a speedy trial. These are length of delay, reason for delay, defendant's assertion of his right, and ensuing prejudice to the defendant. *State v. Mendoza*, 1989-NMSC-032, 108 N.M. 446, 774 P.2d 440.

Eighteen-month delay between arrest and trial did not violate right to speedy trial in a case where (1) the state charged defendants with first-degree murder in contravention of the magistrate's bind-over order, (2) defendants prevailed on interlocutory appeal, and (3) the state dropped charges, released defendants and subsequently obtained a grand jury indictment for first-degree murder. *State v. McCrary*, 1984-NMSC-005, 100 N.M. 671, 675 P.2d 120.

Eighteen-month delay between arraignment and trial did not violate right to a speedy trial, where the defendant acquiesced to a stay in the proceedings during determination of his competence and did not assert his right to a speedy trial until the day the trial began, six months after the trial court lifted the stay. *State v. Mendoza*, 1989-NMSC-032, 108 N.M. 446, 774 P.2d 440.

Arraignment prior to preliminary examination request did not begin six-month period. — Since an arraignment cannot occur until after preliminary examination is held, arraignment prior to preliminary examination request was not effective to start operation of six-month period in which trial must be commenced, so that six-month time limit did not start to run until defendant waived his arraignment. *State v. Sanchez*, 1984-NMCA-068, 101 N.M. 509, 684 P.2d 1174.

Paragraph B six-month rule does not commence during pendency of case in children's court. *State v. Sanchez*, 1984-NMCA-068, 101 N.M. 509, 684 P.2d 1174.

Paragraph B(5) did not toll six-month period where defendant had never been released from custody. — Subdivision (b)(5) (*see now* Subparagraph (5) of Paragraph B) was inapplicable to toll six-month requirement where, although conditions of release

had been revoked for failure to appear, defendant had never actually been released from state's custody. *State v. Romero*, 1984-NMCA-087, 101 N.M. 661, 687 P.2d 96.

Court of appeals is without authority to review supreme court orders granting extensions of time to commence trial, where defendant's cause, challenging the validity of the supreme court's ex parte order granting the state an extension of time in which to try him, was certified to that court. *State v. Carter*, 1974-NMCA-141, 87 N.M. 41, 528 P.2d 1281.

The court of appeals has no power to review a supreme court order granting an extension of time under this rule as such an order is final. *State v. Sedillo*, 1974-NMCA-053, 86 N.M. 382, 524 P.2d 998cert. denied, 86 N.M. 372, 524 P.2d 988, 419 U.S. 1072, 95 S. Ct. 662, 42 L. Ed. 2d 669 (1974).

Allegation of a denial of the defendant's right to a speedy trial based upon an extension granted to the prosecution by the supreme court under this rule is beyond review. *State v. Mazurek*, 1975-NMCA-066, 88 N.M. 56, 537 P.2d 51.

The court of appeals is without authority to review supreme court orders granting extensions of time to commence trial. *State v. Jaramillo*, 1975-NMCA-050, 88 N.M. 60, 537 P.2d 55, cert. denied, 88 N.M. 318, 540 P.2d 248.

The court of appeals has no authority to review actions of the supreme court in granting the extension of a trial. *State v. Williams*, 1978-NMCA-065, 91 N.M. 795, 581 P.2d 1290.

Court of appeals could not review the propriety of the supreme court's grant of extensions of time. *State v. Gallegos*, 1989-NMCA-066, 109 N.M. 55, 781 P.2d 783.

Although the court of appeals cannot review a decision of the Supreme Court extending the time for trial under Paragraph D, the court can review the trial court's decision under Paragraph C. *State v. Sanchez*, 2000-NMCA-061, 129 N.M. 301, 6 P.3d 503, cert. denied, 129 N.M. 249, 4 P.3d 1240.

Technical violation of Paragraph A. — Where defendant makes no showing that his defense was prejudiced in any way by the delay, nor is there any question as to his identity or whether he understands the charge against him, a technical violation of Subdivision (a) (*see now* Paragraph A) will not result in a dismissal of the charges. *State v. Budau*, 1973-NMCA-151, 86 N.M. 21, 518 P.2d 1225, cert. denied, 86 N.M. 5, 518 P.2d 1209 (1974); *State v. Coburn*, 1995-NMCA-063, 120 N.M. 214, 900 P.2d 963.

Although there was a delay of more than fifteen days, the defendant made no showing that his defense was prejudiced in any way by the delay, and without such a showing, a technical violation will not result in a dismissal of the charges. *State v. Jacquez*, 1994-NMCA-166, 119 N.M. 127, 888 P.2d 1009.

Arraignment under New Mexico law is not an indispensable stage in a criminal proceeding. *State v. Budau*, 1973-NMCA-151, 86 N.M. 21, 518 P.2d 1225, cert. denied, 86 N.M. 5, 518 P.2d 1209.

Right to file plea in abatement. — When the defendant appears for arraignment, he has the right to file a plea in abatement, if he has been denied a preliminary hearing. *State ex rel. Hanagan v. Armijo*, 1963-NMSC-057, 72 N.M. 50, 380 P.2d 196 (decided under former law).

Where charge against defendant was filed and then dismissed under writ of habeas corpus, prosecution and conviction three years later under information containing same charge did not violate defendant's constitutional right to a speedy public trial under N.M. Const., art. II, § 14, nor his statutory right to be tried at first term of court after filing of information under 41-11-4, 1953 Comp., (since repealed). *State v. Rhodes*, 1967-NMSC-052, 77 N.M. 536, 425 P.2d 47 (decided under former law).

Where a plea agreement is approved by the court, its conditions are applicable to determine timeliness of the filing of habitual criminal charges, as well as the judgment and sentence. *State v. Santillanes*, 1982-NMCA-118, 98 N.M. 448, 649 P.2d 516.

Applicability of six-month rule to habitual criminal proceeding. — Where more than six months had passed since the filing of an information charging defendant under Section 31-18-5 (now 31-18-17) NMSA 1978 with being an habitual offender, the supreme court ordered that it be dismissed with prejudice in accordance with Subdivision (d) (*see now* Paragraph F) to the extent that the state was precluded only from filing another such information grounded upon all four of those felonies which were the basis for information dismissed. *State v. Lopez*, 1976-NMSC-012, 89 N.M. 82, 547 P.2d 565.

Rule applies to habitual offender proceedings. *State v. Padilla*, 1978-NMCA-060, 92 N.M. 19, 582 P.2d 396, cert. denied, 92 N.M. 180, 585 P.2d 324.

Delay in bringing habitual criminal charges. — Where trial is commenced within the time limitations imposed by this rule a defendant claiming to have been denied due process by a delay in the bringing of habitual criminal charges is required to make a showing of actual prejudice caused by the delay; the delay in itself does not a fortiori establish prejudice. *State v. Santillanes*, 1982-NMCA-118, 98 N.M. 448, 649 P.2d 516.

"Arrest" means an arrest on charges that have been filed in the district court. *State v. Dominguez*, 1977-NMCA-128, 91 N.M. 296, 573 P.2d 230, cert. denied, 91 N.M. 249, 572 P.2d 1257.

Out-of-state arrest. — Where defendant was arrested in another state on a New Mexico warrant for failure to appear, under Paragraph B(5), the six-month period began to run from the date of the out-of-state arrest, not the date when New Mexico authorities

took custody of defendant. *State v. Solano*, 1999-NMCA-019, 126 N.M. 662, 974 P.2d 156, cert. denied, 126 N.M. 533, 972 P.2d 352 (1998).

Tolling of time limitation while bench warrant outstanding. — Where the defendant was serving a sentence at the penitentiary at the time of an arraignment on separate charges and the court ordered the defendant returned to custody until further order but did not set bond nor order any specific "conditions of release," and where the defendant was later discharged from the penitentiary without the court's permission and the court ordered a bench warrant for the defendant's arrest because he did not appear at his pretrial conference, there was a tolling of the time limit within which the trial was to be commenced (which time limit began to run on the date of arraignment) during the time that the bench warrant was outstanding. *State v. Flores*, 1982-NMSC-132, 99 N.M. 44, 653 P.2d 875 (decided prior to 1983 amendment).

Supreme court does not intend six-month provision to apply to delay resulting from appellate proceedings. *State v. Padilla*, 1978-NMCA-060, 92 N.M. 19, 582 P.2d 396, cert. denied, 92 N.M. 180, 585 P.2d 324.

Time limit inapplicable once trial court dismissed supplemental information in habitual offender proceeding. — Once the trial court dismissed a supplemental information in an habitual offender proceeding, there was no case to be tried in the district court and thus no case to which the time limitation of this rule applied. Only upon reversal of the trial court's dismissal and issuance of a mandate returning the case to the district court would there be a case in the district court to which a time limitation was applicable. *State v. Padilla*, 1978-NMCA-060, 92 N.M. 19, 582 P.2d 396, cert. denied, 92 N.M. 180, 585 P.2d 324.

Implied consent to continue date for trial. — By his and his attorney's actions in signing a plea agreement, knowing that a hearing on the plea was scheduled on a subsequent date, defendant expressed his implied consent to continue the date for trial past the date on which the state's extension of time ended, thereby suspending the running of the six-month requirement of the rule. *State v. Sanchez*, 1989-NMSC-068, 109 N.M. 313, 785 P.2d 224.

Basis for continuance held sufficient. — Where the judge was newly appointed and failed to schedule the trial for that reason, good cause existed under Paragraph C to support the trial court's grant of a three-month extension. *State v. Sanchez*, 2000-NMCA-061, 129 N.M. 301, 6 P.3d 503, cert. denied, 129 N.M. 249, 4 P.3d 1240.

Basis for continuance held insufficient. — Where defendant, who was charged with the murder of the victim, claimed that the victim shot at defendant and defendant shot the victim in self-defense; defendant requested a continuance one week before trial to allow defense counsel to examine a jacket defendant wore at the time of the shooting and an unidentified hard fragment found in the lining of the jacket in an attempt to bolster defendant’s claim of self-defense; the court had previously granted defendant four continuances; the motion was heard on the day of trial after the jury had been

selected; defense counsel did not offer any explanation regarding why the jacket and the unidentified fragment had not been discovered sooner or tested before the day of trial; and the court admitted the jacket into evidence and allowed defendant to argue that the hole in the jacket corroborated defendant's testimony that the victim shot defendant in the shoulder, the court did not abuse its discretion in denying the continuance. *State v. Arrendondo,* 2012-NMSC-013, 278 P.3d 517.

Where defendant never indicated what particular facts witnesses would prove, or that he knew of no other witnesses by which such facts could be proved, defendant simply did not present a basis for a continuance, either on the question of a "sanity hearing" or on the merits of the cause. *State v. Hollowell*, 1969-NMCA-105, 80 N.M. 756, 461 P.2d 238.

Defendant's request for time to attempt to retain his own counsel was denied as it presented no independent basis for a continuance. *State v. Hollowell*, 1969-NMCA-105, 80 N.M. 756, 461 P.2d 238.

Where defendant, who appeared pro se, moved for a continuance on the day before trial because defendant had not been able to physically see some of the items defendant was alleged to have stolen; although defendant had seen photographs of the stolen items, defendant did not state how waiting one day to view the physical evidence rather than the photographs of the evidence caused defendant prejudice; and a continuance would have caused the court and the prosecution significant inconvenience, the court did not abuse its discretion in denying defendant's motion. *State v. Archuleta*, 2012-NMCA-007, 269 P.3d 924, cert. denied, 2011-NMCERT-012.

Defendant-instigated objections to counsel held thwarting maneuver. — Trial court did not abuse its discretion in ruling that defendant instigated conflicts with his appointed counsel as a tactical maneuver to thwart the proceedings, where he did not raise any objections to his counsel until just before trial, at which time the six-month deadline for commencing trial had almost elapsed. *State v. Lucero*, 1986-NMCA-085, 104 N.M. 587, 725 P.2d 266.

Rule inapplicable to sentencing. — The existence of Paragraph B of Rule 5-701 NMRA that establishes time limits for sentencing suggests that Paragraph B of this rule was not intended to apply to sentencing but was intended to apply only to trials and habitual criminal proceedings, as the plain meaning of the rule suggests. *State v. Todisco*, 2000-NMCA-064, 129 N.M. 310, 6 P.3d 1032, cert. quashed, 132 N.M. 484, 51 P.3d 527 (2002).

Delay in probation revocation proceedings. — The time constraints of the speedy trial rule and the constitutional right under the state and federal constitutions to a speedy trial are inapplicable to probation revocation proceedings. However, delay in the institution and prosecution of probation revocation proceedings, along with a showing of prejudice to the probationer, may constitute a denial of due process, thereby requiring

the state to waive any right to revoke defendant's probation. *State v. Chavez*, 1985-NMCA-003, 102 N.M. 279, 694 P.2d 927.

Delaying the initiation and hearing of the defendant's probation violation until after the trial by federal authorities for the charges that were the basis of the alleged parole violation did not result in a showing of prejudice or oppression to the defendant, where defendant made no showing that he demanded an earlier hearing, was unable to call necessary witnesses on his behalf, or that any of the witnesses had trouble remembering any of the critical events surrounding the events relevant to the revocation proceedings. *State v. Chavez*, 1985-NMCA-003, 102 N.M. 279, 694 P.2d 927.

State's petition for alternative writ constituted appeal. — State's petition to the supreme court for an alternative writ of prohibition or an alternative writ of superintending control constituted an appeal within the meaning of Paragraph B(4). *State v. Valdez*, 1990-NMCA-018, 109 N.M. 759, 790 P.2d 1040.

Review of order granting extension of time. — A presiding judge had no authority to review or withdraw the order of a designated judge granting the state's petition for an extension of time to try the defendant because that authority rests solely with the Supreme Court. *State v. Remaly*, 1995-NMSC-060, 120 N.M. 492, 903 P.2d 234.

Grant of extension does not preclude speedy trial review. — The grant of an extension of time for trial beyond the six-month limit of this rule by the Supreme Court does not preclude a lower court's review of a violation of the right to speedy trial. *State v. Manzanares*, 1996-NMSC-028, 121 N.M. 798, 918 P.2d 714.

A Supreme Court ruling on a motion pursuant to this rule is not determinative of a subsequent speedy-trial motion except in the unlikely event the record specifically reflects the Supreme Court's analysis and decision on the issue being raised again below. *State v. Manzanares*, 1996-NMSC-028, 121 N.M. 798, 918 P.2d 714.

Six month rule not violated. *State v. Fernandez*, 1994-NMCA-056, 117 N.M. 673, 875 P.2d 1104.

In late August, 2000, trial was set for September 26, 2000. Based on the later April 3, 2000 arraignment date, the trial setting thus fell within the state’s six-month rule for trial, because that period would have expired on October 3, 2000. LaVoy v. Snedeker, ____ F.Supp. ____ (D.N.M. 2004).

Law reviews. — For survey, "Children's Court Practice in Delinquency and Need of Supervision Cases Under the New Rules," see 6 N.M.L. Rev. 331 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Intoxication as ground for police postponing arrestee's appearance before magistrate, 3 A.L.R.4th 1057.

Adequacy of defense counsel's representation of criminal client regarding speedy trial and related matters, 6 A.L.R.4th 1208.

Continuances at instances of state public defender or appointed counsel over defendant's objections as excuse for denial of speedy trial, 16 A.L.R.4th 1283.

Waiver of right to counsel by insistence upon speedy trial in state criminal case, 19 A.L.R.4th 1299.

What constitutes bringing an action to trial or other activity in case sufficient to avoid dismissal under state statute or court rule requiring such activity within stated time, 32 A.L.R.4th 840.

22A C.J.S. Criminal Law § 578 et seq.

5-605. Jury trial.

A. **Trial by jury; waiver.** Criminal cases required to be tried by jury shall be so tried unless the defendant waives a jury trial with the approval of the court and the consent of the state.

B. **Alternate jurors.** In any criminal case, the district court may direct that not more than six jurors, in addition to the regular jury, be called and impanelled to sit as alternate jurors. Alternate jurors, in the order in which they are called, shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, have the same qualifications, be subject to a like examination and challenges for cause, take the same oath, and have the same functions, powers, facilities and privileges as the regular jurors.

C. **Discharge; general rule.** Except in felony cases in which the death penalty may be imposed and a single jury is used for trial and sentencing, an alternate juror who does not replace a regular juror shall be discharged before the jury retires to consider its verdict.

D. **Findings and conclusions; when required.** In a case tried without a jury, the court shall make a general finding and shall, in addition, make specific findings of fact and conclusions of law on all ultimate facts and conclusions of law upon which written requested findings and conclusions have been filed within ten (10) days after the making of the general finding by the court, or within such time as the court may designate.

[As amended by Supreme Court Order No. 09-8300-042, effective November 30, 2009, for all new and pending cases.]

Committee commentary. — Although titled "Jury trial", this rule does not deal exclusively with the right to a jury trial but with procedure for both jury and nonjury cases. For comments on the right to a jury trial, *see* the commentary to Rule 5-301 NMRA. For the procedure governing the selection of jurors, *see* Rule 5-606 NMRA and Sections 38-5-13 and 38-5-14 NMSA 1978.

Under prior law, the defendant could waive a jury trial for a "high court" misdemeanor by proceeding to trial before the court without a jury and without making any objections. *State v. Marrujo*, 79 N.M. 363, 443 P.2d 856 (1968). Under Paragraph A of this rule, all trials in the district court, except for petty misdemeanors, are by jury unless the defendant waives the jury. The state may refuse to consent to a waiver by the defendant and thereby require the matter to be tried by a jury. *See State ex rel. Gutierrez v. First Judicial Dist. Ct.*, 52 N.M. 28, 191 P.2d 334 (1948).

Paragraph B of this rule was added in 1979. The contents of this paragraph were formerly found in Paragraph E of Rule 5-606. This paragraph is derived from Paragraph B of Rule 1-047 and is consistent with American Bar Association Standards Relating to Trial by Jury, Section 2.7 (Approved Draft 1968).

Paragraph C of this rule was added in 1979 to clarify when alternate jurors are to be discharged.

Paragraph D of this rule covers the procedure for judgment in a nonjury case. The court must make a finding of guilty or not guilty. If the finding is guilty, requested findings of fact and conclusions of law may be submitted by the parties within ten (10) days or such time as the court designates. The court is then required to file a decision containing findings of fact and conclusions of law, presumably before announcing the judgment and sentence. *Cf.* Paragraph C of Rule 5-614 and Paragraph A of Rule 5-701. *Compare*, Rule 1-052.

ANNOTATIONS

The 2009 amendment, approved by Supreme Court Order No. 09-8300-042, effective November 30, 2009, in Paragraph C, after "the death penalty may be imposed" added "and a single jury is used for trial and sentencing,".

Cross references. — For right to trial by jury, *see* N.M. Const., art. II, § 12.

For drawing and empaneling jurors, *see* Section 38-5-1 NMSA 1978 et seq.

For forms on waiver of trial by jury - misdemeanor offense and certification and waiver, *see* Rule 9-502 NMRA.

Alternative sentencing procedure in death penalty cases. — The Supreme Court amended Rule 5-605 NMRA, effective November 30, 2009, to provide the option of using two separate juries, one to determine innocence or guilt and one to determine

sentencing, for all new and pending death penalty cases in district court alleging crimes committed before July 1, 2009, in order to address concerns regarding the death penalty system in New Mexico in the remaining death penalty cases. *In re Death Penalty Sentencing Jury Rules*, 2009-NMSC-052, 147 N.M. 302, 222 P.3d 674.

Waiver of right to jury trial requires consent of prosecutor and the approval of the trial court. *State v. Mares*, 1979-NMCA-049, 92 N.M. 687, 594 P.2d 347, cert. denied, 92 N.M. 675, 593 P.2d 1078.

Waiver of jury trial valid despite defendant's claim of duress. — Defendant's waiver of a jury trial, after the jury was excused and her trial was rescheduled because she had arrived late in court, was valid, notwithstanding her argument that she was under duress to waive a jury trial because the court had set bail she would not be able to meet and would therefore be incarcerated prior to trial. *State v. Dean*, 1986-NMCA-093, 105 N.M. 5, 727 P.2d 944.

Claim that written waiver required not reviewable for first time on appeal. — Where the defendant does not claim in his motion for a new trial that his waiver of a 12-person jury was ineffective because not in writing, and where his claim that a written waiver was required is asserted for the first time on appeal, the claim is not entitled to appellate review because the claim that the waiver be in writing is not a question which can be raised for the first time on appeal. *State v. Pendley*, 1979-NMCA-036, 92 N.M. 658, 593 P.2d 755.

Replacing juror with alternate. — When a seated juror is excused and replaced by an alternate juror prior to deliberations, the verdict is not affected, and the defendant is considered to have been tried by the same jury. *State v. Pettigrew*, 1993-NMCA-095, 116 N.M. 135, 860 P.2d 777.

Post-submission substitution of an alternate is error that creates a presumption of prejudice; the state must show under the circumstances of a particular case that the trial court took adequate steps to ensure the integrity of the jury process. *State v. Sanchez*, 2000-NMSC-021, 129 N.M. 284, 6 P.3d 486.

Trial court did not abuse its discretion in declaring a mistrial after the disclosure of a deliberating juror's bias and where the only proposed alternative was a post-submission substitution. — Where defendant was charged and tried in magistrate court for misdemeanor DWI and failure to maintain his lane, and where the magistrate court declared a mistrial after a juror was discharged for stating that she could not be impartial after deliberations had begun and the alternate jurors had already been dismissed from the courtroom, the district court, in a de novo proceeding, did not err in denying defendant's motion to dismiss on double jeopardy grounds, because it was not an abuse of discretion for the magistrate court, after the disclosure of a deliberating juror's bias, to declare a mistrial due to manifest necessity where the proposed alternative, a post-submission substitution, would have created a presumption of

prejudice and would not have alleviated or even addressed the potential taint to the remaining jurors. *State v. Vanderdussen*, 2018-NMCA-041.

An alternate juror's presence in the jury room during deliberations creates a presumption of prejudice which the state may attempt to overcome. *State v. Coulter*, 1982-NMCA-106, 98 N.M. 768, 652 P.2d 1219.

Waiver of objection to juror's participation in trial. — Since the defendants' failed to question a juror during voir dire after she revealed that her sister worked for one of the prosecutors, it was not an abuse of discretion for the court to refuse the defendants' request to replace the juror with an alternate after the jury had retired to deliberate, or to deny their motion for a new trial. *State v. Sanchez*, 1995-NMSC-053, 120 N.M. 247, 901 P.2d 178.

Complaining witness not entitled to jury trial. — A complaining witness in a criminal case where the charge is assault and battery cannot demand a jury trial and is not entitled to same. The defendant is an interested party and also the state. There is no statutory law or provision in the constitution that provides that a complaining witness is entitled to a trial by jury. 1953-54 Op. Att'y Gen. No. 5686 (opinion rendered under former law).

Waiver of jury must be consented to by state. — A defendant or defendants may waive trial by jury but said waiver cannot be accepted unless it is consented to by the state. 1953-54 Op. Att'y Gen. No. 5686 (opinion rendered under former law).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 1056, 1070 to 1075, 1078 to 1080.

Waiver, after not guilty plea, of jury trial in felony case, 9 A.L.R.4th 695.

Presence of alternate juror in jury room as ground for reversal of state criminal conviction, 15 A.L.R.4th 1127.

Paternity proceedings: right to jury trial, 51 A.L.R.4th 565.

Threats of violence against juror in criminal trial as ground for mistrial or dismissal of juror, 3 A.L.R.5th 963.

Stranger's alleged communication with juror, other than threat of violence, as prejudicial in federal criminal prosecution, 131 A.L.R. Fed. 465.

50A C.J.S. Juries §§ 7 to 80, 95 to 222.

5-606. Jurors.

A. **Examination of jurors.** The court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper, or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as it deems proper.

B. **Challenges; procedure.** Challenges for good cause and peremptory challenges shall be made outside the hearing of the jury panel. The party making a challenge will not be disclosed to the jury panel, but each challenge will be recorded by the clerk. The state shall accept or make any peremptory challenge as to each prospective juror before the defense is called upon to accept or make a peremptory challenge as to the prospective juror.

C. **Challenges for cause.** The court shall permit the parties to a case to express in the record of the trial any challenge to a prospective juror for good cause. The court shall rule upon the challenge and may excuse any prospective juror for good cause.

D. **Peremptory challenges.**

(1) The state and the defense in each criminal case tried to a jury in the district court shall be entitled to peremptory challenges of prospective jurors as follows:

(a) if the offense charged is punishable by death, the defense shall be allowed twenty-four (24) challenges and the state shall be allowed sixteen (16) challenges;

(b) if the offense charged is punishable by life imprisonment, the defense shall be allowed twelve (12) challenges and the state shall be allowed eight (8) challenges; and

(c) in all other cases, the defense shall be allowed five (5) challenges and the state shall be allowed three (3) challenges.

(2) When two (2) or more persons are jointly tried, two (2) additional challenges shall be allowed to the defense and to the state for each additional defendant. When two (2) or more defendants are jointly tried and cannot agree by whom the peremptory challenges shall be exercised, they shall be exercised in the manner prescribed by the court.

(3) The state and the defense are each entitled to one (1) peremptory challenge in addition to those otherwise allowed by this rule if one (1) or two (2) alternate jurors are to be empaneled, two (2) peremptory challenges if three (3) or four (4) alternate jurors are to be empaneled, and three (3) peremptory challenges if five (5) or six (6) alternate jurors are to be empaneled. The additional peremptory challenges provided by this paragraph may be used against an alternate juror only, and the other

peremptory challenges allowed by law shall not be used against an alternate juror. The procedure for the exercise of peremptory challenges for alternate jurors shall be the same as that for regular jurors.

E. **Juror qualification and questionnaire forms; retention schedule; certification of compliance with privacy requirements.** Prior to the examination of prospective jurors under this rule, the court shall require each prospective juror to complete a juror qualification and questionnaire forms as approved by the Supreme Court, which shall be subject to the following protections:

(1) All completed juror qualification and questionnaire forms, including any electronic copies, in the possession of the court, attorneys, parties, and any other individual or entity shall be kept confidential unless ordered unsealed under the provisions in Rule 5-123 NMRA;

(2) All completed juror qualification and questionnaire forms, including any electronic copies, in the possession of the court, attorneys, parties, and any other individual or entity shall be destroyed according to the following deadlines:

(a) All copies in the possession of the court shall be destroyed ninety (90) days after expiration of the term of service of the juror or prospective juror unless an order has been entered directing their retention for a longer period of time; and

(b) All copies in the possession of the attorneys, parties, and any other individual or entity shall be destroyed within one hundred twenty (120) days after final disposition of the proceeding for which the juror or prospective juror was called unless permitted by written order of the court to retain the copies for a longer period of time, in which case the court's order shall set the deadline for destruction of those copies; and

(3) On or before the destruction deadline required under this rule, all attorneys and parties shall file a certification under oath in a form approved by the Supreme Court that they have complied with the confidentiality and destruction requirements set forth in this paragraph.

F. **Supplemental questionnaires.** The court may order prospective jurors to complete supplemental questionnaires. Unless otherwise ordered by the court, the party requesting supplemental questionnaires shall be required to pay the actual costs of producing and mailing the supplemental questionnaires. The confidentiality and destruction protections in Subparagraphs (E)(1), (2), and (3) of this rule shall apply to any supplemental questionnaires ordered under this paragraph.

[As amended, effective April 19, 2004; as amended by Supreme Court Order No. 13-8300-042, effective for all cases pending or filed on or after December 31, 2013; as amended by Supreme Court Order No. 18-8300-008, effective December 31, 2018.]

Committee commentary. — Paragraph A of this rule was derived from Paragraph A of Rule 1-047 NMRA and is consistent with American Bar Association Standards Relating to Trial by Jury, Section 2.7 (Approved Draft 1968).

Paragraphs B and C of this rule encompass that portion of Section 38-5-14 NMSA 1978 which relates to challenges of jurors in criminal cases.

There are a number of different procedures followed by state and federal courts in allowing the exercise of peremptory challenges. The commentary to the American Bar Association Standards Relating to Trial by Jury, Section 2.6 (Approved Draft 1968) states,"The details as to how peremptories are to be exercised in a given case must be left to the discretion of the trial judge, as different cases, particularly those with multiple defendants, pose unique problems . . . ."

The New Mexico Supreme Court Committee, after considering a number of alternatives, concluded that the exercise of peremptory challenges in cases where there are multiple defendants probably should be left to the trial judge. One of the following methods should be chosen by the trial judge if, prior to the selection of any jurors, the defendants cannot agree who will exercise challenges for the defense:

(1) the judge may allow the challenges to be exercised alternately, beginning with the defendant whose name first appeared in the information or indictment. The problem with this method is that it is possible that one defendant will exercise all of the challenges allowed;

(2) the judge may divide the total number of defense challenges as equally as possible between all of the defendants beginning with the defendant whose name first appears on the information or indictment. The challenges would then be exercised alternately by the defendants; or

(3) the judge may require all defendants to agree on the exercise of a challenge before it is exercised on a juror.

See the commentary to the American Bar Association Standards Relating to Trial by Jury, Section 2.6 (Approved Draft 1968). *See also State v. Boeglin*, 90 N.M. 93, 559 P.2d 1220 (Ct. App. 1977), for an alternate method of exercising peremptory challenges.

Paragraph E of this rule was added to clarify the procedure for using and retaining juror qualification and questionnaire forms. In cases where an issue may be raised on appeal concerning jury selection or a particular juror, the appellant may consider filing a motion in the district court within ninety (90) days of the jury verdict to request an order requiring the retention of the juror qualification and questionnaire forms for inclusion in the record proper filed in the appellate court. Paragraph E of this rule supersedes administrative regulations concerning the retention of juror qualification and questionnaire forms.

[As amended by Supreme Court Order No. 13-8300-042, effective for all cases pending or filed on or after December 31, 2013; as amended by Supreme Court Order No. 18-8300-008, effective December 31, 2018.]

ANNOTATIONS

The 2018 amendment, approved by Supreme Court Order No. 18-8300-008, effective December 31, 2018, provided additional privacy protections and destruction requirements for information contained in juror questionnaire forms, provided an exception to the confidentiality rules, made certain nonsubstantive changes, and revised the committee commentary; in Paragraph E, after the semicolon, added "certification of compliance with privacy requirements", and after "Supreme Court", added "which shall be subject to the following protections:", added subparagraph designations "(1)" and "(2)", in Subparagraph E(1), after "questionnaire forms,", added "including any electronic copies", after "possession of the court", deleted "as well as in the possession of others, including", and after "individual or entity", added "shall be kept confidential unless ordered unsealed under the provisions in Rule 5-123 NMRA", in Subparagraph E(2), added "All completed juror qualification and questionnaire forms, including any electronic copies, in the possession of the court, attorneys, parties, and any other individual or entity", and after "shall be destroyed", added "according to the following deadlines:", added subparagraph designation "(a)", in Subparagraph E(2)(a), added "All copies in the possession of the court shall be destroyed", and after "retention", deleted "of the form" and added "for a longer period of time; and", and added Subparagraphs E(2)(b) and E(3); and in Paragraph F, added the last sentence of the paragraph relating to confidentiality and destruction protections.

The 2013 amendment, approved by Supreme Court Order No. 13-8300-042, effective December 31, 2013, required prospective jurors to complete an approved juror qualification and questionnaire form and supplemental questionnaires, if ordered by the court; provided for the destruction of juror qualification and questionnaire forms; and added Paragraphs E and F.

The 2004 amendment, effective April 19, 2004, in Subparagraph (1) of Paragraph D, inserted present Sub-subparagraph (a), redesignated former Sub-subparagraphs (a) and (b) as present Sub-subparagraphs (b) and (c), and deleted "death or" preceding "life" in Sub-subparagraph (b).

Compiler's notes. — This rule is similar to Rule 24 of the Federal Rules of Criminal Procedure.

Cross references. — For drawing and empaneling jurors, *see* Rule 5-605 NMRA and Section 38-5-1 NMSA 1978 et seq.

Challenges were discriminatory. — Where defendant, who was Hispanic, used ten of fourteen peremptory challenges to strike every single white male from the jury pool; the state's key witness was a young female; defendant explicitly acknowledged that

defendant's trial strategy was to strike men in lieu of women because fathers don't judge the credibility of young females as well as mothers do and because an analytical woman would probably give defendant a fairer shake; and although defendant claimed that defendant was striking all male venirepersons with prior jury experience, regardless of race, defendant had previously accepted non-white male venirepersons with prior jury experience, the trial court reasonably found that defendant's facially neutral explanation was pretextual and that defendant's trial strategy was discriminatory and racially motivated. *State v. Salas*, 2010-NMSC-028, 148 N.M. 313, 236 P.3d 32.

Where the state used its peremptory challenges to strike individual jurors on the ground that the juror fell asleep during voir dire, the juror was involved in crimes prosecuted by the prosecutor, the juror's son and granddaughter were defendants in the judicial district, the juror was familiar with a potential witness, and the juror's uncle previously had been represented by defense counsel, the state's explanations were not inherently discriminatory or pretextual. *State v. Salas*, 2010-NMSC-028, 148 N.M. 313, 236 P.3d 32.

Excusal for part of trial. — Paragraph C of this rule does not contemplate the excusal of prospective jurors for only one part of a trial if they have an inability to follow the court's instructions on a limited issue. *State v. Fry*, 2006-NMSC-001, 138 N.M. 700, 126 P.3d 516.

Rights of an accused in respect to panel and final jury are (1) that there be no systematic, intentional exclusion of any section of the community and (2) that there be left as fitted for service no biased or prejudiced person. *State v. Ortiz*, 1975-NMCA-112, 88 N.M. 370, 540 P.2d 850.

There is no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to a jury of any particular composition. *State v. Ortiz*, 1975-NMCA-112, 88 N.M. 370, 540 P.2d 850.

Distinctive community groups may not be systematically excluded from the jury wheels, pools of names, panels or venires from which juries are drawn, which jury pools should be reasonably representative of the community. *State v. Ortiz*, 1975-NMCA-112, 88 N.M. 370, 540 P.2d 850.

One is not entitled to relief simply because there isn't a member of his race on the jury unless he shows that the absence resulted from purposeful discrimination; however, one is entitled to relief regardless of palpable guilt if he shows actual exclusion resulting from purposeful discrimination based on race or economic status. *State v. Tapia*, 1970-NMCA-037, 81 N.M. 365, 467 P.2d 31 (decided under former law).

Defendant has right to be present for jury challenges. — The trial court erred in denying defendant the right to be present when challenges to the jury were made, and

the error mandated reversal and remand for a new trial. *State v. Garcia*, 1980-NMSC-132, 95 N.M. 246, 620 P.2d 1271.

Court's discretion to excuse juror for cause. — The trial court has the duty of seeing that there is a fair and impartial jury and in doing so, it must exercise discretion. The trial court's decision not to excuse a juror will not be disturbed unless there is a manifest error or a clear abuse of discretion. *State v. Valdez*, 1972-NMCA-014, 83 N.M. 632, 495 P.2d 1079, *aff'd*, 1972-NMSC-029, 83 N.M. 720, 497 P.2d 231, cert. denied, 409 U.S. 1077, 93 S. Ct. 694, 34 L. Ed. 2d 666 (1972) (decided under former law).

It is within the trial court's discretion as to whether a prospective juror should be excused. The trial court's decision will not be disturbed unless there is a manifest error or a clear abuse of discretion. *State v. Cutnose*, 1975-NMCA-021, 87 N.M. 300, 532 P.2d 889, *overruled on other grounds by State v. McCormack*, 1984-NMSC-006, 100 N.M. 657, 674 P.2d 1117.

It is for the trial court to determine whether a juror should be replaced because disqualified to perform the duties of a juror. The trial court's ruling will be reversed only for abuse of discretion. *State v. Padilla*, 1978-NMCA-020, 91 N.M. 451, 575 P.2d 960.

Excusing juror prejudiced in defendant's favor. — The trial court committed no error in excusing a prospective juror who indicated that he might be favorably prejudiced by the fact that defendants were members of the American Indian movement. Defendants were entitled to an impartial jury. They were not entitled to a juror prejudiced in their favor. *State v. Cutnose*, 1975-NMCA-021, 87 N.M. 300, 532 P.2d 889, *overruled on other grounds by State v. McCormack*, 1984-NMSC-006, 100 N.M. 657, 674 P.2d 1117.

Excluding jurors opposed to capital punishment. — Allowing the prosecutor in a first-degree murder trial to voir dire prospective jurors on their feelings regarding capital punishment and excusing for cause those jurors who were opposed to capital punishment did not deprive defendant of his right to trial by a cross-section of the community. *State v. Ortiz*, 1975-NMCA-112, 88 N.M. 370, 540 P.2d 850.

Since data about the public's attitude towards the death penalty is still in a tentative and fragmentary condition the appeals court was unable to conclude that the defendant was denied a jury that was impartial on the issue of guilt or innocence because those prospective jurors who were opposed to capital punishment were excused for cause. *State v. Ortiz*, 1975-NMCA-112, 88 N.M. 370, 540 P.2d 850.

Right to ask relevant questions on voir dire. — The right to an impartial jury carries with it the concomitant right to take reasonable steps to insure that the jury is impartial. One of the most important methods of securing this right is the right to challenge, yet the right to challenge has little meaning if it is unaccompanied by the right to ask relevant questions on voir dire upon which the challenge for cause can be predicated. *State v. Ortiz*, 1975-NMCA-112, 88 N.M. 370, 540 P.2d 850.

Individual voir dire of prospective jurors. — There are times when individual voir dire of prospective jurors is not only helpful but also essential in providing a fair trial, and the determination of whether to allow individual voir dire lies within the discretion of the trial court. *State v. Frank*, 1979-NMSC-012, 92 N.M. 456, 589 P.2d 1047.

Judge's control over voir dire is not judicial bias. — Restrictions on a party's voir dire by the court does not amount to reversible error absent a showing by defendant of some prejudice. Indeed, a judge's express desire to expedite resolution of a matter is not generally an indication of bias against either party. *State v. Fernandez*, 1994-NMCA-056, 117 N.M. 673, 875 P.2d 1104.

Exercise of right of challenge requires knowledge of all relevant matters. — Full knowledge of all relevant and material matters that might bear on possible disqualification of a juror is essential to a fair and intelligent exercise of the right of counsel to challenge either for cause or peremptorily. *Mares v. State*, 1971-NMSC-106, 83 N.M. 225, 490 P.2d 667 (decided under former law).

Where trial court required parties to exercise their peremptory challenges alternately, this violated the rule and is reversible error if defendant has been harmed by the error. Where defendant asserts he was harmed because he exercised all of his peremptory challenges, but makes no claim that he has been harmed by use of the alternate method in exercising peremptory challenges and does not claim that the jurors who tried the case were other than fair or impartial or that his peremptory challenges would have been exercised differently if the trial court had complied with the rule, the error did not amount to reversible error. *State v. Boeglin*, 1977-NMCA-004, 90 N.M. 93, 559 P.2d 1220.

Challenge of juror because she had heard officer testify in prior trial was without merit as no adequate factual basis was laid for consideration of a legal rule. *State v. Herrera*, 1971-NMCA-024, 82 N.M. 432, 483 P.2d 313, cert. denied, 404 U.S. 880, 92 S. Ct. 217, 30 L. Ed. 2d 161 (1971) (decided under former law).

Peremptory challenges for multiple defendants. — In a prosecution for first-degree murder, the defendant was not denied due process of law because the trial court failed to permit him to exercise 12 peremptory challenges for himself, but instead allowed the defendant and codefendant a total of 14 challenges. Multiple defendants have no constitutional right to more peremptory challenges than given them by rule, provided they are given a fair trial by an impartial jury. *State v. Sutphin*, 1988-NMSC-031, 107 N.M. 126, 753 P.2d 1314.

Several counts in indictment do not give additional peremptory challenges. — The fact that an indictment contains several counts does not entitle accused to any additional peremptory challenges, even though the different counts charge separate and distinct offenses which may be joined in the same indictment. This is also true where several indictments charging similar offenses, which might have been charged in

separate counts of the same indictment, are consolidated. *State v. Compton*, 1953-NMSC-036, 57 N.M. 227, 257 P.2d 915 (decided under former law).

No additional challenges where two felonies charged. — Where defendant has exercised all of his peremptory challenges of right, the court does not err in denying defendant additional challenges, sought on the ground that there are two felonies charged, and this does not require a severance. *State v. Salazar*, 1954-NMSC-062, 58 N.M. 489, 272 P.2d 688 (decided under former law).

Peremptory challenges by habitual offender subject to life imprisonment. — Where defendant sought 12 peremptory challenges because, if convicted, the conviction would be his fourth felony conviction, punishable by life imprisonment pursuant to the habitual offender statute, his claim was premature. Once defendant is charged as an habitual offender, and that charge alleges a sufficient number of prior felony convictions so that his sentence could be enhanced to life imprisonment, defendant might be entitled to 12 peremptories in selecting the jury to try the habitual offender charge. *State v. McKelvy*, 1978-NMCA-006, 91 N.M. 384, 574 P.2d 603.

It is the duty of a juror to make full and truthful answers to such questions as are asked, neither falsely stating any fact nor concealing any material matter. *Mares v. State*, 1971-NMSC-106, 83 N.M. 225, 490 P.2d 667 (decided under former law).

New trial based on juror's false answers. — If a juror falsely represents his interest or situation or conceals a material fact relevant to the controversy and such matters, if truthfully answered, might establish prejudice or work a disqualification of the juror, the party misled or deceived thereby, upon discovering the fact of the juror's incompetency or disqualification after trial, may assert that fact as ground for and obtain a new trial, upon a proper showing of such facts, even though the bias or prejudice is not shown to have caused an unjust verdict, it being sufficient that a party, through no fault of his own, has been deprived of his constitutional guarantee of a trial of his case before a fair and impartial jury. *Mares v. State*, 1971-NMSC-106, 83 N.M. 225, 490 P.2d 667.

Silence of prospective juror can be relied upon the same as negative answer. — Where the only fact disclosed by the juror was that he had been a good friend of victim and her late husband for 22 years and the juror did not indicate his further involvement to such an extent as would have put counsel on further inquiry, his silence can be the same as a negative answer upon which a party has a right to rely. *Mares v. State*, 1971-NMSC-106, 83 N.M. 225, 490 P.2d 667 (decided under former law).

No basis found for holding that jurors failed to respond fully. — Where defendant moved for new trial, alleging that upon voir dire none of the jurors stated that they knew a certain defense witness or had sat as jurors in his trial, but there was no record of the voir dire proceedings so that the appellate court did not know what questions were asked on voir dire, nor did defendant allege that prospective jurors were asked about the witness, it was held that there was no basis for holding that any juror failed to

respond fully and truthfully to an asserted question not supported by the record. *State v. Carrillo*, 1975-NMCA-103, 88 N.M. 236, 539 P.2d 626.

Challenge of black jury member not necessarily improper. — Challenge of the one black member of the jury venire is insufficient to raise the inference of improper use of the peremptory challenge by the state. *State v. Crespin*, 1980-NMCA-073, 94 N.M. 486, 612 P.2d 716.

The prosecution's exercise of a peremptory challenge against the sole black member of the jury panel does not violate the defendant's right to an impartial jury, absent a showing of the prosecution's systematic exclusion of black jurors. *State v. Davis*, 1983-NMCA-027, 99 N.M. 522, 660 P.2d 612.

Challenge jury selection before jury sworn. — Generally, a challenge to jury selection must be made before the jury is sworn. *State v. Wilson*, 1993-NMCA-074, 117 N.M. 11, 868 P.2d 656.

Challenge of jury array because of earlier dismissal of panel members. — Defendant's challenge of the jury array because the trial judge, in a previous case, had dismissed 12 members of the petit jury panel was without merit. *State v. Herrera*, 1971-NMCA-024, 82 N.M. 432, 483 P.2d 313, cert. denied, 404 U.S. 880, 92 S. Ct. 217, 30 L. Ed. 2d 161 (1971) (decided under former law).

Alternate jurors. — When a seated juror is excused and replaced by an alternate juror prior to deliberations, the verdict is not affected, and the defendant is considered to have been tried by the same jury. *State v. Pettigrew*, 1993-NMCA-095, 116 N.M. 135, 860 P.2d 777.

Where defendant fails to exercise available peremptory challenges, he cannot claim prejudice for failure to dismiss prospective jurors. *State v. Smith*, 1979-NMSC-020, 92 N.M. 533, 591 P.2d 664.

Effect of defendant's refusal to have juror replaced by alternate. — Defendant's argument that he was deprived of his right to excuse a juror for cause or by invocation of peremptory challenge after disclosure on the second day of trial of her failure to reveal possibly relevant information in response to his questions during voir dire was without merit; where defendant refused the trial court's offer to substitute an alternate juror, he waived his right to challenge the first juror on appeal. Furthermore, the prerequisite for dismissing an empanelled juror and substitution of an alternate juror therefor, that is, a showing of inability to perform the duties of a juror and consequent prejudice to the defendant arising therefrom, was not established. *State v. Bojorquez*, 1975-NMCA-075, 88 N.M. 154, 538 P.2d 796, cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

Voir dire on death penalty where penalty mandatory. — It is not improper to voir dire potential jurors on the death penalty merely because they will not have any discretion in imposing it. *State v. Ortiz*, 1975-NMCA-112, 88 N.M. 370, 540 P.2d 850.

Any unauthorized contact with juror is presumptively prejudicial to a criminal defendant. *Mares v. State*, 1971-NMSC-106, 83 N.M. 225, 490 P.2d 667 (decided under former law).

Law reviews. — For survey, "Children's Court Practice in Delinquency and Need of Supervision Cases Under the New Rules," see 6 N.M.L. Rev. 331 (1976).

For note, "Criminal Law - Discriminatory Use of Peremptory Challenges in Jury Selection: State of New Mexico v. Sandoval," see 19 N.M.L. Rev. 563 (1989).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 1112, 1116 to 1125, 1254.

Right of defense in criminal prosecution to disclosure of prosecution information regarding prospective jurors, 86 A.L.R.3d 571.

Validity and construction of statute or court rule prescribing number of peremptory challenges in criminal cases according to nature of offense or extent of punishment, 8 A.L.R.4th 149.

Validity of jury selection as affected by accused's absence from conducting of procedures for selection and impaneling of final jury panel for specific case, 33 A.L.R.4th 429.

Propriety of use of multiple juries at joint trial of multiple defendants in state criminal prosecution, 41 A.L.R.4th 1189.

Cure of prejudice resulting from statement by prospective juror during voir dire, in presence of other prospective jurors, as to defendant's guilt, 50 A.L.R.4th 969.

Fact that juror in criminal case, or juror's relative or friend, has previously been victim of criminal incident as ground of disqualification, 65 A.L.R.4th 743.

Propriety of substituting juror in bifurcated state trial after end of first phase and before second phase is given to jury, 89 A.L.R.4th 423.

Threats of violence against juror in criminal trial as ground for mistrial or dismissal of juror, 3 A.L.R.5th 963.

Prospective juror's connection with insurance company as ground for challenge for cause, 9 A.L.R.5th 102.

Use of peremptory challenges to exclude ethnic and racial groups, other than Black Americans, from criminal jury - post-*Batson* state cases, 20 A.L.R.5th 398.

Use of preemptory challenges to exclude caucasian persons, as a racial group, from criminal jury-post-batson state cases, 47 A.L.R.5th 259.

Examination and challenge of federal case jurors on basis of attitudes toward homosexuality, 85 A.L.R. Fed. 864.

Selection and impaneling of alternate jurors under Rule 24(c) of Federal Rules of Criminal Procedure, 119 A.L.R. Fed. 589.

Stranger's alleged communication with juror, other than threat of violence, as prejudicial in federal criminal prosecution, 131 A.L.R. Fed. 465.

50A C.J.S. Juries § 244 et seq.

5-607. Order of trial.

The order of trial shall be as follows:

A. a qualified jury shall be selected and sworn to try the case;

B. initial instructions as provided in Rule Set 14 NMRA, Uniform Jury Instructions - Criminal shall be given by the court;

C. the state may make an opening statement. The defense may then make an opening statement or may reserve its opening statement until after the conclusion of the state’s case;

D. the state shall submit its evidence;

E. out of the presence of the jury, the court shall determine the sufficiency of the evidence, whether or not a motion for directed verdict is made;

F. the defense may then make an opening statement, if reserved;

G. the defense may submit its evidence;

H. the state may submit evidence in rebuttal;

I. the defense may submit evidence in surrebuttal;

J. at any time before submission of the case to the jury, the court may, for good cause shown, permit the state or defense to submit additional evidence;

K. out of the presence of the jury, the court shall determine the sufficiency of the evidence, whether or not a motion for directed verdict is made;

L. the instructions to be given shall be determined in accordance with Rule 5-608 NMRA. The court shall then instruct the jury;

M. the state may make a closing argument;

N. the defense may make a closing argument;

O. the state may make a rebuttal argument; and

P. the court may determine the sufficiency of the evidence, whether or not a motion for directed verdict is made, after the return of the jury's verdict.

[As amended by Supreme Court Order No. 21-8300-020, effective for all cases pending or filed on or after December 31, 2021; as amended by Supreme Court Order No. S-1-RCR-2023-00020, effective for all cases pending or filed on or after December 31, 2023.]

Committee commentary. — Nothing in the provisions of Paragraph E of this rule alters long-settled law that a defendant, by presenting evidence, "waive[s a] claim that the evidence at the close of the State's case [is] insufficient for submission to the jury." *State v. Lard*, 1974-NMCA-004, ¶ 4, 86 N.M. 71, 519 P.2d 307. However, under Paragraph K of this rule the defendant need no longer move for a directed verdict at the close of all of the evidence to preserve a claim that the evidence was insufficient to allow the case to go to the jury. *Lard*, 1974-NMCA-004, at ¶ 6; *see State v. Hernandez*, 1993-NMSC-007, ¶ 66, 115 N.M. 6, 946 P.2d 312 (pointing to Rule 5-607(K) in holding that a trial court's "procedural lapse" in failing to rule on the sufficiency of the evidence at the close of all evidence itself "preserves the issue of sufficiency of the evidence for appellate review").

The 1975 amendments to this rule inserted a new Paragraph B to allow for instructions at the outset of the trial as provided in Rule Set 14 NMRA, Uniform Jury Instructions - Criminal. In addition, a new Paragraph L of this rule alerts the court and counsel that the procedure for settling instructions at the close of the evidence is provided for in Rule 5-608 NMRA.

[As amended by Supreme Court Order No. 21-8300-020, effective for all cases pending or filed on or after December 31, 2021.]

ANNOTATIONS

The 2023 amendment, approved by Supreme Court No. S-1-RCR-2023-00020, effective December 31, 2023, provided that the district court may determine the

sufficiency of the evidence after the return of the jury's verdict, whether or not a motion for directed verdict has been made; and added Paragraph P.

The 2021 amendment, approved by Supreme Court Order No. 21-8300-020, effective December 31, 2021, made technical amendments, and revised the committee commentary; in Paragraph B, after "provided in", deleted "UJI" and added "Rule Set 14 NMRA, Uniform Jury Instructions"; in Paragraph M, after "may make", deleted "the opening" and added "a closing"; in Paragraph N, after "may make", deleted "its" and added "a closing"; and in Paragraph O. after "may make", added "a", and after "argument", deleted "only".

The word "shall" in this rule is mandatory. *State v. Davis*, 1982-NMCA-057, 97 N.M. 745, 643 P.2d 614.

Order of trial when insanity defense raised. — Until these rules are amended to accommodate for a bifurcated trial, separating the issues of insanity and guilt when the insanity defense is raised, the order prescribed by this rule should be followed. *State v. Luna*, 1980-NMSC-009, 93 N.M. 773, 606 P.2d 183.

It is trial court's duty to see that no improper statements are made which are likely to influence the jury in their verdict, and that the cause is tried upon the sworn testimony of the witnesses. *State v. Herrera*, 1977-NMCA-028, 90 N.M. 306, 563 P.2d 100, cert. denied, 90 N.M. 636, 567 P.2d 485.

This rule does not provide for motions for a directed verdict to be taken under advisement. *State v. Davis*, 1982-NMCA-057, 97 N.M. 745, 643 P.2d 614.

Under Subdivision (k) (*see now* Paragraph K), the issue is whether there is sufficient evidence to justify a rational trier of fact to find guilt beyond a reasonable doubt. *State v. Sheets*, 1981-NMCA-064, 96 N.M. 75, 628 P.2d 320.

A trial court's inherent authority to review the sufficiency of the evidence does not end post-verdict. — Where Defendant was convicted of criminal sexual penetration and battery against a household member, and where two days after accepting the jury's verdicts, the district court, on its own motion, vacated both convictions, concluding that the State failed to provide sufficient evidence to identify Defendant as the person who actually committed the crimes, there was no error because a trial court, with jurisdiction over a criminal case, has the inherent authority to review the sufficiency of the evidence supporting conviction at any time while its jurisdiction over the case continues. *State v. Martinez*, 2022-NMSC-004, *rev'g* A-1-CA-37798, mem. op. (N.M. Ct. App. Sept. 16, 2019) (non-precedential).

Determination of sufficiency of evidence for submission to jury. — The trial court's proper function is limited; it should only determine whether the evidence is sufficient for the submission of the case to the jury; in doing so, the trial court is to view the evidence

in the light most favorable to the state. *State v. Davis*, 1982-NMCA-057, 97 N.M. 745, 643 P.2d 614.

The trial court's failure to rule on the sufficiency of the evidence must be considered as a denial of the defendant's challenge to the sufficiency of the evidence. *State v. Davis*, 1982-NMCA-057, 97 N.M. 745, 643 P.2d 614.

Failure of the trial court to rule on the sufficiency of the evidence before presentation of the case to the jury did not merit reversal, but merely preserved the issue of sufficiency of the evidence for appellate review. *State v. Hernandez*, 1993-NMSC-007, 115 N.M. 6, 846 P.2d 312.

Legal conclusion, upon review, considered in light favorable to prosecution. — Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion, that, upon judicial review, all of the evidence is to be considered in the light most favorable to the prosecution. *State v. Sheets*, 1981-NMCA-064, 96 N.M. 75, 628 P.2d 320.

Attempted murder conviction dependent upon conspiracy not sustained where conspiracy evidence insufficient. — Where a conviction for attempted first-degree murder is a derivative liability which depends on a conviction for conspiracy to commit first-degree murder and there is insufficient evidence to sustain the conspiracy conviction, the evidence is insufficient to sustain the attempt conviction. *State v. Sheets*, 1981-NMCA-064, 96 N.M. 75, 628 P.2d 320.

Determining sufficiency of evidence in absence of motion for directed verdict. — The issue of the sufficiency of the evidence was before the appellate court even though no motion for a directed verdict was made at the close of the evidence. *State v. Herrera*, 1977-NMCA-028, 90 N.M. 306, 563 P.2d 100, cert. denied, 90 N.M. 636, 567 P.2d 485.

State's contention that defendant who did not move for a directed verdict at the close of all the evidence waived any claim that the evidence was insufficient was correct under prior law, but under this rule, absence of a motion for a directed verdict at the close of all the evidence did not waive the claim that the evidence was insufficient at that point because the trial court was required to make that determination in the absence of a motion. *State v. Lard*, 1974-NMCA-004, 86 N.M. 71, 519 P.2d 307.

On motion to dismiss, evidence viewed in light most favorable to state. — The trial court, in passing upon a motion to dismiss the charges, is to view the evidence in the light most favorable to the state. *State v. Rodriguez*, 1970-NMSC-073, 81 N.M. 503, 469 P.2d 148.

Counsel is entitled to reasonable measure of latitude in closing remarks to a jury and statements having their basis in the evidence, together with reasonable inferences to be drawn therefrom, are permissible and do not warrant reversal. *State v. Herrera*, 1972-NMCA-068, 84 N.M. 46, 499 P.2d 364, cert. denied, 84 N.M. 37, 499 P.2d 355.

Rebuttal argument found not to assert state's theory of case for first time. — Where the state's rebuttal argument, even when taken out of context as defendant did, was fairly within the evidence and consistent with the state's theory of first-degree murder presented throughout the trial, including its opening argument, defendant's contention that the state asserted its theory of the case for the first time during its rebuttal argument and that defendant was prejudiced because unable to respond to the new theory was frivolous. *State v. King*, 1977-NMCA-042, 90 N.M. 377, 563 P.2d 1170.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75A Am. Jur. 2d Trial §§ 495, 496, 535 to 538, 540.

Adequacy of defense counsel's representation of criminal client regarding argument, 6 A.L.R.4th 16.

Prosecutor's reference in opening statement to matters not provable or which he does not attempt to prove as ground for relief, 16 A.L.R.4th 810.

Prosecutor's appeal in criminal case to racial, national, or religious prejudice as ground for mistrial, new trial, reversal, or vacation of sentence - modern cases, 70 A.L.R.4th 664.

Propriety of trial court order limiting time for opening or closing argument in criminal case - state cases, 71 A.L.R.4th 200.

Negative characterization or description of defendant, by prosecutor during summation of criminal trial, as ground for reversal, new trial, or mistrial - modern cases, 88 A.L.R.4th 8.

Propriety and prejudicial effect of counsel's negative characterization or description of witness during summation of criminal trial - modern cases, 88 A.L.R.4th 209.

88 C.J.S. Trial §§ 31 to 35.

5-608. Instructions to juries.

A. **Required instructions.** The court must instruct the jury upon all questions of law essential for a conviction of any crime submitted to the jury.

B. **Requested instructions.** At the close of the defendant's case, or earlier if ordered by the court, the parties shall tender requested instructions in writing. The original and such copies as may be required by the court shall be given the court, and a copy shall be served on opposing counsel. The original shall have a place for the court to insert a number (No. . . . . .) but shall contain no title or other notations. The copies shall indicate the following information:

(1) [Plaintiff's] [Defendant's] Requested Instruction No. . . . . .;

(2) UJI Criminal No. . . . . .;

(3) If not in UJI Criminal, authority for tendered instruction should be indicated.

C. **Advisement of parties; filing.** The court shall advise the parties of the instructions to be given and:

(1) number the originals of the instructions to be given;

(2) mark one (1) copy of each instruction tendered as either given or refused and initial the copies;

(3) file such marked copies with the district court clerk.

D. **Objections.** Except as provided in Paragraph A of this rule, for the preservation of error in the charge, objection to any instruction given must be sufficient to alert the mind of the court to the claimed vice therein, or, in case of failure to instruct on any issue, a correct written instruction must be tendered before the jury is instructed. Before the jury is instructed, reasonable opportunity shall be afforded counsel so to object or tender instructions, on the record and in the presence of the court.

E. **Use in jury room.** Written instructions of the court shall go to the jury room, but no instruction which goes to the jury room shall contain any notation.

Committee commentary. — This rule was amended in 1975 in conjunction with the Uniform Jury Instructions project. The main purpose of the revision of the rule was to provide a procedure for instructions similar to that used after the adoption of UJI Civil. *See* Rule 1-051 NMRA. As stated by the New Mexico Supreme Court in *State v. Sherwood*, 39 N.M. 518, 50 P.2d 968 (1935), "Prudence and justice would suggest that it would be safest and best, before submitting instructions to a jury, to call upon counsel for both sides to point out specifically what objections, if any, they may have to such instructions, and to request them to suggest such additional instructions as they may think are necessary".

Paragraph A of this rule, codifying prior court decisions, requires the district court to instruct the jury on the law essential for a conviction of the crimes submitted to the jury even if no requested instructions are presented by the parties. *See Territory v. Baca*, 11 N.M. 559, 71 P. 460 (1903). In *State v. Gunzelman*, 85 N.M. 295, 512 P.2d 55 (1973), the supreme court held that the failure of the district court to properly instruct on all of the essential elements of the crime charged was jurisdictional and could be raised for first time on appeal. *See also*, *State v. Walsh*, 81 N.M. 65, 463 P.2d 41 (Ct. App. 1969). Although this rule only requires the court to include instructions essential for conviction "on his own motion", the rule would not prevent the court from including other instructions supported by the evidence when no instruction is tendered.

Paragraph D of this rule retains the language of former Subdivision (g) of this rule. It requires a proper objection or tendering of a proper instruction for matters not covered by Paragraph A of this rule. *See State v. Romero*, 86 N.M. 99, 519 P.2d 1180 (Ct. App. 1974); *State v. Urban*, 86 N.M. 351, 524 P.2d 523 (Ct. App. 1974); *State v. Romero*, 87 N.M. 279, 532 P.2d 208 (Ct. App. 1975). The final sentence of the rule was added in 1975 to make it clear that the parties are entitled to have the district judge hear the objections. *See Webb v. Webb*, 87 N.M. 353, 533 P.2d 586 (1975).

ANNOTATIONS

Compiler's notes. — For reference to superseding of civil rules of procedure governing criminal proceedings by Rules of Criminal Procedure for the District Courts, *see* compiler's notes to Rule 5-101 NMRA.

Conviction of offense not presented to jury. — Where a jury acquitted a defendant of 44 out of 52 charges of violating the Water Quality Act, and defendant appealed his convictions of the remaining eight felony counts, and the appellate court found insufficient evidence to sustain the eight convictions but remanded to the district court to enter judgment and resentencing of eight counts of attempt to commit the offenses of which defendant was convicted, even though he was not charged with attempt and the jury was not instructed regarding the crime of attempt, a conviction of an offense not presented to the jury would deprive the defendant of notice and an opportunity to defend against that charge and would be inconsistent with New Mexico law regarding jury instructions and preservation of error. *State v. Villa*, 2004-NMSC-031, 136 N.M. 367, 98 P.3d 1017.

Rule requires trial court to instruct the jury on the law essential for a conviction of the crime submitted to the jury even if no requested instruction is tendered. *State v. Bender*, 1978-NMSC-044, 91 N.M. 670, 579 P.2d 796.

This rule requires the court to instruct on all essential elements of a crime. *State v. Osborne*, 1991-NMSC-032, 111 N.M. 654, 808 P.2d 624; *State v. Acosta*, 1997-NMCA-035, 123 N.M. 273, 939 P.2d 1081, cert. quashed, 124 N.M. 312, 950 P.2d 285.

Trial court's failure to instruct the jury in embezzlement prosecution on the essential element of fraudulent intent constituted reversible error under this rule. *State v. Green*, 1993-NMSC-056, 116 N.M. 273, 861 P.2d 954.

Both the defendant and the state have a duty to tender correct instructions to the trial court. *Jackson v. State*, 1983-NMSC-098, 100 N.M. 487, 672 P.2d 660.

Error to alter uniform jury instruction on elements of crime. — When a uniform jury instruction is provided for the elements of a crime, it is error to alter the instruction. *State v. Jackson*, 1983-NMCA-007, 99 N.M. 478, 660 P.2d 120, *rev'd on other grounds*, 1983-NMSC-098, 100 N.M. 487, 672 P.2d 660.

Where court rejects modified instruction proposed by defendant. — In case of a failure to instruct on an issue, the phrase "a correct written instruction must be tendered before the jury is instructed" is not applicable when refusal by the court of a proposed instruction on a lesser included offense depends upon a requested modification of the uniform jury instruction. If the court believes no modification is appropriate, the court should instruct in the exact language of the uniform jury instruction. The party requesting the modification can preserve error by alerting the mind of the court to any vice claimed to be present in the uniform jury instruction. *Gallegos v. State*, 1992-NMSC-014, 113 N.M. 339, 825 P.2d 1249.

Failure of trial court to properly instruct on all essential elements of crime charged is jurisdictional and may be raised for the first time on appeal. *State v. Bender*, 1978-NMSC-044, 91 N.M. 670, 579 P.2d 796.

The failure to give an instruction on the law essential for a conviction, required by supreme court mandate, is jurisdictional and reversible error, and the defendant need not tender a mandatory instruction nor object to its omission in order to preserve the error. *State v. Otto*, 1982-NMCA-149, 98 N.M. 734, 652 P.2d 756.

The failure to instruct the jury on the essential elements of an offense constitutes fundamental error. Where fundamental error is involved, it is irrelevant that the defendant was responsible for the error by failing to object to an inadequate instruction or by objecting to an instruction which might have cured the defect in the charge to the jury. *State v. Osborne*, 1991-NMSC-032, 111 N.M. 654, 808 P.2d 624; *State v. Acosta*, 1997-NMCA-035, 123 N.M. 273, 939 P.2d 1081, cert. quashed, 124 N.M. 312, 950 P.2d 285.

Defendant is entitled to have his theory of case submitted to jury under proper instructions where the evidence supports it. *State v. Montano*, 1980-NMCA-163, 95 N.M. 233, 620 P.2d 887.

Right of accused to instructions is controlled by criminal procedure rules. *State v. Najar*, 1980-NMCA-033, 94 N.M. 193, 608 P.2d 169.

Instruction with alternative intent requirements based on statutory language. — There is no difference between an indictment in the alternative in which the charge follows the language of Section 30-6-1C NMSA 1978, relating to child abuse, and the giving of an instruction which includes alternative intent requirements based on the language of the statute; if the alternative charging is not legally deficient, then the instruction is not legally deficient. *State v. Utter*, 1978-NMCA-064, 92 N.M. 83, 582 P.2d 1296.

Where there is basis in evidence for each self-defense instruction, UJI Crim. 41.41 and 41.51 (*see now* UJI 14-5171 and 14-5181 NMRA), and each instruction states the basis for its factual application, the instructions are neither conflicting nor confusing; it would not be an error to refuse an additional instruction explaining how to apply the self-

defense instructions, and it is not an error to fail to give such an additional instruction which is not requested. *State v. Brown*, 1979-NMCA-038, 93 N.M. 236, 599 P.2d 389, cert. denied, 93 N.M. 172, 598 P.2d 215, cert. denied, 444 U.S. 1084, 100 S. Ct. 1041, 62 L. Ed. 2d 769 (1980).

Defendant must tender correct instruction before premising error on refusal to instruct. — In order to premise error on the refusal of the trial court to instruct, the defendant must tender a legally correct instruction on the law. *State v. Jackson*, 1983-NMCA-007, 99 N.M. 478, 660 P.2d 120, *rev'd on other grounds*, 1983-NMSC-098, 100 N.M. 487, 672 P.2d 660; *State v. Garcia*, 1983-NMCA-069, 100 N.M. 120, 666 P.2d 1267; *State v. Crislip*, 1990-NMCA-054, 110 N.M. 412, 796 P.2d 1108.

Defendant properly preserved the issue of failure to instruct on a lesser included offense where he tendered correct written instructions and brought the issue to the trial court's attention as shown by the court's initializing of his denial of the instructions. *State v. Curley*, 1997-NMCA-038, 123 N.M. 295, 939 P.2d 1103.

Rationale for allowing flexibility regarding preservation is reinforced by the actual purpose of Paragraph D of this rule. *State v. Jernigan*, 2006-NMSC-003, 139 N.M. 1, 127 P.3d 537 139 N.M. 1, 127 P.3d 537.

Defendant's right to challenge defective instruction. — The rules of criminal procedure exempt from the normal requirements for preserving an issue on appeal errors involving the essential elements of an offense. Moreover, a defendant's offer of defective instructions and failure to object to the omission of an element in the instructions given by the court does not bar consideration of this issue on appeal. *State v. Peterson*, 1998-NMCA-049, 125 N.M. 55, 956 P.2d 854.

Defendant must submit a proper instruction to preserve error only if no instruction is given on the issue in question on appeal. *Santillanes v. State*, 1993-NMSC-012, 115 N.M. 215, 849 P.2d 358.

Defendant may not complain of instruction given at his request. *State v. Mills*, 1980-NMCA-005, 94 N.M. 17, 606 P.2d 1111, cert. denied, 94 N.M. 628, 614 P.2d 545.

As a general proposition, a defendant may not complain of an instruction given at his request. *State v. Norush*, 1982-NMCA-034, 97 N.M. 660, 642 P.2d 1119.

Waiver of error based on failure to instruct. — The defendant in a murder trial waived any error based on the failure to instruct on voluntary manslaughter by taking the position that no such instruction should be given. *State v. Najar*, 1980-NMCA-033, 94 N.M. 193, 608 P.2d 169.

A defendant neither tendered a written instruction nor orally dictated one to the trial court regarding a modification of jury instructions, the purpose of this rule requiring a tendered written instruction was not met, and the issue was not preserved for review.

State v. Badoni, 2003-NMCA-009, 133 N.M. 257, 62 P.3d 348, cert. denied, 133 N.M. 126, 61 P.3d 835.

Where there was no objection in trial court to definition of negligence, that issue may not be raised for the first time on appeal. *State v. Robinson*, 1979-NMCA-001, 93 N.M. 340, 600 P.2d 286, cert. denied, 92 N.M. 532, 591 P.2d 286 (1979), *overruled on other grounds by Santillanes v. State*, 1993-NMSC-012, 115 N.M. 215, 849 P.2d 358.

Trial court's failure to offer defense counsel an opportunity to object on the record to the court's rejection of a tendered instruction on aiding and abetting, before the jury began its deliberations, deprived defendant of a fair trial. *State v. Wilson*, 1990-NMSC-019, 109 N.M. 541, 787 P.2d 821.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Instructions in state criminal case in which defendant pleads insanity as to hospital confinement in event of acquittal, 81 A.L.R.4th 659.

Court's duty to inform counsel of proposed action on requested instructions under Rule 30 of Federal Rules of Criminal Procedure, 40 A.L.R. Fed. 495.

When does trial court's noncompliance with requirement of Rule 30, Federal Rules of Criminal Procedure, that opportunity shall be given to make objection to instructions upon request, out of presence of jury, constitute prejudicial error, 55 A.L.R. Fed. 726.

Propriety of lesser-included-offense charge to jury in federal criminal case - general principles, 100 A.L.R. Fed. 481.

5-609. Submission to jury.

A. **Foreman.** The court shall direct the jury to select one of its members as foreman to preside over its deliberations.

B. **Forms of verdict.** Before the jury retires the court shall submit to it written forms of verdict for its use in returning a verdict.

C. **Exhibits.** Upon its request to review any exhibit during its deliberations, the jury shall be furnished all exhibits received in evidence.

Committee commentary. — Paragraph C of this rule, allowing the exhibits to go to the jury room upon the request of the jury, modifies the holding in *State v. Valles*, 83 N.M. 541, 494 P.2d 619 (Ct. App. 1972). In that case, the court of appeals held that there was no abuse of discretion by the trial court in refusing to allow exhibits to go to the jury room. Under Paragraph C of this rule, if the jury requests any one exhibit, all exhibits should go in as a way of preventing undue emphasis being placed on one of the exhibits. Because the submission to the jury is automatic upon request under this rule, it is not error for such submission to take place when the defendant and his attorney are

not present. *State v. Riordan*, 86 N.M. 92, 519 P.2d 1029 (Ct. App. 1974). *See also*, *State v. Chavez*, 86 N.M. 199, 521 P.2d 1040 (Ct. App.), cert. denied, 86 N.M. 189, 521 P.2d 1030 (1974).

ANNOTATIONS

Amount of time to be spent in deliberation is a matter for the jury to determine and there is nothing in the nature of things to prevent a jury from being so overwhelmed by the evidence that they need not leave the jury box to reach a verdict. *State v. Mosier*, 1971-NMCA-138, 83 N.M. 213, 490 P.2d 471 (decided under former law).

All exhibits received in evidence are to be furnished to the jury if the jury requests any exhibit. *State v. Chavez*, 1974-NMCA-021, 86 N.M. 199, 521 P.2d 1040, cert. denied, 86 N.M. 189, 521 P.2d 1030.

Subdivision (c) (*see now* Paragraph C) permitting jury to review any exhibits during deliberations does not exclude recorded exhibits. *State v. Fried*, 1978-NMCA-097, 92 N.M. 202, 585 P.2d 647, cert. denied, 92 N.M. 260, 586 P.2d 1089.

Jury listening to tape recording during deliberations not prejudicial. *State v. Fried*, 1978-NMCA-097, 92 N.M. 202, 585 P.2d 647, cert. denied, 92 N.M. 260, 586 P.2d 1089.

Magnifying glass in jury room proper. — Enhancement of the jury's visual acuity through use of a magnifying glass is not experimentation unless there is some indication that the magnification produced additional evidence. *State v. Griffin*, 1993-NMSC-071, 116 N.M. 689, 866 P.2d 1156.

Defendant's presence when exhibits requested or delivered. — This does not require that the defendant and his attorney be present when jury's request to review exhibits is received nor when the exhibits are delivered. *State v. Riordan*, 1974-NMCA-013, 86 N.M. 92, 519 P.2d 1029.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 23A C.J.S. Criminal Law § 1365 et seq.

5-610. Additional instructions to jury following retirement; communications between court and jury.

A. **Upon jurors' request.** After the jurors have retired to consider their verdict, if they desire additional instructions or to have any testimony read to them, they may in the discretion of the court be returned to the courtroom and the court may give them such additional instructions if authorized by UJI Criminal or may order such testimony read to them. Such instruction shall be given and such testimony read only after notice to, and in the presence of, the attorneys and the defendants.

B. **Recall of jurors by court.** The court may recall the jurors after they have retired to consider their verdict to give them additional instructions if authorized by UJI Criminal, or to correct any erroneous instructions it has given them. Such additional or corrective instructions may be given only after notice to and in the presence of the attorneys and the defendants.

C. **Additional evidence prohibited.** After the jurors have retired to consider their verdict, the court shall not recall the jurors to hear additional evidence.

D. **Communications; judge and jury.** The defendant shall be present during all communications between the court and the jury unless the defendant has signed a written waiver of the right to be personally present. All communications between the court and the jury must be in open court in the presence of the defendant and counsel for the parties unless the defendant waives on the record the right to be present or unless the communication involves only a ministerial matter. Unless requested by counsel for the defendant, communications between the court and the jury on a ministerial matter may be made in writing after notice to all counsel without recalling the defendant.

[As amended, effective September 1, 2005.]

Committee commentary. — This rule incorporated the holding in *State v. Lindwood*, 79 N.M. 439, 444 P.2d 766 (Ct. App. 1968), that it was not prejudicial error for the court to recall the jury and give it an instruction previously overlooked after the charge had been given and arguments of counsel made.

In addition to authorizing additional instructions, Paragraph A of this rule specifically allows the reading of testimony to the jury. *State v. Montoya*, 86 N.M. 316, 523 P.2d 814 (Ct. App. 1974).

Paragraph D of this rule has been added to clarify the procedure for communications between the judge and the jury, after the jury has retired to consider the verdict, without recalling the jury. *See State v. McClure*, 94 N.M. 440, 612 P.2d 232 (Ct. App. 1980); *State v. Hinojos*, 95 N.M. 659, 625 P.2d 588 (Ct. App. 1980); *State v. Saavedra*, 93 N.M. 242, 599 P.2d 395 (Ct. App. 1979); *State v. Orona*, 92 N.M. 450, 589 P.2d 1041 (1979); *State v. Brugger*, 84 N.M. 135, 500 P.2d 420 (Ct. App. 1972); *State v. Beal*, 48 N.M. 84, 146 P.2d 175 (1944). In addition, provision has been made for those communications which do not relate to issues in the case at trial to be made without having the defendant present, provided the defendant's presence has not been requested by his attorney. Rule 43 of the Federal Rules of Criminal Procedure, regarding the presence of the defendant, has been interpreted to allow such communications without the presence of the defendant. *United States v. Mesteth*, 528 F.2d 333 (8th Cir. 1976); *United States v. Reynolds*, 489 F.2d 4 (6th Cir. 1973), *cert. denied*, 416 U.S. 988, 40 L. Ed. 2d 766, 94 S. Ct. 2395 (1974); *United States v. Dellinger*, 472 F.2d 340 (7th Cir. 1972), *cert. denied*, 410 U.S. 970, 35 L. Ed. 2d 706, 93 S. Ct. 1443 (1973); *United States v. Alper*, 449 F.2d 1223 (3d Cir. 1971), *cert. denied*,

405 U.S. 988, 31 L. Ed. 2d 453, 92 S. Ct. 1248, *reh. denied*, 406 U.S. 911, 31 L. Ed. 2d 822, 92 S. Ct. 1605 (1972); and *United States v. Stone*, 452 F.2d 42 (8th Cir. 1971).

All communications between the judge and jury should be made a part of the record, whether made in the presence of defense counsel and defendant or not.

While a case is pending, a judge may not entertain any ex parte communications from any party, from counsel for any party, from any advocacy group on behalf of any party, or with any member of the probation department except as allowed by law. Any authorized ex parte communication between the court and the probation department must be in writing.

ANNOTATIONS

The 2005 amendment, approved by Supreme Court order No. 05-8300-011, effective September 1, 2005, rewrote Paragraph D relating to presence of the defendant during communications between the court and jury.

The court has a duty to inform the jury regarding the option of ceasing deliberations. — If the jury reveals that it is having difficulty arriving at a unanimous verdict, and the jury is under the mistaken impression that it is required to continue its deliberations indefinitely until a unanimous verdict is achieved, the trial court has a mandatory duty to inform the jury that it may cease deliberations and not arrive at a unanimous verdict if it is indeed deadlocked. *State v. Juan*, 2010-NMSC-041, 148 N.M. 747, 242 P.3d 314.

Failure to answer jury's question regarding the option of a hung jury. — Where the trial court instructed the jury pursuant to UJI 14-6101 NMRA; after the jury had begun deliberations, the jury asked the court whether a non-verdict or a hung jury was an option and indicated that a non-verdict or a hung jury was not an option under the general verdict instruction; the court never responded to the jury's question, even though the court had promptly responded to all other inquiries from the jury; the jury did not report that it was deadlocked or reveal the status of its deliberations in terms of numerical division; and the jury returned a guilty verdict, the court's failure to issue a supplementary instruction in answer to the jury's instruction coerced the jury into reaching a verdict, requiring a new trial. *State v. Juan*, 2010-NMSC-041, 148 N.M. 747, 242 P.3d 314.

Communication between court and jury. — Where the jury, through the foreperson or a note, in the presence of the defendant and all counsel, but not in the presence of the jury, informs the court of its numerical split with a minority favoring a not guilty verdict, and the court's instruction to the jury in regard to further deliberations is not in open court, is oral, and is carried out through the foreperson who returns to the jury room and orally relays the court's instruction to the jury, the communication constitutes fundamental error. *State v. Cortez*, 2007-NMCA-054, 141 N.M. 623, 159 P.3d 1108, cert. granted, 2007-NMCERT-005.

Improper communication. — Where a juror approached the trial judge in chambers to complain that another juror had announced that she did not believe the state's expert testimony and that she would not change her mind about defendant's innocence and the judge instructed the juror to "just report that you are hung" and to "do whatever you have to do", the conversation related to the case and was an improper communication that raised a presumption of prejudice. *State v. Jojola*, 2006-NMSC-048, 140 N.M. 660, 146 P.3d 305.

Juror's request of bailiff not prejudicial where no response given. — Where juror, during course of deliberations, requested definition of a phrase from a bailiff, but no definition was given, and since none would have been given in any event, the trial court did not err in finding that the presumption of prejudice had been overcome. *State v. Mankiller*, 1986-NMCA-053, 104 N.M. 461, 722 P.2d 1183.

Rule does not require that requested instructions be given. — Although this rule allows the trial court the discretion to give the jury additional or corrected instructions after it retires, it does not require that the requested instructions be given. *State v. Montano*, 1980-NMCA-163, 95 N.M. 233, 620 P.2d 887.

Court may give additional instruction without permitting more argument. — Where an additional instruction correctly stated the law and was supported by the evidence, it was not an abuse of discretion for the trial court to give the instruction without permitting more argument or giving defendant's requested instruction. *State v. Wall*, 1980-NMSC-034, 94 N.M. 169, 608 P.2d 145.

Additional jury instructions should be limited to offenses within indictment, because the indictment is the means by which a defendant learns of the charges he is expected to meet. *State v. Wall*, 1980-NMSC-034, 94 N.M. 169, 608 P.2d 145.

Instruction regarding culpability of accessory does not go beyond indictment. — Where the distinction between a principal and an accessory has been abolished, and defendant has been charged as a principal, an additional instruction given in response to a question from the jury regarding the culpability of an accessory does not go beyond the indictment or allege a new theory of liability. *State v. Wall*, 1980-NMSC-034, 94 N.M. 169, 608 P.2d 145.

Instruction correcting elements instruction. — Where defendant was charged with neglect of defendant's developmentally disabled adult child under the Residents Abuse and Neglect Act; there was no uniform jury instruction for violation of the Act; the trial court gave an elements instruction on the neglect charge and UJI 14-5120 NMRA as a separate instruction; and in response to a jury request for clarification of the mistake-of-fact instruction, which appeared to conflict with the elements instruction, the court instructed the jury, in a hand-written note, to add the mistake-of-fact element to the elements instruction, the manner in which the instructions laid out the elements was adequate for jury instruction. *State v. Greenwood*, 2012-NMCA-017, 271 P.3d 753, cert. denied, 2012-NMCERT-001.

Defendant's recall for issue-related communications clearly implied. — The second sentence of Paragraph D clearly implies that the defendant must be recalled when a communication relating to issues of the case at trial is made. This distinction reflects the well-settled law of New Mexico that it is improper for the trial court to have any communication with the jury concerning the subject matter of the court proceedings except in open court and in the presence of the accused and his counsel. *Hovey v. State*, 1986-NMSC-069, 104 N.M. 667, 726 P.2d 344.

Presumption of prejudice arises whenever an improper communication with the jury as to the subject matter of the proceedings in the defendant's absence occurs, and the state bears the burden of rebutting that presumption by making an affirmative showing on the record that the communication did not affect that jury's verdict. *Hovey v. State*, 1986-NMSC-069, 104 N.M. 667, 726 P.2d 344.

Rule as to inquiry as to numerical division given prospective application. — Prospective application is given to rule that inquiry into the numerical division of jurors is reversible error. Inquiries into numerical division occurring prior to the date of this decision will be reviewed under the approach taken in *State v. Nelson*, 1958-NMSC-018, 63 N.M. 428, 321 P.2d 202; *Pirch v. Firestone Tire & Rubber Co.*, 1969-NMCA-044, 80 N.M. 323, 455 P.2d 189, cert. denied, 80 N.M. 316, 454 P.2d 973.

Instructions related to jury's inability to reach verdict. — When a statement is submitted to the court by the jury during deliberations concerning the inability of the jury to arrive at a verdict, together with a disclosure of the numerical division, the judge not only can, but should, communicate with the jury and can do so if the communication leaves with the jury the discretion whether or not it should deliberate further. The court can inform the jury that it may consider further deliberations, but not that it must consider further deliberations. *State v. McCarter*, 1980-NMSC-003, 93 N.M. 708, 604 P.2d 1242.

Giving of additional instructions is within the trial court's discretion. *State v. Burk*, 1971-NMCA-018, 82 N.M. 466, 483 P.2d 940, cert. denied, 404 U.S. 955, 92 S. Ct. 309, 30 L. Ed. 2d 271 (1971) (decided under former law).

That instructions were given four hours and 15 minutes and four hours and 45 minutes respectively after deliberation does not in and of itself give rise to error. *State v. Cruz*, 1974-NMCA-056, 86 N.M. 341, 524 P.2d 204.

Use of "we" in requesting jury to arrive at verdict. — It cannot be said, as a matter of law, that the inadvertent use of "we" in requesting the jury to arrive at a verdict ("So, would you go on back and we'll see if we can't arrive at a verdict") had the effect of coercing and hastening the jury in its deliberation and invaded the province of the jury. *State v. Cruz*, 1974-NMCA-056, 86 N.M. 341, 524 P.2d 204.

Rehearing portion of witness' testimony. — Where there is a doubt in the minds of jurors as to what a witness said, it cannot be prejudicial, absent some unusual

circumstance, to have that doubt removed by a rehearing of his testimony. Therefore, where jury was unclear as to whether witness said defendant ran through a door, or from a door, trial court did not abuse its discretion by allowing jury to rehear a portion of the witness' testimony. *State v. Montoya*, 1974-NMCA-044, 86 N.M. 316, 523 P.2d 814.

Jury listening to tape recording during deliberations not prejudicial. *State v. Fried*, 1978-NMCA-097, 92 N.M. 202, 585 P.2d 647, cert. denied, 92 N.M. 260, 586 P.2d 1089.

Communications regarding juror's inability to speak English. — A case was remanded for the trial court to certify the record as to the details of any communications between the court and jury as to a jury member not understanding English, and to conduct an evidentiary hearing into whether the state could overcome a presumption of prejudice from the defendant's absence during these communications, and to determine whether the defendant was accorded his right to a jury of 12. Irrespective of the proper preservation of error by the defendant, it was the duty of the trial court to make a record and rule upon any possible miscarriage of justice that could have constituted fundamental error. *State v. Escamilla*, 1988-NMSC-066, 107 N.M. 510, 760 P.2d 1276.

Fact trial court calls jury's attention to time and expense involved in the trial does not in and of itself give rise to error. *State v. Cruz*, 1974-NMCA-056, 86 N.M. 341, 524 P.2d 204.

Additional instruction found not erroneous. — The fact that the additional language stating: "If you reach a verdict on one of the counts you should return a verdict on that count" is not part of UJI Crim. 16.2 (now withdrawn) and the possibility that the trial court may have been anxious to reach a verdict, does not make use of the additional language erroneous. *State v. Burk*, 1971-NMCA-018, 82 N.M. 466, 483 P.2d 940, cert. denied, 404 U.S. 955, 92 S. Ct. 309, 30 L. Ed. 2d 271 (1971) (decided under former law).

Defendant need not be present in court in order to waive his right to be present. *Hovey v. State*, 1986-NMSC-069, 104 N.M. 667, 726 P.2d 344.

Where defendant is in custody, waiver of presence by voluntary absence cannot be inferred. — Where defendant is in custody at the time of the communications between the judge and the jury, the trial court cannot properly infer that he had waived his presence by voluntary absence under Crim. P. Rule 47(b)(1) (now Rule 5-612 NMRA). *Hovey v. State*, 1986-NMSC-069, 104 N.M. 667, 726 P.2d 344.

Evidence insufficient to show valid waiver of right to be present during jury communications. — Where the record indicates that the trial court accepted defense counsel's statement that "I would waive his defendant's presence at this time" without determining whether defense counsel was waiving the right or whether defendant (who was in custody) voluntarily was doing so through his attorney, the record is insufficient to show a valid waiver of the right to be present during jury communications,

defendant's conviction will be reversed and the case remanded for a new trial. *Hovey v. State*, 1986-NMSC-069, 104 N.M. 667, 726 P.2d 344.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law § 1117.

Additional instruction to jury after submission of felony case, in accused's absence, 94 A.L.R.2d 270.

Postretirement out-of-court communications between jurors and trial judge as grounds for new trial or reversal in criminal case, 43 A.L.R.4th 410.

Prejudicial effect, in civil case, of communications between judges and jurors, 33 A.L.R.5th 205.

Court's duty to inform counsel of proposed action on requested instructions under Rule 30 of Federal Rules of Criminal Procedure, 40 A.L.R. Fed. 495.

Modern status of rule that court may instruct dissenting jurors in federal criminal case to give due consideration to opinion of majority (Allen charge), 44 A.L.R. Fed. 468.

23A C.J.S. Criminal Law § 1365 et seq.

5-611. Return of verdict; mistrial; discharge of jurors.

A. **Return.** The verdict shall be unanimous and signed by the foreman. It shall be returned by the jury to the judge in open court.

B. **Several defendants.** If there are two or more defendants, the jury at any time during its deliberations may return a verdict with respect to any defendant as to whom it has agreed.

C. **Several counts.** If there are two or more counts, the jury may at any time during its deliberations return a verdict with respect to any count upon which it has agreed.

D. **Conviction of lesser offense.** If so instructed, the jury may find the defendant guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein. If the jury has been instructed on one or more lesser included offenses, and the jury cannot unanimously agree upon any of the offenses submitted, the court shall poll the jury by inquiring as to each degree of the offense upon which the jury has been instructed beginning with the highest degree and, in descending order, inquiring as to each lesser degree until the court has determined at what level of the offense the jury has disagreed. If upon a poll of the jury it is determined that the jury has unanimously voted not guilty as to any degree of an offense, a verdict of not guilty shall be entered for that degree and for each greater degree of the offense.

E. **Poll of jury.** When a verdict is returned and before it is recorded, the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations.

F. **Irregularity of verdict.** No irregularity in the rendition or reception of verdict of which the parties have been made aware may be raised unless it is raised before the jury is discharged. No irregularity in the recording of a verdict shall affect its validity unless the defendant was in fact prejudiced by such irregularity.

G. **Discharge of jury.** After the jury has retired to consider their verdict the court shall discharge the jury from the cause when:

(1) their verdict has been received;

(2) the court finds there is no reasonable probability that the jury can agree upon a verdict; or

(3) some other necessity exists for their discharge. The court may in any event discharge the jury if the parties consent to its discharge.

H. **Mistrial; jury disagreement.** An order declaring a mistrial for jury disagreement shall be in writing and shall expressly reserve the right to retry the defendant. Orders declaring mistrial for jury disagreement shall be substantially in the form approved by the supreme court.

Committee commentary. — Paragraphs A, B, D and E of this rule were derived from Rule 31 of the Federal Rules of Criminal Procedure and Rule 32 of the Colorado Rules of Criminal Procedure.

Paragraph D of this rule provides that, when instructed, the jury may find the defendant guilty of a necessarily included offense. For a lesser offense to be necessarily included, the greater offense cannot be committed without also committing the lesser. *State v. Medina*, 87 N.M. 394, 534 P.2d 486 (Ct. App. 1975). *See also*, *State v. Everitt*, 80 N.M. 41, 450 P.2d 927 (Ct. App. 1969).

Paragraph C of this rule allows the jury at any time during its deliberation to return a verdict on counts upon which it has agreed. In *United States v. Conti*, 361 F.2d 153 (2d Cir. 1966), the court held that a similar procedure does not result in prejudice to the defendant.

Paragraph D and H of this rule set out the procedure that should be followed in the declaration of a mistrial due to jury disagreement, in cases involving lesser included offenses.

In *State v. Spillmon*, 89 N.M. 406, 553 P.2d 686 (1976), it was held that retrial of the defendant on murder charges would constitute double jeopardy. The trial was to a jury, which returned verdicts of guilty as to attempted robbery and not guilty as to burglary, but which declared that they were dead-locked on the charges of first degree murder and second degree murder. The judge did not formally declare a mistrial, did not expressly state that he was reserving the power to retry the murder charge, did not inquire as to whether the jury had unanimously voted to acquit of either degree of murder, and merely set the murder charges for another trial. The supreme court held that the judge was wrong in concluding the proceedings without formally declaring a mistrial, in concluding the proceedings without expressly reserving the power to retry the charges on which the jury was hung, and in failing to ascertain whether the jury had acquitted of any degree of the murder charge.

In *State v. Castrillo*, 90 N.M. 608, 566 P.2d 1146 (1977), the trial on the charge of murder and manslaughter ended in a hung jury, and the declaration of a mistrial. The court held that the trial judge should have ascertained whether the jury had acquitted of any degree of unlawful homicide. The failure to do so resulted in the bar of the prosecution of all degrees other than the lowest (voluntary manslaughter). In the court of appeals decision, *State v. Castrillo*, N.M. Ct. App. No. 2499, decided December 12, 1976, the court ruled that an oral pronouncement by the judge, that he is declaring a mistrial, is not a proper declaration of a mistrial, and that a formal order is essential. The court also stated that the trial judge must reserve the power to retry any portion of the case.

The *Spillmon* case and the two *Castrillo* cases lay down several rules: (a) a formal written order is required in the declaration of a mistrial because of jury disagreement; (b) an express reservation of the power to retry the charges is essential; and (c) in case lesser included offenses are submitted, no mistrial for jury disagreement should be declared until the judge ascertains whether the jury has acquitted on any of the degrees of the offense. This rule and the court-approved form implement these rules.

The trial judge should not accept an announcement as to the jury vote on any included offense until the jury has carried its deliberations as far as possible. The inquiry concerning a unanimous vote on any degree of the offense does not come until the jury is about to be discharged as deadlocked. The inquiry of the jury is not as to what the jury can do, but what the jury has done. The jury is not sent back for further deliberations, but in a proper case may be sent back to sign a verdict which the judge finds that the jury has already reached. *State v. Castrillo*, 90 N.M. 608, 566 P.2d 1146 (1977). *See* UJI 14-250 and 14-6012 NMRA and their commentaries.

In polling the jury pursuant to Paragraph E of this rule, the judge begins by inquiring as to the highest degree of the offense charged. If the jury is unable to agree as to the highest degree of the offense submitted to the jury, the court may enter an order declaring a mistrial thereby automatically reserving the power to retry the offense and all lesser degrees of the offense. If the judge finds that the jury agreed that the defendant was not guilty as to the highest degree of the offense, the judge then inquires as to the

next highest degree submitted and continues until he reaches the degree of the offense upon which the jury could not agree.

ANNOTATIONS

Compiler's notes. — Paragraph D is deemed to have superseded 11-13-1, 1953 Comp.

Lesser-included offense. — Where the victim of criminal sexual contact of a minor specifically stated that defendant tried to penetrate her, there was no ambiguity in the victim's testimony that could lead a rational juror to acquit defendant of the crime of criminal sexual penetration and defendant's request for a lesser-included offense instruction was properly denied. *State v. Paiz*, 2006-NMCA-144, 140 N.M. 815, 149 P.3d 579, cert. denied, 2006-NMCERT-011.

Paragraph D was likely drafted, for the most part, based on the committee's reading of *State v. Castrillo*, 1977-NMSC-059, 90 N.M. 608, 566 P.2d 1146; *State v. Garcia*, 2005-NMCA-042, 137 N.M. 315, 110 P.3d 531, cert. denied, 2005-NMCERT-004.

Court inquiry to deadlocked jury. — When the jury states that it is deadlocked on a count including first degree murder and the jury has been instructed on the lesser included offense of second degree murder, the court need inquire no further than first degree murder if that is the highest level of the offense at which the jury has disagreed. *State v. Garcia*, 2005-NMCA-042, 137 N.M. 315, 110 P.3d 531, cert. denied, 2005-NMCERT-004.

Trial court's duty when jury is deadlocked. — When a jury is unable to reach unanimous agreement on an open count with lesser included offenses, the judge must poll the jury and clearly establish on the record on which offense in the count the jury was deadlocked. If the judge fails to clearly establish on the record the offenses on which the jury was deadlocked, all but the lowest offense must be dismissed and the dismissed offenses cannot be retried. *State v. Phillips*, 2017-NMSC-019.

Court failed to establish the offenses on which the jury was deadlocked. — Where defendant was charged with first-degree premeditated murder and the lesser included offenses of second-degree murder and voluntary manslaughter, where the jury announced that it was hung, and during the jury poll, seven jurors stated that the jury had unanimously agreed defendant was not guilty of first-degree murder, but five jurors indicated the jury was unable to reach a verdict on that crime, and where there was no written record of whether the jury had acquitted defendant of that crime or deadlocked during deliberations, the district court failed to clearly establish on the record whether the jury deadlocked on first-degree murder and therefore abused its discretion in concluding that the jury was hung and that there was manifest necessity justifying a mistrial on all of the crimes in the count; constitutional double jeopardy protections bar retrial on the first- and second degree murder charges, but defendant may be retried on the lowest offense of voluntary manslaughter. *State v. Phillips*, 2017-NMSC-019.

Retrial permitted where Defendant consented to the trial court's declaration of a mistrial based on jury deadlock. — Where Defendant was charged by criminal information with a single count of homicide by vehicle, and where the district court instructed the jury on both homicide by vehicle and the lesser included offense of driving under the influence of intoxicating liquor, and where Defendant's trial ended in a mistrial when the district court concluded that the jury could not reach a unanimous verdict, there was no manifest necessity to declare a mistrial on the charge of homicide by vehicle, because the record was unclear as to the level of offense on which the jury was deadlocked when the court declared the mistrial. Defendant, in this case however, consented to the district court's discharge of the jury without obtaining a verdict on the charge of homicide by vehicle and may therefore be retried on that offense. *State v. Paul*, 2021-NMCA-041, cert. denied.

Purpose of Rule 5—611(D).— The purpose of the polling requirement of Rule 5—611(D) NMRA is for the district court to create a clear record as to which, if any, of the specific included offenses the jury had agreed and upon which the jury had reached an impasse. *State v. Lewis*, 2019-NMSC-001, *aff'g* 2017-NMCA-056.

Court must clearly establish on the record the offense on which the jury is deadlocked.— Where defendant was charged with criminal sexual contact of a minor (CSCM) and battery, as a lesser included offense of CSCM, and where the jury was unable to reach a unanimous decision of guilty or not guilty on the count of CSCM, the district court did not abuse its discretion by declaring a mistrial on all offenses, and allowing retrial of the greater offense of CSCM, where it had established a clear record that the jury was deadlocked on the greater charge of CSCM. *State v. Lewis*, 2019-NMSC-001, *aff'g* 2017-NMCA-056.

Intent of rule satisfied where communications between jury and court made clear that the jury was unable to agree on a finding of guilty or not guilty on charged offense. — Where defendant was charged with criminal sexual contact of a minor (CSCM) and the lesser included offense of battery, and where, at trial, the district court declared a mistrial based on jury disagreement, defendant's motion to bar retrial on the CSCM charge, based on the grounds that he received an implied acquittal and that retrial would violate his right to be free from double jeopardy, was properly denied, because the record indicated that the jury twice asked whether it should proceed to consider the battery charge if it was unable to reach a unanimous decision on the CSCM charge, and the district court twice explicitly instructed the jury not to consider the charge of battery unless the jury was unanimous that it had reasonable doubt about defendant's guilt of CSCM, and thus the record of communications makes clear that the jury's inability to agree on a finding of guilty or not guilty applied only to the CSCM charge. *State v. Lewis*, 2017-NMCA-056, cert. granted.

Rule does not apply where there is only one degree of offense and a single charge to the jury. *O'Kelly v. State*, 1980-NMSC-023, 94 N.M. 74, 607 P.2d 612.

Failure of jury to reach unanimous agreement is not "verdict returned". *O'Kelly v. State*, 1980-NMSC-023, 94 N.M. 74, 607 P.2d 612.

Court's power to dismiss criminal charge. — Absent a statute the court has no power to dismiss a valid criminal charge on its own motion. *State v. Raburn*, 1966-NMSC-174, 76 N.M. 681, 417 P.2d 813 (decided under former law).

Instruction that jury should disregard first of two counts if guilty verdict returned on second count. — Where two counts are charged in an indictment, one for illegal possession of marijuana and the other for possession with intent to sell, an instruction by the court that the jury should disregard the former count if it finds defendant guilty under the latter operates as an acquittal of the former count and prevents retrial of this issue when the verdict on the latter is overturned. *State v. Moreno*, 1961-NMSC-070, 69 N.M. 113, 364 P.2d 594 (decided under former law).

Silence of jury verdict as to one of two offenses. — Where the two counts of an information charge separate offenses, the silence of the jury verdict as to the first count is equivalent to an acquittal as to the offense charged therein. *State v. Moreno*, 1961-NMSC-070, 69 N.M. 113, 364 P.2d 594 (decided under former law).

Defendant has right to have instructions on lesser included offenses submitted to the jury; however, this right depends on there being some evidence tending to establish the lesser included offenses. *State v. Duran*, 1969-NMCA-048, 80 N.M. 406, 456 P.2d 880 (decided under former law).

Common law entitlement to lesser-included offense is carried forward under Paragraph D of this rule. *State v. Munoz*, 2004-NMCA-103, 136 N.M. 235, 96 P.3d 796.

Interchangeable terms in Paragraph D. — For purposes of Paragraph D of this rule, the terms “lesser-included” and “necessarily-included” are used interchangeably. *State v. Munoz*, 2004-NMCA-103, 136 N.M. 235, 96 P.3d 796.

For lesser offense to be included within the greater, it must be necessarily included. *State v. Patterson*, 1977-NMCA-084, 90 N.M. 735, 568 P.2d 261; *State v. Kraul*, 1977-NMCA-032, 90 N.M. 314, 563 P.2d 108, cert. denied, 90 N.M. 637, 567 P.2d 486.

In order for a lesser offense to be included within a greater offense, the lesser offense must be necessarily included in the greater offense charged in the indictment. For the offense to be necessarily included, the greater offense cannot be committed without also committing the lesser offense. *State v. DeMary*, 1982-NMSC-144, 99 N.M. 177, 655 P.2d 1021.

For lesser offense to be "necessarily included", the greater offense cannot be committed without also committing the lesser. *State v. Medina*, 1975-NMCA-033, 87 N.M. 394, 534 P.2d 486; *State v. Kraul*, 1977-NMCA-032, 90 N.M. 314, 563 P.2d 108, cert. denied, 90 N.M. 637, 567 P.2d 486.

To be necessarily included, the greater offense cannot be committed without also committing the lesser. *State v. Patterson*, 1977-NMCA-084, 90 N.M. 735, 568 P.2d 261.

State's request for a lesser included offense instruction was properly granted since the elements of the lesser crime were a subset of the elements of the charged crime, the defendant could not have committed the greater offense in the manner charged in the indictment without also committing the lesser offense, and therefore notice of the greater offense also incorporated notice of the lesser offense, evidence at the trial was sufficient to sustain a conviction on the lesser offense, and the elements that distinguished the lesser and greater offenses were sufficiently in dispute so that the jury rationally could acquit on the greater offense and convict on the lesser. *State v. Meadors*, 1995-NMSC-073, 121 N.M. 38, 908 P.2d 731.

Manslaughter included in charge of murder under certain circumstances. — Under appropriate circumstances, where there is evidence that the defendant acted as a result of sufficient provocation, a charge of manslaughter could properly be said to be included in a charge of murder, and, accordingly, it would not be error to submit UJI Crim. 2.20 (*see now* UJI 14-220 NMRA) to the jury; however, it cannot seriously be maintained that manslaughter is invariably "necessarily included" in murder, since different kinds of proof are required to establish the distinct offenses. *Smith v. State*, 1976-NMSC-085, 89 N.M. 770, 558 P.2d 39.

Larceny necessarily included within offense of robbery. — Because robbery is an aggravated larceny, larceny is necessarily included within the offense of robbery and defendant had the right to have instructions on the lesser included offenses of larceny submitted to the jury, since there was evidence from several defense witnesses which tended to establish larceny. *State v. Wingate*, 1975-NMCA-035, 87 N.M. 397, 534 P.2d 776.

Battery upon a peace officer is a charge included within the charge of aggravated battery upon a peace officer. *State v. Kraul*, 1977-NMCA-032, 90 N.M. 314, 563 P.2d 108, cert. denied, 90 N.M. 637, 567 P.2d 486.

Possession of marijuana is a lesser offense included within the greater offense of distribution. *State v. Medina*, 1975-NMCA-033, 87 N.M. 394, 534 P.2d 486.

Aggravated assault by use of a threat with a deadly weapon is a lesser included offense of aggravated battery. *State v. DeMary*, 1982-NMSC-144, 99 N.M. 177, 655 P.2d 1021 (1982).

"Same transaction" test is rejected and disapproved of in New Mexico. This test is concerned with whether offenses were committed at the same time, were part of a continuous criminal act and inspired by the same criminal intent. *State v. Tanton*, 1975-NMSC-057, 88 N.M. 333, 540 P.2d 813.

Error in instructions as to degree of crime not necessarily prejudicial. — Even if there be error in an instruction as to the degree of the crime committed, it is not prejudicial to a defendant where he is convicted of a degree of crime which is properly submitted to the jury under the charge made and the evidence adduced upon the trial. *State v. Horton*, 1953-NMSC-044, 57 N.M. 257, 258 P.2d 371 (decided under former law).

Demand for jury poll before return of verdict is premature and impermissible. *O'Kelly v. State*, 1980-NMSC-023, 94 N.M. 74, 607 P.2d 612.

Refusal to poll jury after discharge not abuse of discretion. — Where defense counsel waited until after the jury had been discharged to make his request for a jury poll, the refusal of the court to recall the jury and poll the jury was not an abuse of discretion. *State v. Perez*, 1980-NMSC-143, 95 N.M. 262, 620 P.2d 1287.

There is some justification for inquiries into the numerical division of the jury as to probability of agreement among the jury when done pursuant to the court's duty to assure that a verdict is reached, and in determining whether further deliberations are needed or if the jury should be discharged. Such an inquiry may also be necessary to protect the defendant from double jeopardy consequences when more than one count is presented to the jury. *State v. Rickerson*, 1981-NMSC-036, 95 N.M. 666, 625 P.2d 1183, cert. denied, 454 U.S. 845, 102 S. Ct. 161, 70 L. Ed. 2d 132 (1981).

Inquiries reversible error only when jury coerced. — While inquiry into the numerical division of the jury is not to be encouraged, it is not error per se. Such inquiries are reversible error only when shown to have a coercive effect on the jury. *State v. Rickerson*, 1981-NMSC-036, 95 N.M. 666, 625 P.2d 1183, cert. denied, 454 U.S. 845, 102 S. Ct. 161, 70 L. Ed. 2d 132 (1981).

The trial court has the authority and duty to clarify an inconsistent verdict. — Where defendant was charged and tried for first-degree murder in the shooting death of an Albuquerque police officer, and where, after a thirteen-day trial, the jury returned with its preliminary verdict finding defendant "not guilty" of first-degree murder, but neither filled out a verdict form for a lesser-included offense nor reported any disagreement to the trial court as the jury instructions directed, and where the jury's findings for the special verdicts and other counts suggested that they found defendant guilty of first-degree murder, and where the trial court sent a note asking the jury to clarify its verdict, and where the jury subsequently returned the verdict forms with both the "not guilty" and "guilty" verdict forms for first-degree murder signed, but told the bailiff that the "guilty" verdict form was the proper verdict form for the first-degree murder charge, and where the trial court returned the verdict forms a third time along with a note instructing the jury to indicate their verdict as to the first-degree murder charge, and where the jury returned the verdict forms a third time, finding defendant guilty of first-degree murder, the trial court did not coerce the jury or abuse its discretion when it sought to clarify the jury's inconsistent verdict and denied defendant's motion for a mistrial, because the trial

court has both the authority and a nondiscretionary duty to clarify an inconsistent and ambiguous preliminary verdict. *State v. Lymon*, 2021-NMSC-021.

Duty of court regarding equivocating juror. — Where the trial court, in polling the jury, receives a response from a juror indicating equivocation, it must then question further to give the juror full opportunity to indicate his present state of mind, and that polling or questioning must be carried out so as to avoid influencing or coercing a juror's verdict. *State v. Holloway*, 1987-NMCA-090, 106 N.M. 161, 740 P.2d 711.

Where the record shows that a juror has voiced an uncertainty about the guilt of an accused, or has evidenced lack of full consent to the verdict, the verdict cannot stand. *State v. Holloway*, 1987-NMCA-090, 106 N.M. 161, 740 P.2d 711.

Paragraph F applies only to irregularities of which parties have been made aware; defendant may seek new trial based on possibility that extraneous prejudicial evidence reached the jury where defense counsel was not aware of issues raised until after jury was discharged. *State v. Doe*, 1984-NMCA-045, 101 N.M. 363, 683 P.2d 45.

Mistrial declared where jury cannot agree on offense. — Where a jury has determined that a lesser included offense is inappropriate but cannot agree between conviction and acquittal on the greater offense, the trial court must declare a mistrial and discharge the jury. Under these circumstances, jeopardy does not attach and a new trial may be had. *State v. Wardlow*, 1981-NMSC-029, 95 N.M. 585, 624 P.2d 527.

Violation of pretrial order in limine did not warrant mistrial. — Where, in defendant’s trial for first-degree murder, the State’s bloodstain pattern expert impermissibly referred to seeing “brain matter” on defendant’s shoes in violation of a pretrial order in limine and the trial court found that the witness’s remark was not in deliberate violation of the pretrial order and was inadvertent and curable by a limiting instruction, defendant was not entitled to a mistrial. *State v. Samora*, 2013-NMSC-038.

Alternative theories of same offense presented. — Trial court correctly instructed the jury that unanimity was not required as to one theory of first degree murder where alternative theories were presented; the jury's general verdict would not be disturbed where there was substantial evidence supporting one of the theories of the crime presented to the jury. *State v. Salazar*, 1997-NMSC-044, 123 N.M. 778, 945 P.2d 996.

No requirement that magistrate court expressly reserve jurisdiction. — There is no requirement in the Rules of Criminal Procedure for the Magistrate Courts or in the supreme court approved forms for the magistrate courts which requires a magistrate court to expressly reserve jurisdiction, as required by Subdivision (h) (*see now* Paragraph H) of this rule. *Cowan v. Davis*, 1981-NMSC-054, 96 N.M. 69, 628 P.2d 314.

Contemporaneous written order declaring mistrial not required. — A written order need not be entered contemporaneously with the oral declaration of mistrial in order to

comply with this rule. *State v. Reyes-Arreola*, 1999-NMCA-086, 127 N.M. 528, 984 P.2d 775, cert. denied, 127 N.M. 390, 981 P.2d 1208.

Nunc pro tunc order declaring mistrial. — A successor judge had the power to enter a nunc pro tunc order declaring a mistrial four months after the trial court's declaration. *State v. Reyes-Arreola*, 1999-NMCA-086, 127 N.M. 528, 984 P.2d 775, cert. denied, 127 N.M. 390, 981 P.2d 1208.

Defendant's objection immaterial where mistrial declared. — When a court declares a mistrial and discharges the jury, it is immaterial whether the defendant objects. *O'Kelly v. State*, 1980-NMSC-023, 94 N.M. 74, 607 P.2d 612.

Multiple verdicts on same charge. — Defendant was not acquitted of a charge even though the jury foreman first announced unanimity for acquittal but then created uncertainty as to the vote by later comments and the trial court directed the jury to take the vote again, resulting in a vote for conviction and declaration of a mistrial. *State v. Apodaca*, 1997-NMCA-051, 123 N.M. 372, 940 P.2d 478.

No double jeopardy by defendant being brought to trial second time. — A defendant is not placed in double jeopardy by being brought to trial for the same offense the second time, after the jury in the first trial has been unable to reach a verdict as to guilt or innocence and a mistrial has been properly declared. *Cowan v. Davis*, 1981-NMSC-054, 96 N.M. 69, 628 P.2d 314.

Double jeopardy rights violated. — Although defendant's conviction of third degree criminal sexual penetration must be set aside because a first trial ended in an implied acquittal of second degree criminal sexual penetration and defendant's double jeopardy rights were violated when he was tried for second degree criminal sexual penetration at a second trial, the proper remedy is to order a retrial, at which the highest degree that defendant can be tried for is second degree criminal sexual penetration. *State v. Fielder*, 2005-NMCA-108, 138 N.M. 244, 118 P.3d 752, cert. granted, 2005-NMCERT-008.

Law reviews. — For annual survey of New Mexico law relating to constitutional law, see 12 N.M.L. Rev. 191 (1982).

For note, "Jury - Trial Judge's Inquiry into Numerical Division of Jury: State v. Rickerson," see 13 N.M.L. Rev. 205 (1983).

For annual survey of New Mexico criminal law and procedure, 19 N.M.L. Rev. 655 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75B Am. Jur. 2d Trial §§ 1761, 1762.

Inconsistency of criminal verdict with verdict on another indictment or information tried at same time, 16 A.L.R.3d 866.

Inconsistency of criminal verdict as between different counts of indictment or information, 18 A.L.R.3d 259.

Inconsistency of criminal verdicts as between two or more defendants tried together, 22 A.L.R.3d 717.

Juror's reading of newspaper account of trial in state criminal case during its progress as ground for mistrial, new trial or reversal, 46 A.L.R.4th 11.

Requirement of jury unanimity as to mode of committing crime under statute setting forth the various modes by which offense may be committed, 75 A.L.R.4th 91.

When should jury's deliberation proceed from charged offense to lesser-included offense, 26 A.L.R.5th 603.

Modern status of rule that court may instruct dissenting jurors in federal criminal case to give due consideration to opinion of majority (Allen charge), 44 A.L.R. Fed. 468.

23A C.J.S. Criminal Law § 1395 et seq.

5-612. Presence of the defendant; appearance of counsel.

A. **Presence required.** Except as otherwise provided by these rules, the defendant shall be present at all proceedings, including the arraignment, all hearings and conferences, argument, the jury trial and during all communications between the court and the trial jury.

B. **Waiver of personal presence.** The defendant may waive the right to be personally present:

(1) for a specific hearing or proceeding, by an oral waiver on the record; or

(2) by executing a written waiver substantially in the form approved by the Supreme Court. The waiver must be approved by the defendant's counsel and the court prior to the hearing.

C. **Continued presence not required.** The further progress of the trial, including the return of the verdict, and the imposition of sentence shall not be prevented if the defendant waives the right to be personally present or whenever a defendant who was initially present:

(1) is voluntarily absent after the trial has commenced (whether or not he has been informed by the court of his obligation to remain during the trial); or

(2) engages in conduct which the court determines, by clear and convincing evidence, to be so disruptive as to justify the exclusion of the defendant from further

proceedings. If a defendant is excluded from the proceedings under this subparagraph, the court shall provide the defendant with a timely opportunity to regain the right to be personally present so long as the defendant agrees to refrain from any further disruptive conduct.

D. **Presence not required.** A defendant need not be present in the following situations:

(1) a defendant other than a person may appear by counsel for all purposes;

(2) when the offense is punishable by fine or by imprisonment for a term of less than one (1) year, or both, the court, with the written consent of the defendant, permits arraignment, plea, trial and imposition of sentence in the defendant's absence;

(3) when the proceeding involves only a conference or hearing upon a question of law.

[As amended by Supreme Court Order No. 06-8300-010, effective April 15, 2006.]

Committee commentary. — This rule is similar to Rule 43 of the Federal Rules of Criminal Procedure. *See* Fed. R. Crim. P. 43.

Prior to the 1974 amendment, Paragraph B of this rule excluded capital cases from the scope of this rule. The 1974 amendment, expanding the scope of the rule to include capital cases, follows the decision in *State v. Corriz*, 86 N.M. 246, 522 P.2d 793 (1974).

ANNOTATIONS

The 2006 amendment, approved by Supreme Court Order No. 06-8300-010 effective April 15, 2006, revised Paragraph A to specify each stage of the criminal proceedings during which the defendant shall be present, added a new Paragraph B providing for the waiver of personal appearance by the defendant, relettered former Paragraph B as Paragraph C and revised Paragragh C to require the court find by clear and convincing evidence that the defendant is disruptive prior to excluding the defendant from the courtroom and to permit the defendant to subsequently regain the right to personally be present upon agreement to refrain from disruptive conduct.

Cross references. — For the Waiver of Appearance form approved by the Supreme Court for use with this rule, *see* Criminal Form 9-104 NMRA.

Presence not required during compiling of jury panels. — This rules does not require, nor expressly or impliedly permit, a defendant's presence at the computerized selection of the jury panel from which the jury will eventually be selected. Because this stage is purely ministerial, there is no reason for the defendant to be present. *State v. Huff*, 1998-NMCA-075, 125 N.M. 254, 960 P.2d 342, cert. denied, 125 N.M. 146, 958 P.2d 104.

Constitutional right to be present. — A defendant's right to be present at every stage of the trial is grounded in the sixth amendment to the United States Constitution and made applicable to the states through the fourteenth amendment. *State v. Garcia*, 1980-NMSC-132, 95 N.M. 246, 620 P.2d 1271.

Right may be waived. — A trial court may accept a knowing, intelligent, and voluntary waiver of a defendant's presence at jury selection either as an express waiver or as an implied waiver when a defendant has forfeited that right to be present by conduct. *State v. Padilla*, 2002-NMSC-016, 132 N.M. 247, 46 P.3d 1247.

When presence required. — Defendants must be present at all stages of a criminal proceeding in which their presence, as a practical matter, would aid their counsel in presenting their defense. *State v. Sloan*, 2019-NMSC-019.

Presence not required at a pretrial hearing on qualifying a witness as an expert. — Where defendant was charged with burglary and felony murder, and where defense counsel orally waived defendant's appearance at a pretrial hearing on whether to qualify the blood spatter analyst as an expert witness, defendant's presence was not required, because the hearing was concerned only with a question of law and defendant's presence would not have aided defense counsel in making his arguments. *State v. Sloan*, 2019-NMSC-019.

Presence not required at a pretrial hearing dealing with scheduling matters and a possible conflict of interest with the trial judge. — Where defendant was charged with burglary and felony murder, and where defense counsel orally waived defendant's appearance at a pretrial hearing in which scheduling matters and a possible conflict with the trial judge was discussed, defendant's presence was not required, because the hearing, which did not provide an opportunity for either party to address the charges against defendant, was not a critical stage of defendant's criminal proceeding and the judge's potential conflict of interest was an uncontested issue. *State v. Sloan*, 2019-NMSC-019.

Presence not required at pretrial hearing where the scope of a witness's testimony was discussed. — Where defendant was charged with burglary and felony murder, and where defense counsel orally waived defendant's presence at a pretrial hearing in which the scope of defendant's sister's testimony was discussed, defendant's presence was not required, because the hearing only involved a legal issue and was not a critical stage of defendant's criminal proceeding because the district court was enforcing a well-accepted principle of law concerning limiting the scope of witness testimony about defendant's character or state of mind and the hearing afforded no opportunity to defend against the charge. *State v. Sloan*, 2019-NMSC-019.

Right to be present for challenges to jurors. — Subsection (a) (*see now* Paragraph A) of this rule gives the defendant a right to be present when challenges are being made to jurors. *State v. Garcia*, 1980-NMSC-132, 95 N.M. 246, 620 P.2d 1271.

Reversal mandated for denial of right. — The trial court erred in denying the defendant the right to be present when challenges to the jury were made, and such error mandated reversal and remand for a new trial. *State v. Garcia*, 1980-NMSC-132, 95 N.M. 246, 620 P.2d 1271.

Waiver in general. — The right of presence is not absolute and may be waived if the court determines the waiver to have been voluntarily, knowingly, and intelligently made. Waiver may be occasioned by the voluntary absence of an accused, or by his disruptive conduct. *State v. Clements*, 1988-NMCA-094, 108 N.M. 13, 765 P.2d 1195.

Where defendant is in custody, waiver of presence by voluntary absence cannot be inferred. — Where defendant is in custody at the time of the communications between the judge and the jury, the trial court cannot properly infer that he had waived his presence by voluntary absence under this rule. *Hovey v. State*, 1986-NMSC-069, 104 N.M. 667, 726 P.2d 344.

Defendant voluntarily absented himself from the trial when he went to another city to locate a witness; however, after he was placed in custody, he was no longer voluntarily absent, and the state then had the burden of demonstrating beyond a reasonable doubt that conducting the trial during defendant's absence would be harmless. *State v. Clements*, 1988-NMCA-094, 108 N.M. 13, 765 P.2d 1195.

Waiver of right of presence in capital case. — As the capital versus noncapital distinction is not one mandated by the constitution, and since the rule does not preclude a waiver in capital cases, a defendant in New Mexico may waive the right of presence in a capital case. *State v. Corriz*, 1974-NMSC-043, 86 N.M. 246, 522 P.2d 793.

Waiver of presence at suppression hearing. — Where defense counsel had not spoken with defendant and it was probable that defendant had yet to receive notice of a suppression hearing, defendant could not voluntarily, knowingly, and intelligently waive his presence, and counsel's waiver was ineffective. Since the suppression hearing was critical to defendant's case, he had a right to be present, and it was error to proceed with the hearing in defendant's absence. *State v. McDuffie*, 1987-NMCA-077, 106 N.M. 120, 739 P.2d 989.

Removal of defendant for misconduct in case where insanity pleaded. — That defendant pleaded insanity and was being tried for a capital case did not preclude the trial court from excluding him for misconduct as the trial court must, in all cases, be granted the discretion to control the proper administration of criminal justice and should be able to remove a defendant whenever the circumstances so dictate. *State v. Corriz*, 1974-NMSC-043, 86 N.M. 246, 522 P.2d 793.

Defendant’s conduct during trial did not require a mistrial. — Where, during the testimony of a state witness, defendant rose from defendant’s seat at the defense table and stated that defendant had to go somewhere because defendant could not handle the proceedings; security officers restrained defendant; on voir dire by the court, some

of the jurors indicated that they observed an altercation between defendant and the officers; and all of the jurors stated that they would remain fair and impartial and that they could base their decision solely on the evidence, the trial court did not abuse its discretion in denying defendant's motion for a mistrial. *State v. Swick*, 2010-NMCA-098, 148 N.M. 895, 242 P.3d 462, cert. granted, 2010-NMCERT-010, 149 N.M. 64, 243 P.3d 1146.

Criminal contempt proceedings. — Defendant's criminal contempt conviction in a divorce proceeding was invalid because the court improperly commenced and completed the criminal contempt hearing though defendant was not present. *Beverly v. Beverly*, 2000-NMCA-097, 129 N.M. 719, 13 P.3d 77.

Presence of counsel only at contempt hearing. — Where plaintiff property owner brought suit against adjoining property owner to restrain him from certain actions and court issued order restraining both parties, whereupon defendant had the court issue an order requiring plaintiff to show cause why he should not be held in contempt for violation of restraining order, plaintiff failed to appear within the meaning of Rule 15(b) (*see now* Paragraph B of Rule 5-209 NMRA) when he sent his counsel to respond to the show cause order for him, as appearance by counsel was not a permitted response under the present rule. Trial court was therefore authorized to issue an arrest warrant under Rule 15(b) (*see now* Paragraph B of Rule 5-209 NMRA), but was not authorized to try and sentence the plaintiff under the present rule. *Lindsey v. Martinez*, 1977-NMCA-086, 90 N.M. 737, 568 P.2d 263.

Presence not required at post-conviction hearing. — It is implicit from the language of 39-1-1 NMSA 1978 that it is within the sound discretion of the trial court whether to direct a defendant be physically present before the court at a hearing to reconsider or modify a prior sentence. Construing the pertinent rules and statutes together, a defendant need not be present at a hearing to reconsider a sentence, except where the hearing results in the terms of the sentence being made more onerous. *State v. Sommer*, 1994-NMCA-070, 118 N.M. 58, 878 P.2d 1007.

Private conversation between judge and individual juror held not reversible error. — No reversible error exists where the judge privately confers with prospective individual jurors if the conversation was invited by defense counsel and did not prejudice defendant. *State v. Henry*, 1984-NMCA-040, 101 N.M. 277, 681 P.2d 62, *rev'd on other grounds*, 1984-NMSC-023, 101 N.M. 266, 681 P.2d 51.

Although there is a presumption of prejudice when there is ex parte communication between the trial court and a juror, this presumption does not apply if the ex parte communication takes place with the knowledge and consent of the defendant prior to the ex parte communication. *State v. Pettigrew*, 1993-NMCA-095, 116 N.M. 135, 860 P.2d 777.

Where the judge advised the prosecutor and defense counsel regarding his meeting with a juror and the subject matter was not relevant to the substance of the case, no

improper communication occurred. *State v. Baca*, 1997-NMSC-059, 124 N.M. 333, 950 P.2d 776.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 1098 to 1136.

Giving, in accused's absence, additional instruction to jury after submission of felony case, 94 A.L.R.2d 270.

Right of accused to be present at suppression hearing or at other hearing or conference between court and attorneys concerning evidentiary questions, 23 A.L.R.4th 955.

Validity of jury selection as affected by accused's absence from conducting of procedures for selection and impaneling of final jury panel for specific case, 33 A.L.R.4th 429.

23A C.J.S. Criminal Law §§ 1165, 1395 et seq.

5-613. Conduct of trial.

A. **Oath of witnesses.** The judge shall administer the following oath to each witness: "Do you swear or affirm that the testimony you will give in this case will be the truth, the whole truth and nothing but the truth, under penalty of law?"

B. **Evidence.** The Rules of Evidence, so far as they are applicable and not in conflict with these rules, shall apply to and govern the trial of criminal cases.

[As amended, effective May 15, 2000.]

Committee commentary. — This rule was amended effective July 1, 1973 upon the adoption of the Rules of Evidence.

Prior to May 15, 2000 Paragraph A of this rule adopted by reference Rule 1-045 NMRA. A new subpoena rule for criminal cases was approved by the Supreme Court effective May 15, 2000 and Paragraph A of this rule was deleted. *See* Rule 5-511 NMRA for subpoenas in criminal proceedings.

ANNOTATIONS

The 2000 amendment, effective May 15, 2000, deleted former Paragraph A, and redesignated the remaining paragraphs accordingly, and rewrote the second paragraph of the committee commentary.

Recompilations. — Rule 5-613 NMRA, relating to conduct of trial, was recompiled as Rule 5-119 NMRA, effective December 1, 1998.

5-614. Motion for new trial.

A. **Motion.** When the defendant has been found guilty, the court on motion of the defendant, or on its own motion, may grant a new trial if required in the interest of justice.

B. **Evidence on motion.** When a motion for new trial calls for a decision on any question of fact, the court may consider evidence on such motion by affidavit or otherwise.

C. **Time for making motion for new trial.** A motion for new trial based on the ground of newly discovered evidence may be made only before final judgment, or within two (2) years thereafter, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for new trial based on any other grounds shall be made within ten (10) days after verdict or finding of guilty or within such further time as the court may fix during the ten (10) day period.

D. **Procedure; hearing.** When the defendant has been found guilty by a jury or by the court, a motion for new trial may be dictated into the record, if a court reporter is present, and may be argued immediately after the return of the verdict or the finding of the court. Such motion may be in writing and filed with the clerk. Such motion, written or oral, shall fully set forth the grounds upon which it is based.

E. **Waiver.** Failure to make a motion for a new trial shall not constitute a waiver of any error which has been properly brought to the attention of the court.

[As amended by Supreme Court Order No. 09-8300-006, effective May 6, 2009.]

Committee commentary. — Paragraphs A and D of this rule were derived from Rules 3.580 and 3.590 of the Florida Rules of Criminal Procedure. Paragraph C of this rule was derived from Rule 33 of the Federal Rules of Criminal Procedure.

A motion for a new trial on grounds other than newly discovered evidence must be made within ten (10) days after the verdict and before the judgment is entered. *State v. Wilson*, 1974-NMCA-059, ¶ 11, 86 N.M. 348, 524 P.2d 520.

For the test used for granting a new trial on newly discovered evidence, *see State v. Chavez*, 1974-NMCA-138, ¶ 12, 87 N.M. 38, 528 P.2d 897.

A motion under this rule that is filed not later than thirty (30) days after the filing of the judgment tolls the time for appeal under the Rules of Appellate Procedure. *See* Rule 12-201(D)(1)(b) NMRA (2016).

[As amended by Supreme Court Order No. 16-8300-014, effective for all cases pending or filed on or after December 31, 2016.]

ANNOTATIONS

The 2016 amendment, approved by Supreme Court Order No. 16-8300-014, effective December 31, 2016, in the committee commentary, added the last sentence regarding tolling the time for appeal under the Rules of Appellate Procedure, and provided vendor neutral citations for cited cases.

The 2009 amendment, approved by Supreme Court Order No. 09-8300-006, effective May 6, 2009, in Paragraph C, deleted the last sentence, which provided that if a motion for new trial is not granted within thirty days for the date it is filed, the motion is automatically denied.

Applicability. — This rule has not been preempted by Rule 5-802. *State v. Peppers*, 1990-NMCA-057, 110 N.M. 393, 796 P.2d 614.

Unusual circumstances causing delay in ruling on motion — Where the defendant claimed that he had a mental defect that was not discoverable prior to trial; defense counsel informed the trial court at the sentencing hearing that the defendant would file a motion for a new trial based on the evaluations of the state's psychologists and the defendant's psychologist; the court continued the sentencing hearing and ordered defense counsel to request a hearing upon receipt of the defendant's psychologist's report; the court set a hearing on the motion when the defendant received his psychologist's report; and the court decided the motion within ninety days after hearing the motion, the fourteen-month delay between the time the defendant filed his motion for a new trial and the time that it was granted was not unreasonable and the trial court did not abuse its discretion when it granted the motion for a new trial. *State v. Moreland*, 2008-NMSC-031, 144 N.M. 192, 185 P.3d 363.

Newly discovered evidence. — Where evidence that the defendant had a mental condition, which caused him to have a diminished capacity to reason on a day-to-day basis and which was greatly exacerbated by methamphetamine, was discovered from post-trial psychological reports; the evidence was discovered only because the trial court ordered a diagnostic evaluation of the defendant; and the evidence of the defendant's diminished mental capacity could not have been discovered by the exercise of due diligence because the defendant's mental defects typically had no outward manifestation and trained professionals would be unable to diagnose the defendant without formal psychological tests, the trial court did not abuse its discretion when it granted the defendant's motion for a new trial based on newly-discovered evidence. *State v. Moreland*, 2008-NMSC-031, 144 N.M. 192, 185 P.3d 363.

Determination of ineffective assistance of counsel without a hearing. — Where the trial court witnesses gross or obvious ineffective assistance of counsel, the court may on its own motion order a new trial without holding a hearing on the issue of ineffective assistance of counsel. *State v. Grogan*, 2007-NMSC-039, 142 N.M. 107, 163 P. 3d 494.

Motions for a new trial are not favored and will only be granted upon a showing of a clear abuse by the trial court. *State v. Stephens*, 1982-NMSC-128, 99 N.M. 32, 653 P.2d 863.

Failure to enter order denying motion for new trial. — Where district court failed to enter an order denying defendant's motion for a new trial within thirty days, the motion was deemed automatically denied and defendant could challenge the denial of the motion on appeal even though a final, written order denying the motion had not been filed by the district court. *State v. Huber*, 2006-NMCA-087, 140 N.M. 147, 140 P.3d 1096, cert. denied, 2006-NMCERT-007.

An individual has a qualified right to release pending a motion for a new trial, even after appellate affirmance of a conviction. Such a right, however, can be invoked only by a timely motion for a new trial, and by a motion for release pending a motion for a new trial duly filed and served in the manner required by Rule 23, R. Crim. P. (Dist. Cts.) (*see now* Rule 5-402 NMRA). *In re Martinez*, 1982-NMSC-115, 99 N.M. 198, 656 P.2d 861.

Judgment not required for finality. — Although Paragraph C requires that a motion for new trial be made and decided before the entry of judgment and sentence, the lack of a judgment and sentence does not make a difference for finality purposes and remains a final appealable order. *State v. Danek*, 1993-NMCA-062, 117 N.M. 471, 872 P.2d 889.

Evidence admissible at hearing for new trial. — The trial court did not err in not admitting into evidence at the hearing for a new trial the statement of a state eyewitness which purportedly contradicted previous trial testimony where, the statement did not contradict previous testimony, but was merely cumulative of the defense propounded. *State v. Stephens*, 1982-NMSC-128, 99 N.M. 32, 653 P.2d 863.

It is improper for a trial court to consider a letter from one of the jurors which allegedly impeached the verdict. *State v. Chavez*, 1982-NMSC-108, 98 N.M. 682, 652 P.2d 232.

Where counsel may later ascertain true facts, continuance properly denied. — Where nothing prohibits the defense counsel from attempting to ascertain the true facts after trial and moving for a new trial based on newly discovered evidence, the trial court does not abuse its discretion in refusing to grant a continuance. *State v. Manus*, 1979-NMSC-035, 93 N.M. 95, 597 P.2d 280.

Conditions for granting new trial for newly discovered evidence. — A motion for a new trial upon the ground of newly discovered evidence calls for the exercise of the sound discretion of the trial court and is properly denied unless the newly discovered evidence is such that (1) it will probably change the result if a new trial is granted; (2) it must have been discovered since the trial; (3) it must be such that it could not have been discovered before trial by the exercise of due diligence; (4) it must be material to

the issue; (5) it must not be merely cumulative; and (6) it must not be merely impeaching or contradictory. *State v. Ramirez*, 1968-NMSC-148, 79 N.M. 475, 444 P.2d 986; *State v. Volpato*, 1985-NMSC-017, 102 N.M. 383, 696 P.2d 471; *State v. Shirley*, 1985-NMCA-120, 103 N.M. 731, 713 P.2d 1.

A motion for new trial will be permitted to be filed where it is done promptly, and there is no evidence connecting defendant to the crime excepting the testimony of an accomplice who has recanted, when the testimony is not merely cumulative or corroborative, where the evidence has become available since the trial and was not available during the trial, and where the recanting occurred under circumstances free from suspicion of undue influence or pressure from any source, so that it is as reasonable to believe one of the statements under oath as the other. *State v. Fuentes*, 1959-NMSC-060, 66 N.M. 52, 342 P.2d 1080 (decided under former law).

Even if another person is prepared to testify, or has confessed that he, and not another, has committed a crime for which another was convicted, such evidence is not newly discovered evidence since such a person can add nothing to the testimony the defendant could have given at trial. *State v. Stephens*, 1982-NMSC-128, 99 N.M. 32, 653 P.2d 863.

Defendant did not meet criteria for "newly discovered evidence". *State v. Fero*, 1988-NMSC-053, 107 N.M. 369, 758 P.2d 783.

The district court did not err in denying defendant's motion for a new trial. — Where defendant was convicted of criminal sexual penetration of a minor (CSPM) for digitally penetrating the vagina of a sixteen-year-old female by force or coercion, and where defendant moved for a new trial based on newly discovered evidence after polling the jury and one juror allegedly claimed that they assumed the age of consent in New Mexico was eighteen, based on the CSPM instruction requiring the victim to be between ages thirteen and eighteen, the district court did not abuse its discretion in denying defendant's motion, because there was no record of the jury's responses during polling, the court found that the claim was not new evidence, and the motion, having been filed thirty days after trial, was untimely. *State v. Cebada*, 2024-NMCA-023, cert. denied.

The district court did not abuse its discretion by denying defendant's motion for a new trial where evidence was known to defendant prior to trial. — Where defendant was convicted of two counts of attempted first degree murder with a firearm and two counts of shooting at or from a motor vehicle, and where the district court denied defendant's motion for a new trial based on newly discovered evidence and the discovery of a new witness who would have testified favorably for the defense, the district court did not abuse its discretion by denying defendant's motion, because the evidence and witness upon which defendant bases his argument were known prior to trial. *State v. Bryant*, 2023-NMCA-016, cert. denied.

The trial court did not abuse its discretion in denying the motion for mistrial where defendant failed to assert the alleged discovery violation at the earliest opportunity. — Where defendant was convicted of possession of a firearm by a felon and possession of a controlled substance after law enforcement executed a search warrant and discovered drugs and a firearm in a residence that contained mail with defendant's name on it, and where defendant argued that the district court should have granted a mistrial based on defendant's argument at trial that the state had not disclosed that the law enforcement officer who executed the search warrant lived in close proximity to the residence where the warrant was executed and had seen defendant coming and going from that residence, the district court did not err in denying defendant's motion for a mistrial, because the information disclosed pretrial was adequate to put defendant on notice that the officer's testimony could undercut the defense that the state was unable to connect defendant to the residence, and defendant had the information he needed to raise the asserted discovery violation after opening statements, but failed to do so. Appellate courts generally decline to review evidentiary arguments that are not made at the earliest opportunity. *State v. Pate*, 2023-NMCA-088, cert. denied.

No abuse of discretion in denying motion for new trial where "newly discovered evidence" would only serve to impeach a witness. — Where defendant was convicted of human trafficking, promoting prostitution, accepting earnings from a prostitute, contributing to the delinquency of a minor, and conspiracy, and where defendant filed a motion for a new trial, claiming that newly discovered evidence demonstrated that the alleged victim had not been truthful during her trial testimony, the trial court did not abuse its discretion in denying defendant's motion, because evidence that gives rise to a motion for new trial based on newly discovered evidence must not be merely impeaching or contradictory, and the proffered evidence from a recorded conversation between the victim and defendant's sister merely went to the truthfulness of the victim's testimony. *State v. Jackson*, 2018-NMCA-066, cert. denied.

Movant for new trial must show prejudice. — Defendant contending that he should be granted a new trial because an excessive number of leading questions were allowed over defense attorney's objections had the burden of showing prejudice. *State v. Gomez*, 1971-NMCA-009, 82 N.M. 333, 481 P.2d 412 (decided under former law).

In arguing that he is entitled to a new trial, the defendant must show that he was prejudiced by the state's failure to disclose evidence material to the defense. *State v. Garcia*, 1979-NMSC-049, 93 N.M. 51, 596 P.2d 264.

Prosecutorial misconduct was not prejudicial. — Where the state began its opening statement with a statement that came close to appealing to the passions and prejudices of the jury; defendant objected and the trial court instructed the state to restrict its opening statement to what the evidence would show; and defendant did not request a curative instruction, the trial court did not abuse its discretion in allowing the trial to proceed after sustaining defendant's objection. *State v. Loya*, 2011-NMCA-077, 150

N.M. 373, 258 P.3d 1165, cert. denied, 2011-NMCERT-006, 150 N.M. 763, 266 P.3d 632.

Prejudicial effect may be cured by prompt admonition. — A prompt admonition from the court to the jury to disregard and not consider inadmissible evidence sufficiently cures any prejudicial effect which otherwise might result, and an offer to admonish, even though declined, is sufficient to support a denial of a motion for mistrial. *State v. Vialpando*, 1979-NMCA-083, 93 N.M. 289, 599 P.2d 1086, cert. denied, 93 N.M. 172, 598 P.2d 215.

The district court did not abuse its discretion in giving a corrective instruction to disregard hearsay evidence, rather than granting a mistrial. — Where defendant was arrested outside a motel in Alamogordo, New Mexico based on an outstanding warrant, and where arresting officers conducted a sweep of defendant's motel room, after defendant stated, in response to police questioning incident to defendant's arrest, that he had a loaded syringe in the motel room, which was later determined to contain methamphetamine, and where defendant claimed that the district court's curative instruction during trial was inadequate to prevent prejudice from the arresting officer's hearsay testimony that he had been told by the motel's desk clerk that defendant had not rented the motel room where methamphetamine was discovered, there was no abuse of discretion in the district court's determination that an instruction to the jury to disregard the hearsay testimony would avoid prejudice to defendant, because defendant never objected to the protective sweep or subsequent search of the motel room, so the jury was not required to determine whether defendant had an expectation of privacy in the room, and the desk clerk's statement was only tangentially related to defendant's defense that the syringe had been left in the room by someone else. *State v. Dirickson*, 2024-NMCA-040, cert. denied.

Trial court did not abuse its discretion in denying motion for mistrial based on the presence of security personnel at trial. — In defendant's trial for first degree murder, where defendant moved for a mistrial due to the presence of excessive security during the trial, the trial court did not abuse its discretion by denying defendant's motion for mistrial because all the jurors affirmed that the security did not affect their ability to be fair and impartial. *State v. Romero*, 2019-NMSC-007.

Trial court did not abuse its discretion in denying motion for mistrial based on prosecutor's misstatement of law. — In defendant's prosecution for aggravated driving while under the influence of intoxicating liquor or drugs (DUI), where defense counsel objected and moved for a mistrial after the prosecutor misstated the legal standard for DUI, the trial court did not abuse its discretion in denying defendant's motion, because the record established that the trial court sustained defense counsel's objection, characterized the prosecutor's statement as a misstatement of the law and told the prosecutor to rephrase his statement, and where defense counsel did not object to the prosecutor's rephrasing of the legal standard for DUI. *State v. Storey*, 2018-NMCA-009, cert. denied.

Where the trial court communicated with defendant's DNA expert midtrial in an attempt to expedite the DNA expert's analysis, the trial court did not abuse its discretion in denying defendant's motion for mistrial, because the trial court's communication with the expert witness was procedural and not substantive, designed to assure compliance with quick deadlines so the trial could resume as soon as possible, and it did not unduly interfere with defendant's right to have independent and confidential expert services. *State v. Smith*, 2016-NMSC-007.

In defendant's trial for murder, the prosecutor's comments that the defense counsel was difficult and hard to work with are, at most, unprofessional comments, and where motions for mistrial were filed by defendant on the basis of a trial recess, which lasted only ten days, was granted for the sole purpose of benefitting defendant and was properly within the scope of the trial court's inherent authority to control and manage the trial proceedings and preserve the integrity of the trial process, defendant's allegations fall short of the conduct demanding mistrial; the trial court properly denied defendant's numerous motions for mistrial and did not abuse its discretion. *State v. Smith*, 2016-NMSC-007.

Mistrial not warranted where improper testimony was unintentionally solicited and where the district court offered a curative instruction. — Where defendant was charged with criminal sexual penetration of an inmate, allegedly committed while defendant was employed as a corrections officer, and where, at trial, one of the state's witnesses, when asked by the prosecutor if she recognized anyone in the courtroom, identified the victim's advocate who was present in the courtroom, and where defendant moved for a mistrial, claiming that the witness's statement implicated her status as another alleged victim and was unfairly prejudicial, the district court did not err in denying defendant's motion for a mistrial, because the State did not intend for the witness to identify the victim's advocate in the courtroom but rather to identify the defendant as someone she knew, and even assuming that the unintentionally solicited reference to the victim's advocate amounted to a reference to another wrong committed by defendant, the district court's offer to give a curative instruction, even though it was refused by the defendant, was sufficient to cure any prejudicial effect. *State v. Arvizo*, 2021-NMCA-055, *cert. denied*.

No abuse of discretion in denying motion for mistrial where defendant opened the door to inquiry into inadmissible evidence. — Where the district court granted the defendant's motion to exclude evidence of defendant's affiliation with the Black Berets Motorcycle Gang, the district court did not abuse its discretion in denying defendant's motion for a mistrial based on the prosecutor's questions on cross-examination inquiring whether the Black Berets were a motorcycle gang and whether the Black Berets were affiliated with the Banditos organized motorcycle gang, because defendant opened the door to cross-examination under the doctrine of curative admissibility when he testified on direct examination that the Black Berets Motorcycle Club was a charitable club. *State v. Comitz*, 2019-NMSC-011.

Trial court did not abuse its discretion in denying motion for mistrial based on outside communications with jurors. — Where defendant was tried for first-degree murder, and where, during trial, a deputy told a juror, which the juror repeated to other jurors, that the trial could last into the following week, and where another juror overheard a detective say "we're winning," and "the jury looks tired," and where the district court excused both jurors after questioning them about the communications, but denied defendant's motion for a mistrial, the district court did not abuse its discretion in denying the motion for mistrial because, while the first communication reached the jury, speculation about the end date of the trial could not reasonably have affected the verdict, and the second communication did not reach the jury because the juror who overheard the detective immediately reported the incident to the district court and was excused from the jury. *State v. Stallings*, 2020-NMSC-019.

Granting or denial of motion for new trial is within the court's discretion and is not reviewable except for an abuse of that discretion. *Sierra Blanca Sales Co. v. Newco Indus., Inc.*, 1972-NMCA-153, 84 N.M. 524, 505 P.2d 867, cert. denied, 84 N.M. 512, 505 P.2d 855; *State v. Volpato*, 1985-NMSC-017, 102 N.M. 383, 696 P.2d 471.

Trial courts have broad discretion in granting or denying new trials. *Mares v. State*, 1971-NMSC-106, 83 N.M. 225, 490 P.2d 667 (decided under former law).

A motion for mistrial is addressed to the trial court's discretion and is reviewable on the basis of an abuse of discretion. *State v. Thurman*, 1972-NMSC-040, 84 N.M. 5, 498 P.2d 697; *State v. Garcia*, 1979-NMSC-049, 93 N.M. 51, 596 P.2d 264; *State v. Perrin*, 1979-NMSC-050, 93 N.M. 73, 596 P.2d 516.

Where the trial court communicated with defendant’s DNA expert midtrial in an attempt to expedite the DNA expert’s analysis, the trial court did not abuse its discretion in denying defendant’s motion for mistrial, because the trial court’s communication with the expert witness was procedural and not substantive, designed to assure compliance with quick deadlines so the trial could resume as soon as possible, and it did not unduly interfere with defendant’s right to have independent and confidential expert services. *State v. Smith*, 2016-NMSC-007.

In defendant’s trial for murder, the prosecutor’s comments that the defense counsel was difficult and hard to work with are, at most, unprofessional comments, and where motions for mistrial were filed by defendant on the basis of a trial recess, which lasted only ten days, was granted for the sole purpose of benefitting defendant and was properly within the scope of the trial court’s inherent authority to control and manage the trial proceedings and preserve the integrity of the trial process, defendant’s allegations fall short of the conduct demanding mistrial; the trial court properly denied defendant’s numerous motions for mistrial and did not abuse its discretion. *State v. Smith*, 2016-NMSC-007.

A motion for a new trial is addressed to the discretion of the trial court and will be reversed only for a clear abuse of discretion. *State v. Wright*, 1972-NMCA-073, 84 N.M.

3, 498 P.2d 695; *State v. Smith*, 1979-NMSC-020, 92 N.M. 533, 591 P.2d 664; *State v. Manus*, 1979-NMSC-035, 93 N.M. 95, 597 P.2d 280; *State v. Perez*, 1980-NMSC-143, 95 N.M. 262, 620 P.2d 1287.

The discretion of a trial court is not to be lightly interfered with as to the granting of a motion for new trial. *State v. Chavez*, 1974-NMCA-138, 87 N.M. 38, 528 P.2d 897.

The trial court has broad discretion in granting or denying a motion for new trial, and such an order will not be reversed absent clear and manifest abuse of that discretion. *State v. Chavez*, 1982-NMSC-108, 98 N.M. 682, 652 P.2d 232.

The trial court has broad discretion in granting or denying a motion for new trial, and such an order will not be reversed absent clear and manifest abuse of that discretion. *State v. Chavez*, 1982-NMSC-108, 98 N.M. 682, 652 P.2d 232.

Trial court may not weigh evidence and credibility of witnesses when considering a new trial order based on erroneous jury verdict. *State v. Chavez*, 1984-NMSC-018, 101 N.M. 136, 679 P.2d 804, *overruled on other grounds by State v. Griffin*, 1994-NMSC-061, 117 N.M. 745, 877 P.2d 551.

Supreme court's power to remand case for filing of motion for new trial. — The supreme court has inherent power to prevent miscarriages of justice in a proper case by remanding the case to the trial court with instructions that the defendant be permitted to file a motion for a new trial upon the ground of newly discovered evidence. *State v. Fuentes*, 1959-NMSC-060, 66 N.M. 52, 342 P.2d 1080 (decided under former law).

Newly discovered evidence must be presented or its absence explained. — To obtain a new trial on the grounds of newly discovered evidence, there must be a showing that there is in fact such evidence; movant must inform the court as to this evidence or satisfactorily explain why it is not presented to the court. *State v. Lucero*, 1977-NMCA-021, 90 N.M. 342, 563 P.2d 605, cert. denied, 90 N.M. 636, 567 P.2d 485.

Showing that newly discovered evidence could not have been obtained earlier. — Even when newly discovered evidence is shown to exist, certain requirements must be met in order to obtain a new trial on the basis thereof, including the requirement that the newly discovered evidence must be such as by reasonable diligence on the part of the defendant could not have been secured at the former trial. *State v. Lucero*, 1977-NMCA-021, 90 N.M. 342, 563 P.2d 605, cert. denied, 90 N.M. 636, 567 P.2d 485.

The denial of a motion for new trial based on newly discovered evidence is appropriate where defense counsel was aware of the evidence prior to trial. — Where defendant was convicted of criminal sexual penetration of a minor, criminal sexual contact of a minor, and bribery of a witness, and where defendant filed a motion for new trial based on newly discovered evidence that the State had filed, and later dismissed, sexual abuse charges against the victim’s stepfather based on allegations the victim made, but later recanted, while defendant’s case was pending, the district

court did not abuse its discretion in denying defendant's motion for a new trial, because there was evidence establishing that defense counsel was aware of the stepfather's case in which the victim had made accusations similar to those made in defendant's case, was aware of the victim's recantation, and was aware of the State's dismissal of the stepfather's case, and defendant failed to demonstrate that defense counsel could not have discovered the recantation until after trial. *State v. Miera*, 2018-NMCA-020.

Where newly discovered evidence will not change result. — Where it does not appear that the newly discovered evidence would probably change the result if a new trial were granted, the trial judge has not abused his discretion in denying the motion for new trial. *State v. Ramirez*, 1968-NMSC-148, 79 N.M. 475, 444 P.2d 986 (decided under former law) *State v. Litteral*, 1990-NMSC-059, 110 N.M. 138, 793 P.2d 268.

Where defendant alleged that defendant had discovered that a witness at defendant's trial had committed perjury at a co-defendant's trial because the witness had lied about the color and type of gun the co-defendant possessed; the evidence was not substantive, but merely impeaching evidence; the co-defendant's gun was not material to defendant's case; and the evidence was cumulative of defendant's impeachment of the witness at defendant's trial, the court did not abuse its discretion in denying defendant's motion for a new trial. *State v. Gallegos*, 2011-NMSC-027, 149 N.M. 704, 254 P.3d 655.

Newly discovered, cumulative evidence insufficient basis for new trial. — Where the testimony which the defendant claimed was newly discovered would have been merely cumulative, the trial court did not abuse its discretion in denying the motion for a new trial. *State v. Perez*, 1980-NMSC-143, 95 N.M. 262, 620 P.2d 1287.

District court did not abuse its discretion in denying defendant's motion for new trial. — Where defendant, following his conviction for voluntary manslaughter, requested a new trial on the grounds of juror bias, newly discovered evidence and the district court's failure to instruct the jury regarding the timing of a break during defendant's closing argument, the district court did not abuse its discretion in denying defendant's motion where defendant failed to show that the juror was biased or impartial, failed to show that the existence of the requested evidence could not have been discovered before trial by the exercise of due diligence, and failed to demonstrate that the timing of the break prejudiced him. *State v. Hobbs*, 2016-NMCA-006, cert. denied, 2015-NMCERT-012.

Trial judge's ex parte communications with the jury warranted a new trial in the interest of justice. — Where defendant was tried on an indictment charging a number of offenses related to a carjacking in which the victim was beaten and shot to death, and where several of the charged offenses had complex alternative theories of culpability, and where the trial court gave the jury thirty-one separate instructions and twenty-one separate verdict forms that were complex and potentially confusing, and where, after two days of deliberation, the jury submitted a package of verdict forms to the trial judge who, after reviewing the verdict forms and noticing that certain verdict forms were

necessarily in conflict, returned the verdict forms to the jurors and, without the knowledge or participation of the parties, directed the jurors to read the instructions again and clarify their verdicts, and where the jury returned revised verdict forms to the trial court finding defendant guilty of numerous charges, the trial court did not abuse its discretion when it ordered a new trial in the interest of justice, because the ex parte oral contact with the jurors was improper and such communications give rise to a presumption of prejudice. *State v. Aguilar*, 2019-NMSC-017.

Where the trial court grants a new trial in the "interest of justice", "in the interest of justice" is not the grounds upon which the motion for a new trial was based, but the standard used by the court in determining that a new trial is required. *State v. Chavez*, 1982-NMSC-108, 98 N.M. 682, 652 P.2d 232.

Statement of grounds. — In order to preserve the opportunity for effective appellate review, it is necessary that the trial court comply with the requirement in Subdivision (d) (*see now* Paragraph D) that a motion for new trial "shall fully set forth the grounds upon which it is based" when granting a sua sponte motion. *State v. Chavez*, 1982-NMSC-108, 98 N.M. 682, 652 P.2d 232

If a new trial is properly granted because of insufficient evidence to sustain the jury's verdict, retrial is precluded. *State v. Chavez*, 1982-NMSC-108, 98 N.M. 682, 652 P.2d 232.

The district court erred in granting a new trial based on insufficiency of the evidence. — Where defendant was convicted by a jury of driving while under the influence of intoxicating liquor (DWI), and where, following trial, the district court, sua sponte, granted a new trial, ruling that there was no evidence that defendant's driving and impairment overlapped, the district court erred in granting a new trial, because no provision in the Rules of Criminal Procedure allows a district court to consider the sufficiency of the evidence after the jury has returned its verdict and enter a judgment contrary to the jury's verdict. Insufficiency of the evidence does not support a motion for a new trial. *State v. Willyard*, 2019-NMCA-058, cert. denied.

Multiplicity of counts as not denying fair trial. — Where four of the eight counts against defendant were dismissed, and the jury acquitted on two counts and convicted on two counts, his argument that the multiplicity of counts and the evidence introduced in connection with those counts deprived him of a fair trial was not supported by the record. *State v. Lucero*, 1977-NMCA-021, 90 N.M. 342, 563 P.2d 605, cert. denied, 90 N.M. 636, 567 P.2d 485.

New trial granted where state's rebuttal witnesses refuse to testify. — Where the prosecutor said that he would call six rebuttal witnesses, with the reasonable implication thereby conveyed to the jury that the witnesses would contradict defendant's testimony, and with the state's knowledge that the witnesses would refuse to talk, then where a witness refused to testify on the grounds the answer may tend to incriminate him,

defendant has been prejudiced and a new trial should be granted. *State v. Vega*, 1973-NMCA-085, 85 N.M. 269, 511 P.2d 755.

Once the state has obtained the benefit of the inference of defendant's guilt by a witness and associate of defendant invoking his fifth amendment right not to testify, which is not subject to cross-examination, then the state cannot have the benefit of a presumption that this inference was not prejudicial and shift the burden to defendant to show there was prejudice. *State v. Vega*, 1973-NMCA-085, 85 N.M. 269, 511 P.2d 755.

Where codefendant, who remained silent during trial, offers affidavit. — The trial court did not abuse its discretion in denying defendant's motion for a new trial on the basis of newly discovered evidence, where the evidence offered was the affidavit of a codefendant who had invoked her fifth amendment right not to testify at defendant's trial. *State v. Smith*, 1986-NMSC-038, 104 N.M. 329, 721 P.2d 397.

Legal evidence only should reach jury. — It is the right of a defendant accused of crime to have nothing reach the mind of the jury concerning the case except strictly legal evidence admitted according to law, and if facts prejudicial to him reach the jury otherwise, it is the duty of the trial judge to withdraw a juror and grant a new trial. *State v. Thayer*, 1969-NMCA-086, 80 N.M. 579, 458 P.2d 831 (decided under former law).

Plaintiff not entitled to a new trial in whistleblower lawsuit. — Where plaintiff brought a suit under the Whistleblower Protection Act, NMSA 1978 §§ 10-16C-1 to -6, alleging that the town of Taos (town) terminated his employment in retaliation for complaints he made about mismanagement and waste, the district court did not abuse its discretion in allowing the town to introduce thirty pornographic images, although 5000 pornographic images were found on plaintiff's work computer, in support of its affirmative defense that it terminated plaintiff's employment for viewing pornography at work, not for retaliation. Plaintiff was not entitled to a new trial because the evidence was probative of the town's defense that the termination was reasonable and was due to the extensive and improper use of plaintiff's work computer during work hours. *Maestas v. Town of Taos*, 2020-NMCA-027, cert. granted.

Misrepresentation or concealment of fact by juror as basis for new trial. — If a juror falsely represents his interest or situation or conceals a material fact relevant to the controversy and such matters, if truthfully answered, might establish prejudice or work a disqualification of the juror, the party misled or deceived thereby, upon discovering the fact of the juror's incompetency or disqualification after trial, may assert that fact as ground for and obtain a new trial, upon a proper showing of such facts, even though the bias or prejudice is not shown to have caused an unjust verdict, it being sufficient that a party, through no fault of his own, has been deprived of his constitutional guarantee of a trial of his case before a fair and impartial jury. *Mares v. State*, 1971-NMSC-106, 83 N.M. 225, 490 P.2d 667 (decided under former law).

Time limit for raising issue of disqualification of juror. — Where the motion for a new trial asserted that a juror gave false answers on voir dire regarding her

acquaintance with defendant, such bore on the qualifications of the person to serve as a juror and involved the question of whether defendant was tried by an impartial jury. Such an issue could be raised upon discovering the fact of disqualification after trial and did not have to satisfy the time requirements of Subdivision (c) (*see now* Paragraph C). *State v. Martinez*, 1977-NMCA-068, 90 N.M. 595, 566 P.2d 843.

Perjury as basis for new trial. — A defendant should be granted a new trial if perjury of a material witness against him is later discovered. However, courts must act with great reluctance and with special care and caution before accepting the truth of a claim of perjury, and should properly require the evidence to affirmatively establish the perjury in such clear and convincing manner as to leave no room for reasonable doubt that perjury was committed. *State v. Betsellie*, 1971-NMSC-076, 82 N.M. 782, 487 P.2d 484 (decided under former law).

When, in the face of what was later described by the defendant as known perjury by a key state witness at his trial, the defendant had ample opportunity to elicit the truth but failed to do so by calling other corroborating witnesses to testify, and elected to remain silent, a new trial would not be granted upon recantation of the allegedly false testimony. *State v. Sena*, 1985-NMSC-086, 103 N.M. 312, 706 P.2d 854.

Misconduct of juror as grounds for new trial. — While misconduct on the part of a juror during a trial is censurable, it is not sufficient grounds for a new trial unless it appears, or is at least presumable, that the accused was thereby prejudiced. *State v. Riggsbee*, 1973-NMSC-109, 85 N.M. 668, 515 P.2d 964.

A trial court's oral ruling granting a motion for new trial satisfies the requirement in Paragraph C that the court grant the motion within 30 days after the motion is filed to avoid the consequence of an automatic denial. *State v. Ratchford*, 1993-NMSC-024, 115 N.M. 567, 855 P.2d 556.

Improperly admitted exhibits not warranting new trial. — Where the evidence, exclusive of improperly admitted exhibits, points so overwhelmingly to the guilt of defendant of the crime of which he was convicted, and there is no reasonable possibility that the admission into evidence of these improperly received exhibits contributed to his conviction, the defendant is not entitled to a new trial. *State v. Lopez*, 1969-NMCA-057, 80 N.M. 599, 458 P.2d 851, cert. denied, 80 N.M. 607, 458 P.2d 859 (1969), and cert. denied, 398 U.S. 942, 90 S. Ct. 1860, 26 L. Ed. 2d 279 (1970) (decided under former law).

Denial of new trial though court not convinced of guilt. — A verdict of the jury will not be set aside because the trial court or the court of appeals is not satisfied beyond all reasonable doubt of the guilt of the defendant, as the guilt or innocence of a defendant is for the jury to determine, not the judge, and granting or denial of a new trial is within the trial court's discretion. *State v. Garcia*, 1972-NMCA-142, 84 N.M. 519, 505 P.2d 862, cert. denied, 84 N.M. 512, 505 P.2d 855 (1972).

Denial of motion for new trial proper where logs not presented to court. — Assuming, but not deciding, that the withholding of certain logs was improper, they were never presented to the trial court so that it could determine whether they were material or whether the withholding prejudiced the defense, and consequently there was no error in denying the motion for a new trial on the grounds asserted by defendant. *State v. Lucero*, 1977-NMCA-021, 90 N.M. 342, 563 P.2d 605, cert. denied, 90 N.M. 636, 567 P.2d 485.

Filing requirement jurisdictional. — The filing requirement in Paragraph C is jurisdictional. *State v. Lucero*, 2001-NMSC-024, 130 N.M. 256, 30 P.3d 365.

Motion for new trial filed 28 days after verdict was correctly ruled as not timely so the asserted error in the trial court's remarks not having been properly brought to the attention of the court was waived. *State v. Wilson*, 1974-NMCA-059, 86 N.M. 348, 524 P.2d 520.

Motion to reconsider treated as a motion for new trial based on the relief it sought. — Where, during defendant's trial on charges of receiving or transferring a stolen vehicle, the trial judge denied a motion for mistrial after the prosecutor elicited testimony from the arresting officer that defendant asked to speak to an attorney while in police custody, and where the district court denied defendant's renewed motion for a mistrial after the jury returned a guilty verdict, and where four months after trial ended but before sentencing, defendant filed a motion to reconsider, the motion was treated on appeal as a motion for new trial because when a motion's substance and effect is that of a motion for a new trial and a new trial is unambiguously the relief sought, Rule 5-614 NMRA, along with the timeliness requirements set forth in Subsection C thereof, apply regardless of the motion's title. *State v. Garcia*, 2020-NMCA-024, cert. denied.

Untimely motion to reconsider denial of motion for new trial. — Where, during defendant's trial on charges of receiving or transferring a stolen vehicle, the trial judge denied a motion for mistrial after the prosecutor elicited testimony from the arresting officer that defendant asked to speak to an attorney while in police custody, and where the district court denied defendant's renewed motion for a mistrial after the jury returned a guilty verdict, and where four months after trial ended but before sentencing, defendant filed a motion to reconsider after the case was reassigned to a new judge, the reassigned judge erred in granting defendant's motion because the motion was untimely and barred under this rule because it was filed outside of the ten-day time period. *State v. Garcia*, 2020-NMCA-024, cert. denied.

Where record is ambiguous, the court of appeals cannot hold the trial court in error in failing to grant a mistrial on the basis of remarks allegedly made by the prosecutor. *State v. Vigil*, 1974-NMCA-065, 86 N.M. 388, 524 P.2d 1004, cert. denied, 86 N.M. 372, 524 P.2d 988, cert. denied, 420 U.S. 955, 95 S. Ct. 1339, 43 L. Ed. 2d 432 (1975).

Motion for new trial improperly denied. — The trial judge abused his discretion in denying defendant's motion for a new trial on a charge of armed robbery where the

store manager, one of three witnesses who identified defendant, later determined that he was not the robber, and another man confessed to being guilty of the crime. Reasonable diligence by defendant could not have secured this testimony for the trial, and it is material and goes to the merits of the case. *State v. Chavez*, 1974-NMCA-138, 87 N.M. 38, 528 P.2d 897.

The trial court erred in refusing to grant defendant a new trial on grounds that her attorney's stipulation to the prosecution's facts and waiver of the issue of competency were the result of a plea bargain with the result that the issue of defendant's competency was never clearly determined or considered. *State v. Romero*, 1974-NMSC-042, 86 N.M. 244, 522 P.2d 579.

Where a juror was present in the dwelling in question with victim, the complaining witness, while two police officers (who testified at trial) were also present seeking latent fingerprints, and victim and juror were good friends, then refusal to grant defendant's motion for a new trial was reversible error. *Mares v. State*, 1971-NMSC-106, 83 N.M. 225, 490 P.2d 667 (decided under former law).

Appeal from order granting new trial. — When the jury reaches a verdict after a trial which is fair and free from error, and such a verdict is set aside, the state is "aggrieved" within the meaning of N.M. Const., art. VI, § 2, and, thus, has authority to appeal an order granting a new trial. *State v. Chavez*, 1982-NMSC-108, 98 N.M. 682, 652 P.2d 232.

Although the state may appeal an order granting a new trial in a criminal case, an immediate appeal is limited to an order in which it is claimed; the grant of a new trial was based on an erroneous conclusion; prejudicial legal error occurred during the trial; or newly-discovered evidence warrants a new trial. Thus, an immediate appeal by the state of an order granting a new criminal trial is limited to issues of law. *State v. Griffin*, 1994-NMSC-061, 117 N.M. 745, 877 P.2d 551.

Grant of new trial proper where state failed to provide notice of intent to use evidence of prior bad acts. — Where defendant was convicted of trafficking a controlled substance by possession with intent to distribute, conspiracy to commit trafficking a controlled substance by possession with intent to distribute, abuse of a child, and possession of drug paraphernalia, the district court did not abuse its discretion in granting defendant’s motion for a new trial where the State introduced evidence at trial of prior uncharged controlled drug buys involving defendant and failed to provide reasonable notice to defendant of its intent to introduce such evidence, which was contrary to Rule 11-404(B) NMRA, and where the improper evidence was prejudicial to the defense because the improper evidence was the only evidence linking defendant to the apartment where drugs were found, the only evidence linking defendant to the co-defendant, and the only evidence linking defendant to the drugs. *State v. Acosta*, 2016-NMCA-003.

Two year time limit applied. — Where defendant's motion for a new trial was based on his psychological and psychiatric condition that was not known and was not discoverable at the time of trial and where the district court had not sentenced defendant, the two year time limit applied to defendant's motion. *State v. Moreland*, 2007-NMCA-047, 141 N.M. 549, 157 P.3d 728, cert. granted, 2007-NMCERT-004.

Enlargement of time to rule on motion for new trial. — Where the defendant filed a motion for a new trial at a hearing at which the district court granted a continuance to rule on defendant's sentencing for the purpose of receiving a forensic evaluation by defendant's expert, the district court enlarged the thirty day period to rule on the motion for a new trial as allowed by Rule 104 NMRA. *State v. Moreland*, 2007-NMCA-047, 141 N.M. 549, 157 P.3d 728, cert. granted, 2007-NMCERT-004.

No abuse of discretion. — District court did not abuse its discretion in granting defendant a new trial on the basis of newly discovered evidence that would warrant an instruction on diminished capacity where defendant's psychological and psychiatric condition was not known and was not discoverable at the time of trial and was discovered only because the district court ordered a diagnostic evaluation of defendant. *State v. Moreland*, 2007-NMCA-047, 141 N.M. 549, 157 P.3d 728, cert. granted, 2007-NMCERT-004.

Law reviews. — For article, "Survey of New Mexico Law, 1982-83: Criminal Procedure," see 14 N.M.L. Rev. 109 (1984).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law § 390.

Order denying motion for directed verdict or for judgment notwithstanding the verdict as appealable where movant has been granted a new trial, 57 A.L.R.2d 1198.

Absence of convicted defendant during hearing or argument of motion for new trial or in arrest of judgment, 69 A.L.R.2d 835.

Formal requirements of judgment or order as regards appealability, 73 A.L.R.2d 250.

Own motion of court: propriety of court's grant of new trial on own motion in criminal case, 85 A.L.R.2d 486.

Time for filing motion for new trial based on jury conduct occurring before, but discovered after, verdict, 97 A.L.R.2d 788.

Propriety and prejudicial effect of prosecutor's argument to jury indicating his belief or knowledge as to guilt of accused - modern state cases, 88 A.L.R.3d 449.

Propriety and prejudicial effect of prosecutor's argument giving jury impression that defense counsel believes accused guilty, 89 A.L.R.3d 263.

Jury's discussion of parole law as ground for reversal or new trial, 21 A.L.R.4th 420.

Emotional manifestations by victim or family of victim during criminal trial as ground for reversal, new trial, or mistrial, 31 A.L.R.4th 229.

Postretirement out-of-court communications between jurors and trial judge as grounds for new trial or reversal in criminal case, 43 A.L.R.4th 410.

Juror's reading of newspaper account of trial in state criminal case during its progress as ground for mistrial, new trial or reversal, 46 A.L.R.4th 11.

Unauthorized view of premises by juror or jury in criminal case as ground for reversal, new trial, or mistrial, 50 A.L.R.4th 995.

Court reporter's death or disability prior to transcribing notes as grounds for reversal or new trial, 57 A.L.R.4th 1049.

Prosecutor's appeal in criminal case to self-interest or prejudice of jurors as taxpayers as ground for reversal, new trial, or mistrial, 60 A.L.R.4th 1063.

Prosecutor's appeal in criminal case to racial, national, or religious prejudice as ground for mistrial, new trial, reversal, or vacation of sentence - modern cases, 70 A.L.R.4th 664.

Standard for granting or denying new trial in state criminal case on basis of recanted testimony - modern cases, 77 A.L.R.4th 1031.

Negative characterization or description of defendant, by prosecutor during summation of criminal trial, as ground for reversal, new trial, or mistrial - modern cases, 88 A.L.R.4th 8.

Inattention of juror from sleepiness or other cause as ground for reversal or new trial, 59 A.L.R.5th 1.

What constitutes "newly discovered evidence" within meaning of Rule 33 of Federal Rules of Criminal Procedure relating to motions for new trial, 44 A.L.R. Fed. 13.

Time limitation in connection with motions for new trial under Rule 33 of Federal Rules of Criminal Procedure, 51 A.L.R. Fed. 482.

What standard, regarding necessity for change of trial result, applies in granting new trial pursuant to Rule 33 of Federal Rules of Criminal Procedure for newly discovered evidence of false testimony by prosecution witness, 59 A.L.R. Fed. 657.

Juror's reading of newspaper account of trial in federal criminal case during its progress as ground for mistrial, new trial, or reversal, 85 A.L.R. Fed. 13.

Recantation of testimony of witness as grounds for new trial - federal criminal cases, 94 A.L.R. Fed. 60.

66 C.J.S. New Trial § 177 et seq.

5-614.1. Judicial acquittal notwithstanding guilty verdict.

A. **Motion.** When the defendant has been found guilty, the court on motion of the defendant, or on its own motion, may enter judgment of acquittal if the court finds the evidence insufficient to sustain a guilty verdict.

B. **Time for making motion for acquittal.** A defendant may move for a judgment of acquittal, or renew such a motion, within fourteen (14) days after the jury returns a guilty verdict or after the court discharges the jury, whichever is later.

C. **Procedure; hearing.** When the defendant has been found guilty by a jury or by the court, a motion for acquittal may be dictated into the record and may be argued immediately after the return of the verdict. That motion may be in writing and filed with the clerk. That motion, written or oral, shall fully set forth the grounds on which it is based.

D. **Waiver.** Failure to make a motion for acquittal shall not constitute a waiver of any error which has been properly brought to the attention of the court.

[Adopted by Supreme Court Order No. S-1-RCR-2023-00020, effective for all cases pending or filed on or after December 31, 2023.]

Committee commentary. — The district court has "inherent authority to determine whether the evidence presented at trial was legally insufficient to support a conviction." *State v. Martinez*, 2022-NMSC-004, ¶¶ 1, 4, 26, 503 P.3d 313. When reviewing the sufficiency of the evidence after the return of a guilty verdict, the district court shall use the same standard employed by appellate courts in assessing whether sufficient evidence supports a conviction. *Id*. ¶ 12. That standard is as follows: "In reviewing the sufficiency of the evidence, [the district court] must view the evidence in the light most favorable to the guilty verdict, indulging all reasonable inferences and resolving all conflicts in the evidence in favor of the verdict. Contrary evidence supporting acquittal does not provide a basis for reversal because the jury is free to reject [the d]efendant's version of the facts. The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Galindo*, 2018-NMSC-021, ¶ 12, 415 P.3d 494 (internal quotation marks and citations omitted).

In cases when a defendant is charged with multiple offenses and the jury returns a guilty verdict on more than one charge, the district court may acquit the defendant on one of the charges while also entering judgment and sentencing the defendant on the remaining charge or charges that are supported by the jury's guilty verdict. In a case like

that, for purposes of creating a clear record on appeal, the district court shall issue one final order containing both the judgment and sentence for the convictions that were supported by sufficient evidence, as well as the judicial acquittal on the unsupported guilty verdicts.

[Adopted by Supreme Court Order No. S-1-RCR-2023-00020, effective for all cases pending or filed on or after December 31, 2023.]

5-615. Notice of federal restriction on right to receive or possess a firearm or ammunition.

A. **Notice required.** A person who is the subject of an order set forth in Paragraph B of this rule shall be given written notice of the following:

(1) The person is prohibited under federal law from receiving or possessing a firearm or ammunition as provided by 18 U.S.C. § 922(g)(4);

(2) The Administrative Office of the Courts is required under Section 34-9-19(B) NMSA 1978 to report information about the person's identity to the Federal Bureau of Investigation for entry into the National Instant Criminal Background Check System; and

(3) The person may petition the court as provided in Section 34-9-19 NMSA 1978 to restore the person's right to possess or receive a firearm or ammunition and to remove the person's name from the National Instant Criminal Background Check System.

B. **Orders requiring notice.** The notice required under Paragraph A of this rule shall be included in or made a part of an order,

(1) that was issued after a hearing

(a) of which the defendant received actual notice; and

(b) at which the defendant had an opportunity to participate with the assistance of counsel; and

(2) that finds the defendant,

(a) incompetent to stand trial; or

(b) not guilty by reason of insanity at the time of the offense.

[Provisionally approved by Supreme Court Order No. 16-8300-003, effective for all orders issued on or after May 18, 2016; Supreme Court Order No. 17-8300-003, withdrawing amendments provisionally approved by Supreme Court Order No. 16-8300-

003, effective retroactively to May 18, 2016, and approving new amendments, effective for all orders filed on or after March 31, 2017.]

Committee commentary. — Enacted in 2016, NMSA 1978, Section 34-9-19(C) requires the Administrative Office of the Courts to notify a person who has been "adjudicated as a mental defective" or "committed to a mental institution" that the person "is disabled pursuant to federal law from receiving or possessing a firearm or ammunition." Federal law declares it a crime for a person who has been "adjudicated as a mental defective" or "committed to a mental institution" to, among other things, receive or possess a firearm or ammunition. *See* 18 U.S.C. § 922(g)(4) ("It shall be unlawful for any person . . . who has been adjudicated as a mental defective or who has been committed to a mental institution . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.").

The terms "adjudicated as a mental defective" and "committed to a mental institution" are defined under federal regulation and New Mexico law as follows:

Adjudicated as a mental defective.

(a) A determination by a court, board, commission, or other lawful authority that a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease:

(1) is a danger to himself or to others; or

(2) Lacks the mental capacity to contract or manage his own affairs.

(1) A finding of insanity by a court in a criminal case; and

(2) Those persons found incompetent to stand trial or found not guilty by reason of lack of mental responsibility pursuant to articles 50a and 72b of the Uniform Code of Military Justice, 10 U.S.C. 850a, 876b.

Committed to a mental institution. A formal commitment of a person to a mental institution by a court, board, commission, or other lawful authority. The term includes a commitment to a mental institution voluntarily. The term includes commitment for mental defectiveness or mental illness. It also includes commitments for other reasons, such as for drug use. The term does not include a person in a mental institution for observation or a voluntary admission to a mental institution.

27 C.F.R. § 478.11; NMSA 1978, § 34-9-19(M) ("[T]he terms 'adjudicated as a mental defective' and 'committed to a mental institution' have the same meaning as those terms are defined in federal regulations at 27 C.F.R. Section 478.11 . . . .").

Paragraph A of this rule prescribes the notice that must be given under Section 34-9-19(C) to a person who has been "adjudicated as a mental defective" or "committed to a mental institution." *See also* Form 4-940 NMRA (Notice of federal restriction on right to possess or receive a firearm or ammunition). Paragraph B identifies the orders that require notice in a criminal proceeding because they presumptively meet the federal definition of "adjudicated as a mental defective" or "committed to a mental institution."

The requirements in Paragraph (B)(1) are intended to ensure that adequate due process protections are present before notice is provided and the person's identifying information is reported to the National Instant Criminal Background Check System (NICS). *Accord, e.g., United States v. Rehlander*, 666 F.3d 45, 48 (1st Cir. 2012) ("[T]he right to possess arms (among those not properly disqualified) is no longer something that can be withdrawn by government on a permanent and irrevocable basis without due process. Ordinarily, to work a permanent or prolonged loss of a constitutional liberty or property interest, an adjudicatory hearing, including a right to offer and test evidence if facts are in dispute, is required."); Open Letter to the States' Attorneys General from the Bureau of Alcohol, Tobacco, Firearms, and Explosives, U.S. Department of Justice (May 9, 2007), https://www.atf.gov/file/83751/download (explaining that the ATF historically has required "traditional protections of due process be present, including adequate notice, an opportunity to respond, and a right to counsel"); *cf*. 18 U.S.C. § 921(a)(33) (providing that "[a] person shall not be considered to have been convicted of [a misdemeanor crime of domestic violence under § 922(g)(9)], unless . . . the person was represented by counsel in the case . . . .").

The inclusion in Paragraph (B)(2)(a) of a finding of incompetency to stand trial is not free from doubt. The federal definition of "adjudicated as a mental defective" arguably is limited in Subsection (b)(2) to a finding of incompetent to stand trial in proceedings under the Uniform Code of Military Justice (UCMJ) and therefore may not apply to such a finding in a state criminal proceeding. However, the federal agency that promulgated the definition interprets Subsection (b)(2) as applying to findings of incompetency both in criminal cases and in proceedings under the UCMJ. *See* 79 Fed. Reg. 774, 777 (2014) (statement in proposed rule by the Bureau of Alcohol, Tobacco, Firearms, and Explosives). That interpretation is consistent with federal law that governs the reporting of information to the NICS. *See* NICS Improvement Amendments Act of 2007, Pub. L. 110-180, § 101(c)(1)(C), 121 Stat. 2559, 2562-63 (2008) (providing that no law shall prevent a federal department or agency from providing to the Attorney General any record that includes a finding of incompetent to stand trial "*in any criminal case* or under the Uniform Code of Military Justice" (emphasis added)).

Further, the standards for determining competency in a proceeding under the UCMJ and under New Mexico law in a criminal case are substantially the same. *Compare* 10 U.S.C. § 876b(a)(1) (requiring commitment to the Attorney General's custody of a person "presently suffering from a mental disease or defect rendering the person mentally incompetent to the extent that the person is unable to understand the nature of the proceedings against that person or to conduct or cooperate intelligently in the defense of the case"); *with, e.g., State v. Rotherham*, 1996-NMSC-048, ¶ 12, 122 N.M.

246, 923 P.2d 1131 (“A person is competent to stand trial when he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and he has a rational as well as factual understanding of the proceedings against him. An accused must have the capacity to assist in his own defense and to comprehend the reasons for punishment.” (internal quotation marks, alterations, and citations omitted)). Requiring notice for a finding of incompetency in a criminal proceeding, therefore, is consistent with the intent and scope of the federal definition, which is controlling under New Mexico law. *See* NMSA 1978, § 34-9-19(M).

[Provisionally approved by Supreme Court Order No. 16-8300-003, effective for all orders issued on or after May 18, 2016; Supreme Court Order No. 17-8300-003, withdrawing amendments provisionally approved by Supreme Court Order No. 16-8300-003, effective retroactively to May 18, 2016, and approving new amendments, effective for all orders filed on or after March 31, 2017.]

ANNOTATIONS

The 2017 amendment, approved by Supreme Court Order No. 17-8300-003, effective March 31, 2017, clarified the notice provisions for persons who are prohibited under federal law from receiving or possessing a firearm or ammunition as provided in 18 U.S.C. § 922(g)(4) to correspond with Section 34-9-19 NMSA 1978, clarified the types of orders that require the notice provided in Paragraph A to ensure that due process protections are present and to align with federal definitions, and revised the committee commentary; in Paragraph A, in the introductory sentence, deleted “The court shall provide written notice to a” and added “A”, after “Paragraph B of this rule”, deleted “that” and added “shall be given written notice of the following:”; added the subparagraph designation “(1)”, in Subparagraph A(1), after “firearm or ammunition”, added “as provided by 18 U.S.C. § 922(g)(4)”, added the subparagraph designation “(2)”; in Subparagraph A(2), after the subparagraph designation, deleted “The notice shall further state that” and added “The Administrative Office of the Courts is required under Section 34-9-19(B) NMSA 1978 to report information about”, after “the person’s”, deleted “identifying information will be transmitted” and added “identity”, and after “Criminal Background Check System”, added “and” and added new Subparagraph A(3); in Paragraph B, in the introductory sentence, after “this rule shall be”, deleted “in the form substantially approved by the Supreme Court and shall be attached to the following:” and added “included in or made a part of an order”; added new Subparagraph B(1) and redesignated former Subparagraphs B(1) and B(2) as Subparagraphs B(2)(a) and B(2)(b) respectively; in Subparagraph B(2), added “that finds defendant,”; in Subparagraph B(2)(a), deleted “An order finding a defendant”, and after the semicolon, deleted “and” and added “or”; and in Subparagraph B(2)(b), after the subparagraph designation, deleted “An order finding a defendant”.

ARTICLE 7
Judgment and Appeal

5-701. Judgment; costs.

A. **Judgment.** If the defendant is found guilty, a judgment of guilty shall be rendered if the court makes the legal determination that sufficient evidence supports the verdict. If the defendant has been acquitted, a judgment of not guilty shall be rendered. The judgment and sentence shall be rendered in open court and thereafter a written judgment and sentence shall be signed by the judge and filed. The clerk shall give notice of entry of judgment and sentence.

B. **Sentencing hearing.** Except for good cause shown, the sentencing hearing shall begin within ninety (90) days from the date the trial was concluded or the date a plea was entered.

C. **Judgment and sentence.** Within thirty (30) days after the conclusion of the sentencing hearing, the court shall enter a judgment and sentence.

D. **Costs and fees.** In a case in which there is a conviction, costs and fees may be imposed as provided by law.

[As amended, effective December 1, 1998; as amended by Supreme Court Order No. S-1-RCR-2023-00020, effective for all cases pending or filed on or after December 31, 2023.]

ANNOTATIONS

The 2023 amendment, approved by Supreme Court No. S-1-RCR-2023-00020, effective December 31, 2023, provided that if a defendant is found guilty at trial, the district court shall render a judgment of guilty only if the court makes the legal determination that sufficient evidence supports the verdict; and in Paragraph A, after “shall be rendered” added “if the court makes the legal determination that sufficient evidence supports the verdict”.

The 1998 amendment, effective December 1, 1998, substituted "the defendant" for "he" in the second sentence in Paragraph A; added present Paragraphs B and C; redesignated former Paragraph B as present Paragraph D; and in Paragraph D substituted "costs and fees may be imposed as provided by law" for "the costs may be adjudged against the defendant".

A trial court’s inherent authority to review the sufficiency of the evidence does not end post-verdict. — Where Defendant was convicted of criminal sexual penetration and battery against a household member, and where two days after accepting the jury’s verdicts, the district court, on its own motion, vacated both convictions, concluding that the State failed to provide sufficient evidence to identify defendant as the person who actually committed the crimes, there was no error because a trial court, with jurisdiction over a criminal case, has the inherent authority to review the sufficiency of the evidence supporting conviction at any time while its

jurisdiction over the case continues. *State v. Martinez*, 2022-NMSC-004, *rev'g* A-1-CA-37798, mem. op. (N.M. Ct. App. Sept. 16, 2019) (non-precedential).

Failure to enter judgment in accordance with verdict. — Once the jury returns a guilty verdict, this rule requires the trial court to enter judgment in accordance with the verdict. The trial court's noncompliance with this rule requires a reversal of its judgment of not guilty and a remand for an entry of judgment in compliance with this rule. *State v. Davis*, 1982-NMCA-057, 97 N.M. 745, 643 P.2d 614.

Orally pronounced sentence not final. — Since an orally pronounced sentence is not a final judgment and is subject to change until reduced to writing, the trial court had authority to change an orally pronounced sentence even though the defendant, pursuant to the oral sentence, had already reported to his probation officer, submitted a report, and paid the fee for probation costs. *State v. Rushing*, 1985-NMCA-091, 103 N.M. 333, 706 P.2d 875.

Suspension or deferment of sentence is not a matter of right but is an act of clemency within the trial court's discretion. *State v. Follis*, 1970-NMCA-083, 81 N.M. 690, 472 P.2d 655.

Right of state to appeal. — Where the trial court fails to comply, after the verdict is received, with a mandatory rule of criminal procedure, the state has a right to appeal. *State v. Davis*, 1982-NMCA-057, 97 N.M. 745, 643 P.2d 614.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 791 to 793.

24 C.J.S. Criminal Law §§ 1458 to 1592.

5-702. Advising defendant of a right to appeal.

A. **Advice by court.** At the time of imposing or deferring sentence in a case which has gone to trial on a plea of not guilty, the court shall advise the defendant of his right to appeal and of the right of a person who is unable to pay the cost of an appeal to proceed at state expense.

B. **Duties of defense counsel.** In addition to the advice given by the court, defense counsel shall, within the time provided in the Rules of Appellate Procedure, file with the court one of the following documents:

(1) a notice of appeal in compliance with Rule 12-201 of the Rules of Appellate Procedure; or

(2) an affidavit, substantially in the form approved by the supreme court, signed and sworn to by defendant and witnessed by counsel stating defendant's decision not to appeal.

[As amended, effective October 1, 1987.]

Committee commentary. — The original version of this rule was abrogated as a part of the adoption of the Rules of Appellate Procedure in 1975. Paragraph A of Rule 12-201 incorporates the appeal procedure formerly contained in this rule.

The new rule is derived from Rule 32(a)(2) of the Federal Rules of Criminal Procedure. This rule does not require the court to advise a defendant pleading guilty or no contest under Rule 5-503 of his right to appeal. *See State v. Chavez*, 80 N.M. 560, 458 P.2d 812 (Ct. App. 1969). *See* Federal Rules 32(a)(2) and commentary. 62 F.R.D. 271, 320, 322 (1974). Nevertheless, an appeal from a plea of guilty is permissible. *See e.g.*, *State v. Vigil*, 85 N.M. 328, 512 P.2d 88 (Ct. App. 1973).

This rule was revised in 1983 to correct the growing number of petitions for postconviction relief arising from defendants who claim they were never advised of their right to appeal. Requiring both the defendant to certify that the defendant was, in fact, advised of the right to appeal, and counsel to witness the advice given, will preclude this problem.

ANNOTATIONS

Appeal is matter of right. — An appeal from a judgment and sentence in a criminal case is a matter of right. *Barela v. State*, 1970-NMCA-044, 81 N.M. 433, 467 P.2d 1005 (decided under former law).

Upon conviction defendant has an undoubted right to appeal his sentence. *Rodriguez v. District Court*, 1971-NMSC-101, 83 N.M. 200, 490 P.2d 458.

Rule applied to show-cause proceeding involving indirect criminal contempt. — Since a hearing on an order to show cause why respondents should not be held in contempt was in effect a trial on a plea of not guilty to a contempt charge, and since the respondents were held in contempt, a felony, they should have been informed of their rights under Subdivision (a) (*see now* Paragraph A). *State v. Wisniewski*, 1985-NMSC-079, 103 N.M. 430, 708 P.2d 1031.

Former provisions applied to show-cause proceeding involving indirect criminal contempt. — Subdivision (a) (*see now* Paragraph A), which tolled the time for taking an appeal where the court had failed to advise a defendant who had pled not guilty of his right to process an appeal at state expense, applied to a proceeding to show cause why the respondents, police officers, should not be held in indirect criminal contempt for their failure to disclose certain evidence to the defendant. *State v. Wisniewski*, 1985-NMSC-079, 103 N.M. 430, 708 P.2d 1031 (decided under former law).

Refusal of counsel to appeal. — Court-appointed counsel has a duty to represent his client until relieved and if a defendant requests counsel to appeal and counsel refuses

to do so, this is state action entitling a defendant to post-conviction relief. *Maimona v. State*, 1971-NMCA-002, 82 N.M. 281, 480 P.2d 171 (decided under former law).

If a defendant in a criminal action requests court-appointed counsel to appeal his conviction, and counsel refuses to do so, such a refusal is state action entitling the defendant to post-conviction relief. *Barela v. State*, 1970-NMCA-044, 81 N.M. 433, 467 P.2d 1005 (decided under former law).

That counsel did not advise defendant he could appeal as an indigent provides no basis for relief. *Barela v. State*, 1970-NMCA-044, 81 N.M. 433, 467 P.2d 1005 (decided under former law).

Hearing to determine right to court-appointed counsel for appeal. — Where the trial court failed to determine whether defendant was in fact indigent and entitled to court-appointed counsel for the appeal, defendant is to be given a hearing to determine whether, at the time of his notice of appeal, he in fact was indigent and if indigent, he is entitled to post-conviction relief and counsel is to be appointed to perfect the direct appeal. *Barela v. State*, 1970-NMCA-044, 81 N.M. 433, 467 P.2d 1005 (decided under former law).

Defendant's letter stating he can't pay costs is sufficient claim of indigency. *Barela v. State*, 1970-NMCA-044, 81 N.M. 433, 467 P.2d 1005.

Contempt proceeding which is at least partially criminal in nature is a "trial" within the meaning of this rule. *State v. Echols*, 1983-NMCA-025, 99 N.M. 517, 660 P.2d 607.

Ineffective assistance of counsel per se. — Failure to file a timely notice of appeal or an affidavit of waiver constitutes ineffective assistance of counsel per se, and the presumption thereof is conclusive rather than rebuttable, in accordance with the requirements of the Fifth and Sixth Amendments of the U.S. Constitution. *State v. Duran*, 1986-NMCA-125, 105 N.M. 231, 731 P.2d 374.

Presumption of ineffective assistance of counsel. — The conclusive presumption of ineffective assistance of counsel established in *State v. Duran*, 1986-NMCA-125, 105 N.M. 231, 731 P.2d 374 applies to appeals from a de novo trial in district court following a conviction in magistrate or municipal court. *State v. Cannon*, 2014-NMCA-058, cert. denied, 2014-NMCERT-006 and cert. denied, 2014-NMCERT-005.

Where defendant was convicted of aggravated DWI by a jury in magistrate court; defendant timely appealed the conviction to district court and filed a demand for a jury trial; the district court denied defendant’s request for a jury trial; at a bench trial, the district court found defendant guilty of DWI; and defendant filed an untimely notice of appeal with the district court, defense counsel was conclusively presumed to be ineffective. *State v. Cannon*, 2014-NMCA-058, cert. denied, 2014-NMCERT-006 and cert. denied, 2014-NMCERT-005.

Waiver of the right to appeal cannot be inferred from mere inaction. — Where defendant appealed from a stipulated corrected sentence that was entered four years after the original judgment and sentence, after which defendant filed neither an appeal nor an affidavit of waiver, the presumption of ineffective assistance of counsel for failure to file a timely notice of appeal still applied, and the passage of four years after entry of the original judgment and sentence does not constitute a waiver of defendant's right of appeal. *State v. Dorais*, 2016-NMCA-049, cert. denied.

Trial counsel may be held in contempt for failing to take a timely appeal, and also for making inaccurate factual recitations in the docketing statement filed. *State v. Fulton*, 1983-NMCA-010, 99 N.M. 348, 657 P.2d 1197.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Validity and effect of criminal defendant's express waiver of right to appeal as part of negotiated plea agreement, 89 A.L.R.3d 864.

24 C.J.S. Criminal Law §§ 1680, 1681.

5-703. Predisposition report procedure.

A. **Ordering the report.** The court may order a predisposition report at any stage of the proceedings.

B. **Inspection.** The report shall be available for inspection by only the parties and attorneys by the date specified by the district court, and in any event, no later than ten (10) days prior to any hearing at which a sentence may be imposed by the court unless the parties agree to proceed with shorter notice.

C. **Hearing.** Before a sentence is imposed, the parties shall have an opportunity to be heard on any matter concerning the report. The court, in its discretion, may allow the parties to present evidence regarding the contents of the report.

[As amended by Supreme Court Order No. 06-8300-005, effective March 31, 2006.]

Committee commentary. — This rule is designed to regularize the sentencing process so that the basis of the judge's decision is made known and challenged at the time of sentencing if necessary. The principle expressed in this rule is consistent with the *American Bar Association Standards Relating to Sentencing Alternatives and Procedures, Part IV* (Approved Draft 1968), the *Model Sentencing Act,* Article II (Nat. Council on Crime and Delinquency, 2d Ed. 1972) and Rule 32(c) of the *Federal Rules of Criminal Procedure. See* 62 F.R.D. 271, 324-25 (1974).

This rule provides that counsel may advise the court of any plea negotiations and that the report may be requested at that time so as to be available for use during negotiations and at the plea hearing under Rule 5-303 NMRA.

ANNOTATIONS

The 2006 amendment, effective March 31, 2006, amended Paragraph B to change the date for inspection of the predisposition order from two working days to 10 working days and to provide for agreement of the parties for shorter notice.

Cross references. — For computation of time, *see* Rule 5-104 NMRA.

For statutory procedure probation revocations, *see* Section 31-21-15 NMSA 1978.

Probation report not required. — Trial judge has authority to impose sentence immediately after trial, absent an abuse of discretion in so doing, since ordering a presentence report is not mandatory. *State v. Vialpando*, 1979-NMCA-083, 93 N.M. 289, 599 P.2d 1086, cert. denied, 93 N.M. 172, 598 P.2d 215.

Record of arrests. — Defendant is not deprived of due process if sentencing judge considers accurate arrest information relevant to the question of punishment. *State v. Montoya*, 1978-NMCA-009, 91 N.M. 425, 575 P.2d 609, cert. denied, 91 N.M. 491, 576 P.2d 297.

Defendant's due process rights not violated by having probation officer collect data and prepare presentence report. *State v. Lack*, 1982-NMCA-111, 98 N.M. 500, 650 P.2d 22.

Presentence report. — Trial court may withhold portions of probation department presentence report which contain its specific recommendations. *State v. Haar*, 1980-NMCA-065, 94 N.M. 539, 612 P.2d 1350, cert. denied, 449 U.S. 1063, 101 S. Ct. 787, 66 L. Ed. 2d 606 (1980).

Trial judge has authority to impose sentence immediately after trial, absent an abuse of discretion in so doing, since ordering a presentence report is not mandatory. *State v. Vialpando*, 1979-NMCA-083, 93 N.M. 289, 599 P.2d 1086, cert. denied, 93 N.M. 172, 598 P.2d 215.

Defendant is not deprived of due process if sentencing judge considers accurate arrest information relevant to the question of punishment. *State v. Montoya*, 1978-NMCA-009, 91 N.M. 425, 575 P.2d 609, cert. denied, 91 N.M. 491, 576 P.2d 297.

A defendant's record of arrests, without convictions, may be highly relevant in determining the type and extent of punishment. Defendant is given the opportunity to be heard on the accuracy of the arrest record. *State v. Montoya*, 1978-NMCA-009, 91 N.M. 425, 575 P.2d 609, cert. denied, 91 N.M. 491, 576 P.2d 297.

Defendant's due process rights not violated by having probation officer collect data and prepare presentence report. *State v. Lack*, 1982-NMCA-111, 98 N.M. 500, 650 P.2d 22.

Trial court may withhold portions of probation department presentence report which contain its specific recommendations. *State v. Haar*, 1980-NMCA-065, 94 N.M. 539, 612 P.2d 1350, cert. denied, 449 U.S. 1063, 101 S. Ct. 787, 66 L. Ed. 2d 606 (1980).

Plan of restitution. — Where no plan of restitution was ever prepared by the defendant in cooperation with the probation or parole department as required by 31-17-1 NMSA 1978, the failure to comply with this requirement was not error where data was supplied by the defendant and supported the court's determination of the defendant's ability to pay restitution and where the presentence report gave the defendant prior notice concerning the amounts of restitution and he was accorded an opportunity to contest the amounts ordered by the court. *State v. Lack*, 1982-NMCA-111, 98 N.M. 500, 650 P.2d 22.

Law reviews. — For comment, "A Comment on State v. Montoya and the Use of Arrest Records in Sentencing," see 9 N.M.L. Rev. 443 (1979).

For annual survey of New Mexico law relating to constitutional law, see 12 N.M.L. Rev. 191 (1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Admissibility of expert testimony as to appropriate punishment for convicted defendant, 47 A.L.R.4th 1069.

Right of convicted defendant or prosecution to receive updated presentence report at sentencing proceedings, 22 A.L.R.5th 660.

Obtaining a presentence report is not a matter of right. State v. Vialpando, 93 N.M. 289, 599 P.2d 1086 (Ct. App.), cert. denied, 93 N.M. 172, 598 P.2d 215 (1979).

5-704. Death penalty; sentencing.

A. **Notice of intent.** In any case in which the state seeks the death penalty, the state shall file a notice of intent to seek the death penalty within ninety (90) days after arraignment. The notice of intent shall specify the elements of the statutory aggravating circumstances upon which the state will rely in seeking a sentence of death. Before the time for filing a notice of intent has expired, upon motion by the state with good cause shown, the district court may extend the time for filing a notice of intent.

B. **Pre-trial review of state penalty proceeding evidence.** No later than ninety (90) days prior to trial, the court shall hold a hearing to determine whether or not there is probable cause to believe that one or more aggravating circumstances exist. If the court finds that there is not probable cause on one or more aggravating circumstances, the court shall dismiss that aggravating circumstance.

C. **Capital defense counsel.** The defendant in a death penalty case must be represented by at least two (2) attorneys, one of whom meets the minimum standards

set forth in this paragraph for first-chair capital defense attorneys and another who meets the minimum standards set forth in this paragraph for first-chair or second-chair capital defense attorneys.

(1) The minimum standards for first-chair capital defense attorneys are:

(a) member in good standing of the New Mexico Bar;

(b) a minimum of five (5) years active criminal litigation experience as a licensed attorney immediately preceding appointment;

(c) prior experience as lead counsel or co-counsel in at least eight (8) felony jury trials that were tried to completion, at least two of which were murder prosecutions; and

(d) completion within two (2) years prior to entry of appearance in a death penalty case of at least twelve (12) hours of training in the defense of capital cases in a program approved by the New Mexico Department of the Public Defender and qualified for New Mexico MCLE credit.

(2) The minimum standards for second-chair capital defense attorneys are:

(a) member in good standing of the New Mexico Bar;

(b) a minimum of three (3) years active criminal litigation experience as a licensed attorney immediately preceding appointment;

(c) prior experience as lead counsel or co-counsel in at least eight (8) felony jury trials that were tried to completion; and

(d) completion within two (2) years prior to entry of appearance in a death penalty case of at least twelve (12) hours of training in the defense of capital cases in a program approved by the New Mexico Department of the Public Defender and qualified for New Mexico MCLE credit. This requirement may be met within one (1) year after appointment as second-chair counsel in a death penalty case.

The district court shall require any attorney who enters an appearance as trial counsel in a death penalty case to show that the attorney is a qualified capital defense attorney in accordance with the requirements of this paragraph. If the district court determines that the defendant is not represented by two (2) qualified capital defense attorneys, at least one of whom is qualified to act as first chair, the district court, in the case of indigent defendants, shall order the New Mexico Department of the Public Defender to appoint one or more qualified attorneys to ensure that the defendant is represented as required by this paragraph. In the case of a defendant who has retained private counsel, the district court shall order the New Mexico Department of the Public

Defender to appoint an attorney who is qualified as a first-chair capital defense attorney to assist the privately retained defense attorney.

D. **Separate trial and sentencing juries optional.**

(1) If the defendant is charged with an offense which may be punished upon conviction by the penalty of death, the procedure set forth in Section 31-20A-1 NMSA 1978 shall govern unless the defendant at least sixty (60) days before the scheduled trial date elects, by written notice filed with the court, to have two separate juries for trial and sentencing as provided in Subparagraph (2) of this paragraph.

(2) If the defendant elects to have separate trial and sentencing juries under Subparagraph (1) of this paragraph, a trial jury shall be impaneled to determine whether the defendant is innocent or guilty of the capital felony offense and any other charged non-capital offenses. The jury shall be selected and instructed in the same manner as any other jury selected and instructed to determine the innocence or guilt of a defendant charged with non-capital felony offenses. If the trial jury finds the defendant guilty of a capital felony offense that may result in a sentence of death, a second jury shall be selected in accordance with Paragraph E of this rule to determine whether the defendant shall be sentenced to death or life imprisonment.

(3) At the sentencing hearing, the state may present evidence relevant to any aggravating factor permitted to be considered under Section 31-20A-5 NMSA 1978. The defendant may present evidence relevant to any mitigating factor, including but not limited to those factors enumerated in Section 31-20A-6 NMSA 1978. If the defendant elects the two-jury procedure set forth in Subparagraph (2) of this paragraph, information presented to the sentencing jury may include portions of the trial transcript and exhibits as designated by the parties and admitted by the court. The state and the defendant shall be permitted to rebut any information received at the hearing, and shall be given fair opportunity to present argument as to the adequacy of the evidence to establish the existence of any aggravating or mitigating factor, and as to the appropriateness in the case of imposing a sentence of death. The parties may make opening statements and closing arguments, including a rebuttal closing argument by the state.

E. **Individual sequestered voir dire.** For the selection of jurors for the single jury permitted under the procedure set forth in Section 31-20A-1 NMSA 1978 or for the separate sentencing jury permitted under Subparagraph (2) of Paragraph D of this rule, voir dire shall be conducted by questioning individual prospective jurors on death penalty issues out of the presence of any other prospective juror. The court may also permit individual sequestered voir dire of prospective jurors on other issues.

F. **Alternate jurors.** If the defendant is charged with an offense which may be punished upon conviction by the penalty of death and a single jury is used for trial and sentencing, alternate jurors shall not be discharged until the regular jurors are discharged. Such jurors may not attend or participate in the consideration of a verdict,

but shall be treated in the same manner as other jurors and shall be called after a verdict is returned to act as alternate jurors to replace jurors who become or are found to be unable or disqualified to consider the sentence to be imposed. If the defendant elects the two-jury procedure set forth in Subparagraph (2) of Paragraph D of this rule, alternate jurors for the trial jury and the sentencing jury shall be impaneled and discharged in accordance with Rule 5-605 NMRA.

G. **Jury deliberations.** In any case in which the state seeks the death penalty and a single jury is used for trial and sentencing, if the jury convicts the defendant of first-degree murder, the court will proceed with the sentencing proceeding. The jury shall consider the aggravating and mitigating circumstances at the same time or separately. If the defendant has elected the two-jury procedure under Paragraph D of this rule, and if the trial jury convicts the defendant of first-degree murder, the trial jury shall then be discharged and a sentencing jury shall be selected as permitted by this rule. The court will then proceed with the sentencing proceeding and the sentencing jury shall consider the aggravating and mitigating circumstances at the same time or separately.

H. **Bifurcated proceedings.** Upon request of a party, the court shall bifurcate the issues of aggravating circumstances and mitigating circumstances in the following order:

(1) aggravating circumstances determination. The sentencing jury will first determine if one or more of the statutory aggravating circumstances charged in the indictment or information exist. The aggravating circumstance evidence shall be presented to the jury as follows:

(a) the state shall submit evidence of aggravating circumstances;

(b) the defense may submit its evidence;

(c) the state may submit any evidence in rebuttal;

(d) the defense may submit evidence in surrebuttal.

(2) sentencing stage. If the sentencing jury returns a finding that the state has proven the existence of at least one aggravating circumstance beyond a reasonable doubt:

(a) the defense may submit evidence of mitigating circumstances;

(b) the state may submit its evidence;

(c) the defense may submit any evidence in rebuttal;

(d) the state may submit evidence in surrebuttal.

I. **Polling of sentencing jury.** If the sentencing jury returns a verdict that the defendant should be sentenced to death, the court shall poll each juror to assure that the juror agrees with sentence of death.

J. **Record of proceedings.** All proceedings under this rule, whether conducted in open court, at bench conferences or in chambers, shall be recorded verbatim.

K. **Disability of judge.** In any felony case in which the defendant may be punished by the penalty of death, if the judge, who has presided over the trial or accepted a guilty plea, is unable to preside over a sentencing proceeding to determine the sentence to be imposed by reason of absence, death, sickness or other disability, any other judge regularly sitting in or assigned to the court may conduct a sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. Prior to conducting a sentencing proceeding, a substitute judge shall file a certificate that he read or heard the evidence and examined the exhibits.

[As amended, effective April 19, 2004; as amended by Supreme Court Order No. 09-8300-009, effective May 6, 2009; by Supreme Court Order No. 09-8300-042, effective November 30, 2009, for all new and pending cases.]

Committee commentary. — This rule was drafted to comply with the legislative directive that the Supreme Court promulgate rules to regulate the practice and procedure in capital felony cases for the selection and utilization of alternate jurors and substitute trial judges caused by the disability of any juror or trial judge before whom a capital felony sentencing proceeding has commenced. *See* note to Section 31-20A-6 NMSA 1978. *See* Laws 1979, Chapter 150, Section 11.

Paragraph F of this rule is the same as Rule 5-605 NMRA, except alternate jurors in certain felony cases will not be discharged at the time the regular jurors retire to deliberate, but rather will be kept under the same conditions as the regular jurors. Alternate jurors in capital felony cases may not participate in the deliberation of the verdict even if a regular juror is no longer able to participate. It is believed that alternate juror participation in the deliberation of the verdict may be unconstitutional in that the deliberation of the other eleven jurors may have progressed to a stage that the alternate juror would have little voice in the verdict. *See* commentary to American Bar Association Standard 2.7, Standard Relating to Trial by Jury.

Subsection B of Section 31-20A-1 NMSA 1978 requires that the sentencing proceeding be commenced as soon as practicable after the verdict. Paragraph B of this rule, requiring the court to commence the death penalty sentencing proceeding immediately after the guilt phase of the trial, was deleted as part of the 2004 amendments.

[As amended by Supreme Court Order No. 09-8300-009, effective May 6, 2009; by Supreme Court Order No. 09-8300-042, effective November 30, 2009, for all new and pending cases.]

ANNOTATIONS

The second 2009 amendment, approved by Supreme Court Order No. 09-8300-042, effective November 30, 2009, added Paragraph D; in Paragraph E, at the beginning of the sentence added the language preceding "dire shall be conducted by questioning individual prospective jurors"; in Paragraph F, in the first sentence, after "penalty of death" added "and a single jury is used for trial and sentencing" and added the last sentence; in Paragraph G, in the first sentence, after "death penalty" added "and a single jury is used for trial and sentencing" and added the third and fourth sentences; in Subparagraph (2) of Paragraph H, added "sentencing" before "jury"; and in Paragraph I, in the title and in the sentence, added "sentencing" before "jury".

The first 2009 amendment, approved by Supreme Court Order No. 09-8300-009, effective May 6, 2009, in Paragraph A, in the first sentence, deleted "may", replaced "seek" with "seeks", after "arraignment", deleted "unless good cause is shown", and added "Before the time for filing a notice of intent has expired, upon motion by the state with good cause shown, the district court may extend the time for filing a notice of intent."; in Paragraph C, deleted "Unless counsel is retained by the defendant, in any case in which the death penalty may be imposed, at least two attorneys shall be appointed to represent the defendant.", and inserted the new language.

The 2004 amendment, effective April 19, 2004, added present Paragraphs A, B, C, and D, redesignated former Paragraph A as present Paragraph E, deleted former Paragraph B, inserted present Paragraphs F, G, H, and I, redesignated former Paragraph C as present Paragraph J, and in the committee commentary, added the last sentence in the first paragraph, substituted “E” for “A” in the first sentence and “alternate juror participation in the deliberation of the verdict” for “this” in the third sentence of the second paragraph, and substituted the present last sentence for the former last two sentences in the third paragraph.

Alternative sentencing procedure in death penalty cases. — The Supreme Court amended Rule 5-704 NMRA, effective November 30, 2009, to provide the option of using two separate juries, one to determine innocence or guilt and one to determine sentencing, for all new and pending death penalty cases in district court alleging crimes committed before July 1, 2009, in order to address concerns regarding the death penalty system in New Mexico in the remaining death penalty cases. *In re Death Penalty Sentencing Jury Rules*, 2009-NMSC-052, 147 N.M. 302, 222 P.3d 674.

Paragraph A is designed to effectuate the provisions of the Capital Felony Sentencing Act. *State v. Fry*, 2006-NMSC-001, 138 N.M. 700, 126 P.3d 516.

Legislative intent of Paragraph A. — Former Paragraph A (now Paragraph E) of this rule reflects the legislature's decision to have a single jury, composed of the same jurors, decide both the question of guilt or innocence and the appropriate sentence in a death penalty case. *State v. Fry*, 2006-NMSC-001, 138 N.M. 700, 126 P.3d 516.

Jurors excluded. — Former Paragraph A (now Paragraph E) of this rule does not allow jurors who in no case would vote for capital punishment and jurors who would automatically vote for the death penalty in all cases to sit on the guilt-innocence phase of a capital trial. *State v. Fry*, 2006-NMSC-001, 138 N.M. 700, 126 P.3d 516.

This rule is inapplicable to a sentence of life without the possibility of parole. — In an interlocutory appeal, where defendant was charged with first-degree murder, a capital felony, and with one count each of first-degree kidnapping, robbery, and conspiracy to commit robbery, and where defendant argued that due to her possible sentence of life without the possibility of parole, she must be afforded heightened procedural protections that apply when the State seeks the death penalty, the district court did not err in determining that the death penalty procedures set forth in this rule do not apply because the extraordinary penalty of death is not implicated, and heightened procedural requirements are not necessary because the life without the possibility of parole sentence does not invoke the unique complexities and demands of a death penalty. *State v. Chadwick-Mcnally*, 2018-NMSC-018.

Law reviews. — For article, "The Capital Defendant's Right to Make a Personal Plea for Mercy: Common Law Allocution and Constitutional Mitigation," see 15 N.M.L. Rev. 41 (1985).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Propriety of imposition of death sentence by state court following jury's recommendation of life imprisonment or lesser sentence, 8 A.L.R.4th 1028.

5-705. Life imprisonment without possibility of release or parole.

A. **Notice of intent.** In any case in which the state seeks life imprisonment without the possibility of release or parole, the state shall file a notice of intent to seek life imprisonment without the possibility of release or parole within ninety (90) days after arraignment in district court. The notice of intent shall specify the elements of the statutory aggravating circumstances upon which the state will rely in seeking a sentence of life imprisonment without the possibility of release or parole. Before the time for filing a notice of intent has expired, with good cause shown, the district court may modify the time for filing a notice of intent.

B. **Pretrial review of state penalty proceeding evidence.** Upon the defendant’s motion, no later than ninety (90) days prior to trial, the court shall hold a hearing to determine whether or not there is probable cause to believe that one or more aggravating circumstances exist. If the court finds that there is not probable cause on one or more aggravating circumstances, the court shall dismiss that aggravating circumstance.

C. **Bifurcated proceeding upon motion.** Upon motion and a showing of prejudice, the court may bifurcate the issues of guilt of the defendant and whether one or more aggravating circumstances exist under Section 31-20A-5 NMSA 1978. If the court

bifurcates the proceeding, it must also determine whether the same jury that decides guilt will also decide whether one or more aggravating circumstances exist. A motion for bifurcated proceeding must be filed at least ninety (90) days prior to trial. The court's decision on the motion shall be issued no later than ten (10) days prior to trial.

D. **Procedures for proceeding that has not been bifurcated.** If the proceeding is not bifurcated, the trial jury shall determine by a special verdict whether one or more aggravating circumstances exist beyond a reasonable doubt.

E. **Procedures for bifurcated proceedings.** If the court bifurcates the issues of guilt of the defendant and whether one or more aggravating circumstances exist, the court shall proceed as follows:

(1) A trial jury shall be impaneled to determine whether the defendant is guilty of an offense for which the sentence imposed may be life without the possibility of release or parole.

(2) If the trial jury finds the defendant guilty of an offense that may result in a sentence of life without the possibility of release or parole, the same jury or a second jury, as determined by the court under Paragraph C of this rule, shall determine whether one or more aggravating circumstances exist beyond a reasonable doubt. The court shall permit the state and the defendant to present evidence and argument relating to the presence or absence of one or more aggravating circumstances.

[Adopted by Supreme Court Order No. 19-8300-018, effective for all cases pending or filed on or after December 31, 2019.]

Committee commentary. — This rule follows the repeal of the death penalty in 2009, *see* 2009 N.M. Laws, ch. 11, §§ 5-7, and sets forth procedures for cases in which a defendant faces a possible sentence of life imprisonment without the possibility of release or parole. *See* NMSA 1978, § 31-20A-2 (2009).

Under Paragraph A, the time for filing the notice of intent may be modified upon motion of a party or by the district court, sua sponte.

In *State v. Chadwick-McNally*, the Supreme Court held that defendants facing a possible sentence of life imprisonment without the possibility of release or parole were not entitled to the heightened procedural protections that are afforded to defendants facing a possible death sentence, including a hearing comparable to that provided for under Rule 5-704 (B) NMRA and bifurcated proceedings on issues of guilt and aggravated circumstances as provided for under Rule 5-704 (H). 2018-NMSC-018, ¶¶ 16-19, 20-22, 414 P.3d 326. Given the significant liberty interest implicated for a defendant facing a sentence of life imprisonment without parole—now the most serious penalty a criminal defendant in New Mexico can face—this rule provides for some of the heightened procedural protections contemplated by Rule 5-704.

Under Paragraph B, a defendant who moves for a pretrial determination on whether there is probable cause to believe that one or more aggravated circumstances exist is entitled to a hearing on that issue. A defendant is not entitled, as a matter of course, to bifurcated proceedings on the issues of guilt and whether one or more aggravating circumstances exist; "[w]hether bifurcated proceedings are appropriate must be determined by the court on a case-by-case basis." *Chadwick-McNally*, 2018-NMSC-018, ¶¶ 21-22.

Under Paragraphs (D) and (E)(2), if a jury finds beyond a reasonable doubt that one or more aggravating circumstances exist, the defendant shall be sentenced to life imprisonment without the possibility of release or parole. *Id*. ¶ 25. Mitigation is not permitted. *Id*. "If the jury does not find that one or more aggravating circumstances exist, then the defendant shall be sentenced to life imprisonment." *Id*. (quoting § 31-20A-2).

[Adopted by Supreme Court Order No. 19-8300-018, effective for all cases pending or filed on or after December 31, 2019.]

ARTICLE 8
Special Proceedings

5-801. Reduction of sentence.

A. **Reduction of sentence.** A motion to reduce a sentence may be filed within ninety (90) days after the sentence is imposed, or within ninety (90) days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within ninety (90) days after entry of any order or judgment of the appellate court on direct appeal denying review of, or having the effect of upholding, a judgment of conviction. A motion to reduce a sentence may also be filed upon revocation of probation as provided by law. Changing a sentence from a sentence of incarceration to a sentence of probation shall constitute a permissible reduction of sentence under this paragraph.

B. **Mandatory sentence.** This rule does not apply to the death penalty or a mandatory sentence.

[As amended, effective March 1, 1986; August 1, 1989; August 1, 1992; as amended by Supreme Court Order No. 09-8300-006, effective May 6, 2009; as amended by Supreme Court Order No. 14-8300-014, effective for all cases filed on or after December 31, 2014.]

Committee commentary. — Motions to correct clerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission should be brought under Rule 5-113(B) NMRA. Motions challenging the legal validity of a conviction or a sentence should be brought under Rule 5-802 or Rule 5-803 NMRA. This rule authorizes motions seeking discretionary reduction of a sentence.

This rule was originally drafted to be substantially the same as Rule 35 of the Federal Rules of Criminal Procedure. Prior to the adoption of Rule 5-801 NMRA there was confusion as to when the district court could modify a sentence. The New Mexico rule was that the district court could modify a sentence of a prisoner during the same term of the conviction, even if the defendant had already commenced to serve his sentence. *See State v. White*, 1962-NMSC-139, ¶ 12, 71 N.M. 342, 378 P.2d 379. The district court, however, lost all power to modify a judgment after the filing of the notice of appeal. *See id*. ¶ 14. The Rules of Criminal Procedure for the District Courts abolished the concept of terms of court and therefore it was desirable to have a specific rule setting forth the limits of power of the district court.

The rule, as originally drafted, limited the period of time that district court could modify a sentence to a period of thirty (30) days after imposition of sentence. Rule 5-801 was revised in 1988 to comply with the Supreme Court's decision in *Hayes v. State*, 1988-NMSC-021, 106 N.M. 806, 751 P.2d 186. In *Hayes*, the Supreme Court held that if the motion to reduce a sentence is filed within thirty (30) days after the mandate on appeal, the trial court could reduce the sentence within a reasonable time after the filing of the motion. *Id*. ¶ 8. The Supreme Court suggested that ninety (90) days from a timely filed motion was a reasonable time. *See also* Rule 35, Federal Rules of Criminal Procedure for the United States District Courts.

Under this rule, no modification of sentence can be considered by the trial court after the filing of notice of appeal. However, the trial court may modify the sentence within thirty (30) days after receipt of the mandate.

This rule is not to be construed as allowing the reduction, deferral or suspension of a sentence unless such modification of sentence is consistent with applicable New Mexico law.

A motion under this rule that is filed not later than thirty (30) days after the filing of the judgment tolls the time for appeal under the Rules of Appellate Procedure. *See* Rule 12-201(D)(1)(b) NMRA (2016); *see also State v. Romero*, 2014-NMCA-063, ¶¶ 5-13, 327 P.3d 525 (concluding that timely filing of post-judgment motion under Rule 5-801 suspends finality of judgment until a written ruling on the motion is entered).

[As amended by Supreme Court Order No. 14-8300-014, effective for all cases filed on or after December 31, 2014; as amended by Supreme Court Order No. 16-8300-014, effective for all cases pending or filed on or after December 31, 2016.]

ANNOTATIONS

The 2016 amendment, approved by Supreme Court Order No. 16-8300-014, effective December 31, 2016, in the committee commentary, added the last sentence regarding tolling the time for appeal under the Rules of Appellate Procedure.

The 2014 amendment, approved by Supreme Court Order No. 14-8300-014, effective December 31, 2014, provided for the reduction of a sentence; in the title of the rule and Paragraph A, deleted “Modification” and added “Reduction”; deleted former Paragraph A, which authorized the court to correct an illegal sentence and a sentence imposed in an illegal manner; relettered former Paragraph B as new Paragraph A, and in the first sentence, after “the appellate court”, added “on direct appeal”; and at the beginning of relettered Paragraph B, deleted “Paragraph B of”.

The 2009 amendment, approved by Supreme Court Order No. 09-8300-006, effective May 6, 2009, in Paragraph B, deleted the last sentence, which provided that the court shall determine the motion within ninety days after the date it is filed or the motion is deemed to be denied.

The 1992 amendment, effective for cases filed in the district courts on or after August 1, 1992, substituted "ninety (90) days" for "thirty (30) days" in three places in the first sentence of Paragraph B.

Applicability. — This rule has not been preempted by Rule 5-802 NMRA. *State v. Peppers*, 1990-NMCA-057, 110 N.M. 393, 796 P.2d 614.

The 1986 amendment of this rule has only prospective effect. *Enright v. State*, 1986-NMSC-070, 104 N.M. 672, 726 P.2d 349.

Jurisdiction for motions. — Insofar as the filing of motions under this rule is concerned, this rule is jurisdictional, so that motions must be filed within 30 (now 90) days of the entry of the appellate judgment. As to the disposition of the motion, however, the court possesses discretion to hear and decide motions after 30 days. *Hayes v. State*, 1988-NMSC-021, 106 N.M. 806, 751 P.2d 186.

Trial courts have subject matter jurisdiction to consider motions made pursuant to this rule and the denial of these motions is a final, appealable order. *State v. Neely*, 1994-NMSC-057, 117 N.M. 707, 876 P.2d 222.

A district court has inherent common law authority to correct a sentence that is illegal due to clear error. — Where defendant pleaded guilty to second-degree criminal sexual penetration, and where the district court, in the first judgment and sentence (J&S), erred in ordering that defendant serve two years of parole, resulting in an unlawfully short period of mandatory parole, and where, thirteen days later, the district court attempted to correct the sentencing error by entering a second amended J&S, which replaced defendant’s parole period of two years with five-to-twenty years, both of which were illegal sentences, as 31-21-10.1(A)(2) NMSA 1978, requires a sex offender convicted of CSP in the second degree to serve an indeterminate period of supervised parole for not less than five years and up to the natural life of the sex offender, and where defendant challenged the revised parole period in a petition for writ of habeas corpus, and where the district court determined that it had no jurisdiction to correct the illegal parole sentence in the first J&S, relying on State v. Torres, 2012-

NMCA-026, which concluded that former Rule 5-801(A) NMRA abrogated the common law principle that a district court retained inherent jurisdiction to correct illegal sentences, and accordingly granted defendant's habeas petition, invalidated and voided the second amended J&S, and reinstated the original two-year parole period, the district court erred in granting the habeas petition, because historical changes to Rule 5-801(A) did not remove a district court's common law jurisdictional authority to correct a sentence that is illegal due to clear error. *State v. Romero*, 2023-NMSC-008, *overruling State v. Torres*, 2012-NMCA-026, 272 P.3d 689.

Abrogation of common law jurisdiction to correct illegal sentences. — Paragraph A of Rule 5-801 NMRA abrogated the common law principle that a district court has inherent and unlimited jurisdiction to correct illegal sentences. *State v. Torres*, 2012-NMCA-026, 272 P.3d 689, *overruled by State v. Romero*, 2023-NMSC-008.

Paragraph A of Rule 5-801 NMRA, which abrogated the common law jurisdiction of the district court to correct illegal sentences, does not violate the separation of powers doctrine. *State v. Torres*, 2012-NMCA-026, 272 P.3d 689, *overruled by State v. Romero*, 2023-NMSC-008.

District court has no jurisdiction to correct illegal sentence. — Paragraph A of Rule 5-801 NMRA strictly limits the district court's jurisdiction to correct an illegal sentence to habeas corpus proceedings. *State v. Torres*, 2012-NMCA-026, 272 P.3d 689, *overruled by State v. Romero*, 2023-NMSC-008.

Where defendant was sentenced to an unlawfully light term of imprisonment in 1988 and in 2006 the state discovered the error and filed a motion under Rule 5-801 NMRA to increase defendant's sentence by an additional eight years, the district court did not have jurisdiction to correct the illegal sentence. *State v. Torres*, 2012-NMCA-026, 272 P.3d 689, *overruled by State v. Romero*, 2023-NMSC-008.

This rule permits alteration, but only to the extent of correcting an invalid sentence or reducing a valid sentence. *State v. Sisneros*, 1981-NMCA-085, 98 N.M. 279, 648 P.2d 318, *aff'd in part, rev'd on other grounds*, 1982-NMSC-068, 98 N.M. 201, 647 P.2d 403, *aff'd*, 1984-NMSC-085, 101 N.M. 679, 687 P.2d 736.

Deferred sentence modified to conditional discharge. — Modification from a deferred sentence to a conditional discharge was an authorized sentence reduction under this rule. *State v. Herbstman*, 1999-NMCA-014, 126 N.M. 683, 974 P.2d 177.

Defendant's presence not required. — It is implicit from the language of Section 39-1-1 NMSA 1978 that it is within the sound discretion of the trial court whether to direct a defendant be physically present before the court at a hearing to reconsider or modify a prior sentence. Construing the pertinent rules and statutes together, a defendant need not be present at a hearing to reconsider a sentence, except where the hearing results in the terms of the sentence being made more onerous. *State v. Sommer*, 1994-NMCA-070, 118 N.M. 58, 878 P.2d 1007.

Unambiguous, statutorily authorized sentence not "illegal". — Defendants who received unambiguous sentences within the limits authorized by sentencing statutes cannot seek correction of "illegal sentences" under this rule. *State v. Aqui*, 1986-NMSC-048, 104 N.M. 345, 721 P.2d 771, cert. denied, 479 U.S. 917, 107 S. Ct. 321, 93 L. Ed. 2d 294 (1986) (decided prior to 1986 amendment).

Timing essential to modification of sentence. — Since the habeas corpus petition was not filed within ninety days of the rendition of the sentence, as required by Paragraph B, the district court did not have authority to modify the conditions of probation under this rule. *State v. Trujillo*, 1994-NMSC-066, 117 N.M. 769, 877 P.2d 575.

Sentence is "imposed" for purposes of Rule 5-801(A) when the judgment and sentence is filed. — Where, following defendant's guilty plea to criminal charges, the district court orally sentenced defendant to a term of nine years imprisonment and, thirty-three days later, entered a written judgment and sentence, and where defendant filed a motion for reconsideration of sentence seventy-eight days after the filing of the judgment and sentence but 111 days after the district court orally announced the sentence, and where the state filed a response, arguing that defendant's motion was untimely because it was not filed within ninety days of the sentencing hearing when the sentence was orally announced, the district court erred in granting the state's motion, because the written judgment and sentence is controlling and is the appropriate measure for evaluating when a defendant's time for filing a motion for reduction begins to accrue. Defendant's motion for reconsideration was timely. *State v. Jenkins*, 2024-NMCA-019.

Evidence presented to support motion did not have to be "unavailable" at the time of the original sentencing. — Where defendant was sentenced to nine years imprisonment following his guilty plea to criminal charges, and where defendant filed a motion for reconsideration of sentence, submitting reports from a social worker and a doctor, and requested that the district court review the experts' reports, findings and recommendations, and where the district court denied defendant's motion, ruling that a motion to reconsider sentence must include new information that was not available to the court at the time of the original sentencing, the district court erred in its interpretation of the rule and in denying defendant's motion, because the plain language of Rule 5-801 NMRA contains to requirement that the information offered in support of the motion be "unavailable" at the time of the sentencing. Rather, it is within the trial court's discretion whether to modify a valid sentence. *State v. Jenkins*, 2024-NMCA-019.

Oral sentence subject to modification. — Since an orally pronounced sentence is not a final judgment and is subject to change until reduced to writing, a court has the authority to modify such sentence even though the defendant has taken actions to effect the probationary terms of the sentence. *State v. Rushing*, 1985-NMCA-091, 103 N.M. 333, 706 P.2d 875.

Court cannot give good time credits for presentence confinement. — A district court does not have jurisdiction under this rule to correct or modify sentences by ordering that defendants be given good time credits against their sentences for the periods they spent in presentence confinement. *State v. Aqui*, 1986-NMSC-048, 104 N.M. 345, 721 P.2d 771, cert. denied, 479 U.S. 917, 107 S. Ct. 321, 93 L. Ed. 2d 294 (1986).

Limitation on modification of death sentence. — The district court does not have jurisdiction to modify a jury-imposed or a judge-imposed, at a nonjury trial, death sentence under the Capital Felony Sentencing Act, Section 31-20A-1 NMSA 1978 et seq. *State v. Cheadle*, 1985-NMSC-052, 102 N.M. 743, 700 P.2d 646.

Once the jury has unanimously agreed on a sentence of death in conformance with the Capital Felony Sentencing Act, the district court has no discretion to impose a sentence of life imprisonment; it is the supreme court which automatically reviews the jury's judgment and sentence. *State v. Guzman*, 1985-NMSC-035, 102 N.M. 558, 698 P.2d 428.

Modification of sentence based on restitution. — In a fraud case, the district court's order regarding payment of restitution within thirty days was not a proper method of achieving the district court's legitimate objective of determining whether the fraudulently obtained funds were recoverable. The district court must consider defendant's ability to pay restitution within thirty days before conditioning a portion of his term of imprisonment on payment of restitution within that time frame. *State v. Whitaker*, 1990-NMCA-014, 110 N.M. 486, 797 P.2d 275.

Revocation of parole on only one count where probation granted on multiple concurrent sentences. — When a defendant was sentenced to multiple concurrent sentences, and the trial court suspended the sentences and placed the defendant on probation which he subsequently violated, the trial court could not invoke the original sentence on one count only and provide that probation would continue on the other counts. The effect of applying revocation to one count only and reserving probation on the remaining counts for possible imposition of imprisonment on any or all of the remaining counts upon future violations is to change an original valid concurrent sentence into consecutive sentences and creates an increase in penalty which violates the constitutional prohibition against double jeopardy. *State v. Martinez*, 1982-NMCA-185, 99 N.M. 248, 656 P.2d 911.

Plea agreement to serve concurrent sentences out-of-state. — Where, in accordance with a plea bargain, in exchange for the defendant's guilty plea and his agreement to waive extradition to another state, the time to be served on concurrent New Mexico sentences was to be served out of the state concurrently with any sentence imposed by the out-of-state court, the New Mexico court could not later order the out-of-state court to return the defendant to New Mexico to serve concurrent out-of-state and New Mexico sentences here. *State v. Sykes*, 1982-NMCA-119, 98 N.M. 458, 649 P.2d 761.

Upon the filing of notice of appeal from order, trial court loses jurisdiction of the case, except for the purpose of perfecting the appeal. *State v. Garcia*, 1983-NMCA-017, 99 N.M. 466, 659 P.2d 918.

Effect of pending post-judgment motion on the finality of the judgment. — The timely filing of a post-judgment motion pursuant to Rule 5-801 NMRA suspends the finality of the preceding judgment and sentence until such time as a written ruling upon the motion is entered. *State v. Romero*, 2014-NMCA-063.

Effect of pending post-judgment motion on an appeal. — Where defendants timely filed post-judgment motions to reconsider their sentences and while the motions were pending, defendants filed notices of appeal, the judgments were not final, the appeals were premature, and the Court of Appeals lacked jurisdiction. *State v. Romero*, 2014-NMCA-063.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Right of convicted defendant or prosecution to receive updated presentence report at sentencing proceedings, 22 A.L.R.5th 660.

5-802. Habeas corpus.

A. **Scope of rule.** This rule governs the procedure for filing a writ of habeas corpus by persons in custody or under restraint for a determination that such custody or restraint is, or will be, in violation of the constitution or laws of the State of New Mexico or of the United States; that the district court was without jurisdiction to impose such sentence; or that the sentence was illegal or in excess of the maximum authorized by law or is otherwise subject to collateral attack.

B. **Petition.** The petition may be submitted using Form 9-701 NMRA and shall contain the following required information:

(1) the petition shall clearly state whether either

(a) the petition seeks to vacate, set aside, or correct the sentence or order of confinement, correct the Department of Corrections' interpretation or application of the sentence or order of confinement, or challenge the conviction; or

(b) the petition challenges conditions of confinement or matters other than those set forth in Subparagraph (B)(1)(a) of this rule;

(2) the respondent's name and title. The respondent shall be the petitioner's immediate custodian, who shall have the power to produce the body of the petitioner before the court and shall have the power to discharge the petitioner from custody if the petition is granted;

(3) a brief statement naming the place where the person is confined or restrained;

(4) a brief statement of the steps taken to exhaust all other available remedies, including a statement of the name of the case, the docket number of the case, the court, administrative agency, or institutional grievance committee from which relief was sought, and the result of each judicial or administrative proceeding;

(5) a brief statement of whether an appeal or prior petitions for habeas corpus or other relief have been filed, including a statement of the case name, the docket number of the case, the grounds upon which relief was sought, the court from which relief was sought, the result of each proceeding and, if appropriate, a statement of why the claim now being raised was not raised in such prior proceedings or how the claim now being raised differs from a claim raised in those proceedings;

(6) if the petitioner has previously filed a petition seeking relief under this rule, a brief statement explaining why the petition should not be dismissed under Paragraph H of this rule;

(7) a concise statement of the facts and law upon which the application is based; and

(8) a concise statement of the relief sought.

C. **Time and other limitations pertaining to petitions challenging the conditions of confinement within the New Mexico Corrections Department.**

(1) A New Mexico Corrections Department (NMCD) inmate may file a petition challenging any misconduct or disciplinary report or decision received while incarcerated in a NMCD correctional facility, provided that

(a) no court of this state shall acquire subject-matter jurisdiction over any complaint, petition, grievance, or civil action filed by any inmate of the NMCD with regard to any cause of action under state law that is substantially related to the inmate's incarceration by the NMCD until the inmate exhausts the NMCD's internal grievance procedure;

(b) the inmate files the petition challenging the disciplinary decision within one (1) year of the inmate's receipt of the NMCD's final disciplinary decision; and

(c) the NMCD shall inform the inmate of the provisions of Paragraph C of this rule in writing at the time of its decision. Should the NMCD fail to inform the inmate of the provision of Paragraph C of this rule in writing at the time of its decision, the time limitations of Subparagraph (C)(1)(b) of this rule shall be waived.

(2) A NMCD inmate may file a petition challenging any other condition of the inmate's confinement while incarcerated in a NMCD correctional facility, provided that no court of this state shall acquire subject-matter jurisdiction over any complaint, petition, grievance, or civil action filed by any inmate of the NMCD with regard to any cause of action under state law that is substantially related to the inmate's incarceration by the NMCD until the inmate exhausts the NMCD's internal grievance procedure.

D. **Papers attached to petition.** The following shall be attached to the petition:

(1) any opinion, order, transcript, or other written material indicating any court's, agency's, or institutional grievance committee's position or ruling on the petitioner's custody or restraint; and

(2) if the petitioner is indigent, an affidavit attesting to the petitioner's indigency and containing a statement of the petitioner's available assets and a motion for permission to proceed in forma pauperis, provided that a petitioner who is incarcerated at the time of filing the petition may file the petition without payment of the applicable filing fee or a motion for permission to proceed in forma pauperis.

E. **Venue.** If the petition

(1) seeks to vacate, set aside, or correct the sentence or order of confinement, correct the NMCD's interpretation or application of the sentence or order of confinement, or challenge the conviction, it shall be filed in the county of the court in which the matter was adjudicated, or, if the matter has not been adjudicated, in the county of the court that ordered the contested confinement; or

(2) challenges conditions of confinement or matters other than those set forth in Subparagraph (E)(1) of this rule, it shall be filed in the county where the petitioner is confined or restrained.

F. **Filing of the petition.** A writ of habeas corpus will be issued only upon filing with the clerk of the court a petition on behalf of the party seeking the writ. Upon the filing of the petition, the clerk of the district court shall file-stamp the petition with the date of receipt ("file-stamp" date). If the petition is filed by a petitioner who is not represented by an attorney and who is confined to an institution, the petition is deemed to be filed with the clerk of the court on the day the petition is deposited in the institution's internal mail system for forwarding to the court provided that the petitioner states within the petition, under penalty of perjury, the date on which the petition was deposited in the institution's internal mail system. A notation with a "deemed filed" date shall also be made on the petition and in the court's database.

G. **Court's classification and case assignment.**

(1) If the petitioner indicates that the petition challenges matters contained in Subparagraph (E)(1) of this rule, the clerk shall file the petition in the original criminal

case, thereby reopening the original criminal case, and shall assign the petition to the judge that originally heard the criminal case, or if that judge is no longer serving on the bench, to a judge presiding in the criminal division. Upon receipt of the petition or revised petition, the clerk of the court shall immediately forward a file-stamped copy of the petition and any attachments to the district attorney and to the public defender department post-conviction unit or, if the petition is filed on behalf of the petitioner by private legal counsel, to that legal counsel. Mailing copies of the petition in accordance with this subparagraph and with a completed certificate of mailing shall constitute service on the respondent by the clerk of the court in accordance with Rule 5-103, 5-103.1, or 5-103.2 NMRA.

(2) If the petitioner indicates that the petition challenges matters contained in Subparagraph (E)(2) of this rule, a new habeas corpus case shall be opened and the matter shall be assigned to a judge who addresses criminal matters in accordance with the court's assignment practices. Upon receipt of the petition or revised petition, the clerk of the court shall immediately forward a file-stamped and dated copy of the petition and any attachments to the attorney general and to the public defender department post-conviction unit or, if the petition is filed on behalf of the petitioner by private legal counsel, to that legal counsel. Mailing copies of the petition in accordance with this subparagraph and with a completed certificate of mailing shall constitute service on the respondent by the clerk of the court in accordance with Rule 5-103, 5-103.1, or 5-103.2 NMRA.

H. **Procedure in non-death penalty cases.** If a sentence of death has not been imposed, upon presentation of the petition the court shall proceed in the following manner:

(1) **Pre-appointment review.** For petitions not filed by an attorney, within forty-five (45) days of the file-stamp date on the petition, the public defender department may file a statement recommending that the court order a revised petition under Subparagraph (I)(2)(a) of this rule or indicating whether the petition is a proceeding that a reasonable person of adequate means would be willing to bring at a person's own expense and provide sufficient detail for further judicial review of the public defender's assessment. The court ordinarily should not appoint the public defender during the pre-appointment review period.

(2) **Initial court review.** Within one-hundred twenty (120) days of the file-stamp date on the petition, the court shall examine the petition together with all attachments and statement of the public defender department, if any. Within this initial one-hundred twenty (120) day court review

(a) **Petitioner's opportunity to revise.** If the court is unable to determine from the face of the petition whether the petition should be allowed to go forward on the merits or dismissed under this rule, the court may return a copy of the petition to the petitioner for additional factual information or a restatement of the legal claims. If the petition is returned to the petitioner, the court shall set a date certain within the one-

hundred twenty (120)-day initial review period, but no less than forty-five (45) days from the date of returning the copy to the petitioner, for the petitioner to resubmit a revised petition. If no revised petition is filed under this subparagraph by the date specified by the court, the judge may dismiss the petition.

(b) **Summary dismissal.** If it plainly appears from the face of the petition, any attachments, and the prior proceedings in the case that the petitioner is not entitled to relief as a matter of law, the court shall order a summary dismissal of the petition, state the reasons for the dismissal, and promptly serve a copy of the order on petitioner, district attorney if the petition challenges matters contained in Subparagraph (E)(1) of this rule, attorney general if the petition challenges matters contained in Subparagraph (E)(2) of this rule, and the public defender department post-conviction unit or, if the petition is filed on behalf of the petitioner by private legal counsel, to that legal counsel.

(c) **Appointment of counsel.** If, after reviewing the petition, any statement filed by the public defender department, and revised petition, if any, the court does not order a summary dismissal, the court shall appoint counsel to represent the petitioner, subject to the standards of the Indigent Defense Act, Section 31-16-3 NMSA 1978, unless the petitioner has filed a waiver of counsel or has retained counsel. A copy of the order of appointment shall be provided to the petitioner, respondent, and the public defender department post-conviction unit;

(3) **Procedure; time limits.** Within ninety (90) days after the date of appointment, counsel for the petitioner shall file either an amended petition or a notice that counsel does not intend to amend the petition and provide a copy of the amended petition or notice directly to the assigned judge. Within thirty (30) days after the filing of an amended petition or a notice of non-intent to amend the petition, the court may dismiss some or all of the claims in the petition under Subparagraph (H)(2) of this rule. Within one-hundred twenty (120) days after filing of the amended petition or notice not to amend, the respondent shall file a response to any claims not dismissed and provide a copy of the response directly to the assigned judge, without further order of the court;

(4) **Preliminary disposition hearing.** After the response is filed, at the request of a party or upon its own motion, the court may conduct a preliminary disposition hearing for the purpose of clarifying the issues and petitioner's evidence in support of the claims in the petition. At the preliminary disposition hearing, the court will attempt to resolve any of the issues presented by the petition based on the filings by counsel for the parties. The court shall then determine whether an evidentiary hearing is required. If it appears that an evidentiary hearing is not required, the court shall dispose of the petition without an evidentiary hearing, but may ask for briefs and oral arguments on legal issues;

(5) **Evidentiary hearing.** If an evidentiary hearing is required, the court shall conduct a hearing as promptly as practicable.

I. **Second and successive petitions.** If the petitioner has previously filed a petition seeking relief under this rule, the court shall have the discretion to

(1) dismiss any claim not raised in a prior petition unless fundamental error has occurred, or unless an adequate record to address the claim properly was not available at the time of the prior petition; and

(2) dismiss any claim raised and rejected in a prior petition unless there has been an intervening change of law or fact or the ends of justice would otherwise be served by rehearing the claim.

J. **Discovery procedures.**

(1) **Discovery procedures for parties represented by counsel.** At any time, counsel for a party may make a formal written request to opposing counsel for production of documents and other discovery materials that are available under Rules 5-501 and 5-502 NMRA. The written request shall describe the good faith efforts by counsel to obtain the discovery materials from previous counsel or any other sources and shall show that these efforts were unsuccessful. Counsel for the opposing party shall comply with the request within thirty (30) days after service or notify the court in writing of any objection to the request. Any objection based on privilege should clearly identify the material withheld and the basis of the privilege claim. The court shall then hold a hearing to rule on any objection to the discovery request. The court shall grant a challenged request for discovery when the requesting party demonstrates that the materials are relevant either to advance the claims that are alleged in the petition or to defend against the claims that are alleged in the petition.

(2) For purposes of this rule, “discovery materials” are

(a) materials in the possession of a party;

(b) materials in the possession of law enforcement authorities to which the petitioner would have been entitled to at the time of trial; or

(c) materials in the possession of the NMCD.

(3) Counsel for a party may make use of any other discovery procedure under the Rules of Criminal Procedure only after notice to opposing counsel and prior written authorization from the court. In determining whether to authorize such proceedings, the court may consider any of the factors contained in Rule 5-507(A) NMRA.

(4) **Discovery procedures for pro-se petitioners.** Petitioners not represented by counsel shall petition the court before requesting discovery under this rule and the Rules of Criminal Procedure for the District Courts. In determining whether to authorize a discovery request, the court may consider any of the factors contained in Rule 5-507(A) NMRA.

(5) **Motions to compel.** If the state or the petitioner fails to comply with any of the provisions of this rule, the court may enter an order under Rule 5-505 or Rule 5-112 NMRA.

K. **Transportation of incarcerated petitioners.** If the presence of the petitioner is required at a hearing it shall be the responsibility of counsel for the petitioner to submit a transportation order for petitioners who are incarcerated. It shall be the responsibility of the respondent to facilitate the transportation of the petitioner if needed.

L. **Death penalty cases.** If a sentence of death has been imposed

(1) upon issuance of the mandate of the Supreme Court affirming the sentence of death, the district court shall promptly appoint counsel to represent the defendant;

(2) following the issuance of the mandate the execution shall be stayed pending further proceedings under this paragraph;

(3) unless an extension of time is granted for good cause shown, within one-hundred eighty (180) days after appointment, the defendant shall file a petition for writ of habeas corpus;

(4) unless an extension of time is granted for good cause shown, within one-hundred eighty (180) days after service of a petition for writ of habeas corpus, the respondent shall file a response to the petition;

(5) within thirty (30) days after service of the response, the court shall schedule a hearing on the petition. In considering the petition, the court may hear evidence, require briefs, or schedule arguments;

(6) within thirty (30) days after the filing of the district court's order on the petition

(a) if the writ is granted, the state may appeal; or

(b) if the writ is denied, the petitioner may appeal;

(7) the Rules of Appellate Procedure shall govern the appeal to the Supreme Court.

M. **Procedure on petition remanded by the Supreme Court.** A petition originally filed in the Supreme Court may be remanded by the Supreme Court to the district court. If the petition is remanded by the Supreme Court, the district court shall proceed as if the petition had been filed in the district court in the first instance.

N. **Appeal; non-death penalty proceedings.** Within thirty (30) days after the district court's decision

(1) if the writ is granted, the state may appeal as of right under the Rules of Appellate Procedure;

(2) if the writ is denied, a petition for certiorari may be filed with the Supreme Court.

[As amended, effective March 1, 1986; March 16, 1998; June 1, 2002; as amended by Supreme Court Order No. 09-8300-006, effective May 6, 2009; as amended by Supreme Court Order No. 14-8300-014, effective for all cases filed on or after December 31, 2014; as amended by Supreme Court Order No. 17-8300-025, effective for all cases pending or filed on or after December 31, 2017.]

Committee commentary for 2017 amendments. — Rule 5-802 NMRA was amended in 2017 to streamline the administrative processing of petitions for a writ of habeas corpus in the district courts.

The amendments eliminate the thirty (30)-day review and acceptance period under Paragraph F and instead require that all petitions for a writ of habeas corpus be filed immediately upon receipt by the district court. Paragraph F establishes two important dates, the "file-stamp" date and the "deemed filed" date. The "deemed filed" date incorporates the prison mailbox rule allowing a petition for a writ of habeas corpus to be deemed filed the date it is deposited in the institution's internal mail system. *See* Rule 5-103(I) NMRA (Filing and service by an inmate). The deemed filed date will mainly affect the one (1)-year time limitation to file a petition for a writ of habeas corpus in federal court following a state court conviction. *See* Committee commentary for 2009 amendments. However, the deemed filed date may also affect the one (1)-year time limitation for filing a petition challenging a disciplinary decision of the New Mexico Corrections Department under Paragraph C. The "file-stamp" date is the date the district court actually receives the petition. All the deadlines in Rule 5-802 run from the "file-stamp" date.

Paragraph G provides guidance to the district court as to how classify and assign petitions challenging the underlying conviction versus petitions challenging the conditions of confinement. Petitioners who wish to raise both types of claims must file two separate petitions and submit each petition in the venue required by Paragraph E. *See* Form 9-701 NMRA.

While the district court may deny a petition for a writ of habeas corpus on appropriate grounds during the pre-appointment review period under Subparagraph (H)(1), the committee recommends that district courts consider the information provided in the pre-appointment review before denying a petition for a writ of habeas corpus.

Under Subparagraph (H)(2), within one-hundred twenty (120) days of the "file stamp date," the district court must either return the petition to petitioner for further information, summarily dismiss the petition, or appoint counsel. If the district court fails to take one of the foregoing actions within that designated time period, the petitioner may request a hearing.

Committee commentary for 2014 amendments. — Rule 5-802 NMRA was amended in 2014 following an extensive review by the Court and its Ad-hoc Habeas Corpus Review Committee. Rule 5-802 is designed to address petitions filed after the entry of a final judgment and all direct appeals, however styled, in a criminal case. For example, motions to vacate a sentence and motions to withdraw a plea after the entry of a final judgment and all direct appeals should be treated as habeas petitions to be adjudicated under Rule 5-802 as opposed to motions to modify or reduce a sentence filed under Rule 5-801.

Paragraph B(5) is amended to clarify that it applies to successive petitions for habeas relief. District courts should ordinarily dismiss petitions that do not comply with the provisions of Paragraph B(5).

Paragraph E(1) is amended to ensure that a habeas petition is assigned to the judge that originally heard the matter. This is the current practice in most district courts and reflects a policy that the judge that originally heard the matter is in a better position to rule on a petition for habeas corpus because that judge is familiar with the petitioner's case. Therefore, even if the judge that originally heard the case has transferred to a different division within the same court, the case should still be assigned to that judge. Should that judge no longer be serving on the bench, the criminal, as opposed to civil division of the court, should handle the matter. The criminal division is more familiar with the types of claims likely to be raised in a petition for a writ of habeas corpus.

The Committee added a new Paragraph F and substantially amended former Paragraph E (now Paragraph G). Paragraphs F and G are designed to help the district court screen out frivolous petitions while making sure meritorious petitions are properly addressed. First, Paragraph F gives the district courts more flexibility in processing petitions for habeas corpus. Oftentimes, habeas petitions are difficult to recognize when received by the district court. Paragraph F gives the district court time to determine what the petition is, whether it should be accepted as a habeas petition, and how it should be filed without prejudicing the rights of the petitioner. Paragraph F also ensures that the proper parties i.e. the district attorney, attorney general and the public defender are given notice of a filing of a petition for a writ of habeas corpus. By receiving notice, these parties will be able to keep track of the petitions and will be ready to respond if called upon by the district court.

Second, Paragraph G(1) gives the Public Defender Department the opportunity to file a statement regarding the filed petition for habeas corpus before counsel is appointed and/or a final order is rendered by the district court. Under the Indigent Defense Act, a person has the limited right to appointed counsel representation in post-conviction

matters “unless the court in which the proceeding is brought determines that it is not a proceeding that a reasonable person with adequate means would be willing to bring at his own expense.” NMSA 1978, § 31-16-3(B)(3) (1968). Therefore, the Public Defender may not be able to represent a petitioner in all cases. In addition, allowing the Public Defender an opportunity to file a statement regarding the petition may also help the district court screen out potentially frivolous claims.

Third, Paragraph G(1) imposes a deadline on the district court to either summarily dismiss the petition, return the petition to petitioner for further information, or appoint counsel. By allowing the court to return a petition to petitioner for further development, the court may be able to clarify issues that are vague or ambiguous. Once the district court returns a petition to a petitioner for further development, the burden is on petitioner to file a revised petition. When a petitioner fails to file an amended petition when directed by the court under Paragraph G(1), the judge shall ordinarily dismiss the petition except in rare cases.

Paragraph G(2) makes clear that a district court may dismiss some of all of the claims in a petition much like a court in a civil matter could enter summary judgment on some claims while allowing other claims to proceed to trial. Under Paragraph F(2), a response must be filed by the state to any claims that are not dismissed.

Paragraph G(3) adds in one final opportunity for the district court to clarify issues. The court may hold a “preliminary disposition hearing” or status conference at which it will clarify the issues and attempt to resolve the issues based upon the written filings of the parties. If the court is unable to resolve the issues based upon the written filings an evidentiary hearing under Paragraph G(4) may be necessary.

Paragraph H gives the district court guidance as to the handling of successive petitions for habeas relief. The standard is higher for a petitioner raising a claim rejected in a previous habeas petition than a claim rejected on direct appeal. Standard notions of claim and issue preclusion generally do not apply in habeas cases. *Campos v. Bravo*, 2007-NMSC-021, ¶ 5, 141 N.M. 801, 161 P.3d 846. Courts have some discretionary capacity to dismiss habeas claims when a prior petition has been filed. According to *Duncan v. Kerby*, 1993-NMSC-011, 115 N.M. 344, 851 P.2d 466:

The successive-writ petitioner has already enjoyed the opportunity to fully explore his constitutional claims in the postconviction setting, whereas the petitioner who makes his initial claim on direct appeal has not, and consequently, the successive writ petitioner is in a weaker position to argue that equity confers yet another postconviction opportunity to make his claim.

Id. ¶ 5. In exercising its discretion, the court should consider whether the prior petition was pro se or the petitioner was represented by counsel. Petitioners proceeding pro se will often not have developed their claims as fully as petitioners represented by counsel.

In *Allen v. LeMaster*, 2012-NMSC-001, 267 P.3d 806, the New Mexico Supreme Court ruled that the state could not depose a habeas petitioner due to Rule 5-503's prohibition on the compelled statements of defendants. Although the opinion did not address the totality of discovery in the habeas context, it marked the starting point for the Committee's addition of Paragraph I on discovery. As habeas cases become more complex it is important to have rules in place for when discovery is needed or requested.

Paragraph I operates from the perspective that discovery in the habeas context should only occur when necessary and with supervisory control from the district court. Consistent with *Allen*, petitioners represented by counsel and the state may request discovery pursuant to Rules 5-501 and 5-502 NMRA. *See id*. ¶ 15 ("The placement of habeas corpus regulation within our Rules of Criminal Procedure demonstrated this Court's recognition that postconviction motions challenging a conviction or sentence in a criminal case are in reality part of a criminal proceeding."). However, other discovery devices under the Rules of Criminal Procedure must be approved by the court. Discovery is limited to the items listed in Paragraph I(2). Among the reasons for requiring pro-se petitioners to get court approval before requesting discovery are to discourage abuse and protect victims of crime. Therefore, the court should proceed cautiously on any discovery request of a victim.

Committee commentary for 2009 amendments. — The 2009 amendments to this rule make five changes to the procedures governing petitions for writs of habeas corpus. First, Paragraph B is amended to provide that a petition filed by an unrepresented inmate is deemed to be filed on the date that the petition is deposited in the institution's internal mail system. The amendment further provides that the inmate must state in the petition, under penalty of perjury, the date on which the petition was deposited for mailing. A corresponding amendment to Form 9-701 NMRA includes this statement.

The purpose of the amendment to Paragraph B is to eliminate uncertainty regarding the date when the petition is filed in the district court. Although there is no time limit for filing a state petition for a writ of habeas corpus, the date of filing can have an impact on the deadline for filing a petition for a writ of habeas corpus in federal court. Currently, defendants convicted in state court have one (1) year to file a petition for a writ of habeas corpus in federal court, and the one (1) year period begins to run from the date of the final judgment on a guilty plea, or one (1) year from a final decision of the highest state court ruling on a direct appeal after trial. However, under federal law, the filing of a state habeas petition tolls the one (1) year limitations period for filing a habeas petition in federal court.

While a state petition can toll the federal limitations period, disputes often arise concerning when the state petition was actually filed in state court. In some instances, unforeseen mailing delays beyond the control of the inmate prevent the receipt of a state habeas petition to toll the one (1) year federal limitations period before it expires. Moreover, the practices among the various state judicial districts for processing state habeas petitions can vary greatly and, as a result, impact the application of the federal

tolling provision. For example, some districts apparently refer habeas petitions to a district court judge for fairly swift review before actually filing, with filing by the clerk soon thereafter. In other districts, however, clerks sometimes hold petitions for sixty (60) days or more before they are reviewed by a judge and officially filed with the court. But in virtually none of these districts are the petitions actually file-stamped on the date of receipt by the clerk.

The uncertainties inherent in mailing documents from prison, and the existing inconsistent filing procedures in the district courts, have the potential to drastically affect an inmate's right to toll the federal limitations period while state post-conviction remedies are exhausted. *See Adams v. LeMaster*, 223 F.3d 1177 (10th Cir. 2000) (holding that New Mexico inmate's federal habeas petition was not timely filed because the one (1) year limitation period expired before state petition was file-stamped by state district court clerk). The amendments to Paragraph B are intended to eliminate confusion and avoid the unfair application of federal tolling provisions that may result from inconsistent filing practices in state district courts or unforeseen mailing delays beyond the control of an incarcerated petitioner.

Because there are no filing deadlines for filing state habeas petitions by unrepresented inmates in New Mexico, the changes to Paragraph B will not affect the substantive or procedural rights of the parties to a state post-conviction proceeding. State district courts, however, may want to revise their procedures so that the date file-stamped on a petition filed under this rule reflects the date of mailing set forth in the petition. If the State has reason to believe that the mailing date set forth in the petition is not accurate, the State may file a motion with the district court asking for a correction to the filing date.

The amendments to Paragraph C are intended to eliminate the inordinate amount of paperwork necessary to prepare and process requests for free process in post-conviction proceedings, which seems particularly unnecessary given the undeniable right of access to the courts by persons, indigent or not, who seek to correct an unlawful confinement. Moreover, the processing of this paperwork appears to lead to many of the delays in the actual filing of habeas petitions discussed above. The amendment to Paragraph C therefore seeks to eliminate these problems by allowing an incarcerated petitioner to file a petition without payment of a filing fee.

The amendments to Paragraph D are intended to clarify the place of filing for habeas petitions. The first change to Subparagraph (1) of Paragraph D provides that petitions challenging the Department of Correction's interpretation of a sentence should be filed with the court that imposed the sentence. As Rule 5-802.D(1) is currently written, the Department's interpretation and application of a sentence fall within "matters other than [those set forth in] Subparagraph (1)," thereby requiring the petition to be filed in the judicial district where the petitioner is confined or restrained. The rationale for the proposed amendment is that, much like petitions that seek to correct a sentence, the court that sentenced the inmate is better qualified to interpret its own sentence than a court of the judicial district in which the institution is located. The second change to Subparagraph (1) of Paragraph D also clarifies that the petition should be filed with the

court that adjudicated the petitioner's confinement rather than focusing on the county where the offense was committed.

The amendments to Subparagraph (2) of Paragraph E expands the filing deadlines for amended petitions and responses ordered by the district court. Currently, if counsel is appointed to represent a petitioner, the attorney has thirty (30) days to file an amended petition. In situations where counsel is appointed, the issues involved and the need for further investigation by counsel often make the 30-day filing deadline for an amended petition unrealistic. As a result, motions to extend the filing deadline are routinely made and granted. The amendment to the filing deadline seeks to recognize this reality and eliminate unnecessary motion practice by expanding the filing deadline to ninety (90) days. As a matter of fairness and consistency, the amendments also increase the filing deadline to ninety (90) days in those instances when the State is ordered to file a response to the amended petition.

Finally, the amendment to Paragraph H eliminates the deemed denied provision that previously governed the Supreme Court's review of the denial of habeas corpus petitions under Rule 12-501 NMRA. With this amendment, an express order by the Supreme Court is required to deny a petition for review filed under Rule 12-501 regardless of the length of time the petition for review is pending in the Supreme Court. The amendment is intended to conform to similar amendments to Rules 5-614, 5-801, and 5-121 NMRA eliminating the application of other deemed denied provisions during other stages of a criminal proceeding.

[Adopted, effective December 1, 1998; as amended by Supreme Court Order No. 09-8300-006, effective May 6, 2009; as amended by Supreme Court Order No. 14-8300-014, effective for all cases filed on or after December 31, 2014; as amended by Supreme Court Order No. 17-8300-025, effective for all cases pending or filed on or after December 31, 2017.]

ANNOTATIONS

The 2017 amendment, approved by Supreme Court Order No. 17-8300-025, effective December 31, 2017, eliminated the thirty (30)-day review and acceptance period and instead required that all petitions for a writ of habeas corpus be filed immediately upon receipt by the clerk of the district court, required the clerk of the district court to make a notation on the petition with a "deemed filed" date if the petition is filed by a petitioner who is not represented by an attorney and who is confined to an institution, provided guidance to the district court as to how to classify and assign petitions based on whether the petition challenges the underlying conviction or challenges the conditions of confinement, required the clerk of the district court to serve a file-stamped copy to the appropriate counsel, required the district court, within one-hundred twenty (120) days of the date of receipt of the petition, to examine the petition and to either return the petition to petitioner for further information, summarily dismiss the petition, or appoint counsel for the petitioner, set a procedure to ensure that incarcerated petitioners are transported for hearings, and revised the Committee commentary; in Paragraph A, after the

semicolon, added “or”; in Paragraph B, in the introductory clause, after “The petition”, added “may be submitted using Form 9-701 NMRA and”, and after “following”, added “required information”, added new Subparagraph B(1) and redesignated former Subparagraphs B(1) through B(5) as Subparagraphs B(2) through B(6), respectively, in Subparagraphs B(3), B(4), B(5), and B(6), added “brief” prior to “statement”, in Subparagraph B(6), after “Paragraph H”, added “of this rule”, and deleted former Subparagraph B(6), which required a statement regarding the purpose of the petition; in Paragraph C, in Subparagraph C(1)(a), replaced “corrections department” with “NMCD” throughout the subparagraph, and after the semicolon, deleted “and”, in Subparagraph C(1)(c), added “of this rule in writing” prior to each occurrence of “at the time of its decision”, and after “time limitations of”, deleted “Paragraph C(1)(b)” and added “Subparagraph C(1)(b) of this rule”, in Subparagraph C(2), replaced “his” with “the inmate’s”, deleted the subparagraph designation “a”, and replaced “corrections department” with “NMCD” throughout the subparagraph; in Paragraph D, in Subparagraph D(1), after the semicolon, added “and”, in Subparagraph D(2), after “filing the petition”, deleted “need not file a motion for permission to proceed in forma pauperis and”, after “applicable filing fee”, deleted “; and” and added “or a motion for permission to proceed in forma pauperis”, and deleted former Subparagraph D(3), which required that a certificate of service be attached to the petition; in Paragraph E, in Subparagraph E(1), replaced “Department of Corrections’” with “NMCD’s”, and after “contested confinement”, deleted “. The petition shall be assigned to the judge that originally heard the matter, or if that judge is no longer serving on the bench, the successor criminal division”, and in Subparagraph E(2), after “Subparagraph”, added “(E)”, and after “of this”, deleted “paragraph” and added “rule”; in Paragraph F, after the first sentence, deleted “The clerk of the court shall immediately stamp ‘received for review’ on the prospective petition upon receipt and shall also forward a copy of the petition and any attachments to the district attorney, attorney general, and the public defender department post-conviction unit. The court shall have thirty (30) days to review for filing the prospective petition and any attachments. Upon acceptance by the court, a petition shall be deemed properly filed and effective as of the previous date of receipt, and a copy of the petition shall be served on the respondent by the clerk of the court in accordance with Rule 5-103, 5-103.1 or 5-103.2 NMRA.” and added “Upon the filing of the petition, the clerk of the district court shall file-stamp the petition with the date of receipt (‘file-stamp’ date).”, and added the last sentence of the paragraph; added new Paragraph G and redesignated former Paragraphs G through I as Paragraphs H through J, respectively; in Paragraph H, in Subparagraph H(1), in the subparagraph heading, deleted “Initial review; appointment of counsel” and added “Pre-appointment review”, after the subparagraph heading, deleted “Within thirty (30) days after receipt” and added “For petitions not filed by an attorney, within forty-five (45) days”, after “of the”, added “file-stamp date on the”, after the next occurrence of “petition”, deleted “and attachments from the district court”, after “file a statement”, added “recommending that the court order a revised petition under Paragraph (I)(2)(a) of this rule or”, after “indicating”, deleted “that” and added “whether”, after “the petition is”, deleted “not”, after “reasonable person”, added “of adequate means”, after “further judicial review”, added “of the public defender’s assessment”, and added the last sentence of Subparagraph H(1), added new subparagraph designation “(2)” and redesignated former

Subparagraphs H(2) through H(4) as Subparagraphs H(3) through H(5), respectively, in Subparagraph H(2), added the subparagraph heading “Initial court review.”, after “Within”, deleted “forty-five (45) ” and added “one-hundred twenty (120)”, after “days”, deleted “after the petition is accepted and filed” and added “of the file stamp date on the petition”, and after “with all attachments”, added “and statement of the public defender department, if any. Within this initial one-hundred twenty (120) day court review:”, added new Subparagraph H(2)(a), added new subparagraph designation “(b)”, in Subparagraph H(2)(b), added the subparagraph heading “Summary dismissal.”, after “district attorney”, added “if the petition challenges matters contained in Subparagraph E(1) of this rule”, after “attorney general”, added “if the petition challenges matters contained in Subparagraph E(2) of this rule", after “post-conviction unit”, added “or, if the petition is filed on behalf of the petitioner by private legal counsel, to that legal counsel”, and deleted the last paragraph of Subparagraph H(2)(b), which provided for a revised petition when the court was unable to determine whether the petitioner was entitled to relief as a matter of law, added subparagraph designation “(c)”, in Subparagraph H(2)(c), added the subparagraph heading “Appointment of counsel.”, after “reviewing”, added “the petition”, after “public defender department,”, added “and revised petition, if any,”, after “the order”, added “of appointment”, after “shall be”, deleted “served on” and added “provided to the”, and after “public defender department”, added “post-conviction unit”, in Subparagraph H(3), after “(90) days after”, added “the date of”, after “amend the petition”, added “and provide a copy of the amended petition or notice directly to the assigned judge”, after “Subparagraph”, deleted “(1)” and added “(H)(2) of this rule”, and after “any claims not dismissed”, added “and provide a copy of the response directly to the assigned judge, without further order of the court”, in Subparagraph H(4), after “may ask for briefs”, deleted “and/or” and added “and”, in Subparagraph H(5), added the subparagraph heading “Evidentiary hearing.”; in Paragraph J, in Subparagraph J(1), after “Rules 5-501”, deleted “or” and added “and”, in Subparagraph J(2)(c), replaced “New Mexico Corrections Department” with “NMCD”, in Subparagraph J(3), after “contained in”, deleted “Paragraph A of”, and after “Rule 5-507”, added “(A)”, in Subparagraph J(4), after “factors contained in”, deleted “Paragraph A of”, and after “Rule 5-507”, added “(A) NMRA”; and added new Paragraph K and redesignated former Paragraphs J through L as Paragraphs L through N, respectively.

The 2014 amendment, approved by Supreme Court Order No. 14-8300-014, effective December 31, 2014, clarified that the rule is addressed to petitions filed after entry of a final judgment and that it applies to successive petitions; provided for Corrections Department inmates to file a petition challenging misconduct or disciplinary reports; ensured that a petition is assigned to the judge who originally heard the matter; provided the means for the district court to screen out frivolous petitions; gave the Public Defender the opportunity to file a statement regarding the petition before counsel is appointed for the petitioner; imposed a deadline on the district court to dismiss the petition, return the petition for additional information, or appoint counsel; authorized the district court to dismiss some of the claims in a petition; in Paragraph B, deleted the former first and second sentences which provided that a writ would only be issued upon the filing of a petition and that the petition filed by an inmate of an institution was

deemed filed when it was deposited in the institution's internal mailing system; in Paragraph B (5), after “is the”, deleted “claim has been raised in prior proceedings”, and added “Petitioner has previously filed a petition seeking relief under this rule”, after “explaining why the”, deleted “ends of justice require consideration of the”, and after “why the petition”, added “should not be dismissed under Paragraph H”; in Paragraph B (6)(b), after “challenges”, added “conditions of”; added Paragraph C; in Paragraph E (1), added the last sentence; in Paragraph E (2), after “challenges”, added “conditions of”; added Paragraph F; in Paragraph G, in the introductory sentence, after “the court shall”, deleted “promptly” and added “proceed in the following manner”, in Paragraph G (1), added the title of the subparagraph and in the first unnumbered paragraph, added the first sentence, in the third sentence, added “Within forty-five (45) days after the petition is accepted and filed, the court shall”, and in the third sentence, after “fact of the” deleted “motion” and added “petition”, after “face of the petition, any”, deleted “annexed exhibits” and added “attachments”, after “in the case that the”, deleted “movant” and added “petitioner”, and after “dismissal of the petition”, added the remainder of the sentence; in Paragraph G (1), added the second unnumbered paragraph, in the third unnumbered paragraph, in the first sentence, after “If”, added “after reviewing any statement field by the public defender department”, after “summary dismissal”, deleted “unless the petitioner has filed a waiver of counsel or has retained counsel”, and after “to represent the petitioner”, added the remainder of the sentence, and added the second sentence; in Paragraph G (2), added the title of the subparagraph, in the first sentence, after “for the petitioner”, deleted “may” and added “shall”, after “petitioner shall file”, added “either”, after “an amended petition or”, deleted “if no amended petition is filed”, and added “a notice that counsel does not intend to amend”, after “intend to amend the petition”, deleted “originally filed by the petitioner is deemed accepted”, deleted the former second sentence which required the court to order the respondent to file a response within thirty days after the petition was filed; added the second sentence; deleted the former third sentence which provided that if a response was ordered, the clerk of the court was required to serve a copy of the petition and order be served on the respondent, deleted the former fourth sentence which required the respondent to file a response within ninety days after service of the petition, and added the third sentence; in Paragraph G (3), added the title, in the first sentence, deleted “if the court directs the respondent to file a response”, after “After the petition is filed”, added “at the request of a party or upon its own motion”, after “upon its own motion, the court” deleted “shall” and added the remainder of the sentence, added the second sentence, and in the third sentence, added “The court shall then”, after “the petition without a”, added “evidentiary”, after “ask for briefs and”, added “/or”, and after “oral arguments”, added “on legal issues”; and added Paragraphs H and I.

The 2009 amendment, approved by Supreme Court Order No. 09-8300-006, effective May 6, 2009, in Paragraph B, added the second sentence; in Subparagraph (2) of Paragraph C, after "forma pauperis" added the proviso; in Subparagraph (1) of Paragraph D, after "sentenced or order of confinement", added "correct the Department of Corrections’ interpretation or application of the sentence or order of confinement, or challenge the conviction" and after "county of the court in which the", deleted "offence was committed" and added the remainder of the sentence; in Subparagraph (2) of

Paragraph D, after "matters other than", added "those set forth in" and after "it shall be filed in the", deleted "judicial district" and added "county"; in Subparagraph (2) of Paragraph E, in the second and fifth sentences, changed thirty days to ninety days; and in Paragraph H, deleted former Subparagraph (3) which provided that if the petition for certiorari is not granted by the Supreme Court within thirty days after filing, it shall be deemed denied.

The 2002 amendment, effective June 1, 2002, in Paragraph D(1), substituted "county in which the offense was committed" for "judicial district in which petitioner was convicted"; in Paragraph G, inserted "in non-death penalty cases" in the bold heading and "If a sentence of death has not been imposed" at the beginning; redesignated Paragraphs F and G as present Paragraphs G and H and added Paragraph F.

The 1998 amendment, effective March 16, 1998, inserted "If the petition:" after the paragraph heading in Paragraph D, and deleted "If the petition" at the beginning of Subparagraphs D(1) and (2), deleted "do the following" at the end of Paragraph E, inserted "promptly examine" and deleted "shall be examined promptly by the court" in Subparagraph E(1), rewrote Subparagraph E(2), deleted "may appoint cousel for an indigent petitioner and" following "court" and substituted "a" for "the" in Subparagraph E(4), inserted "Within thirty (30) days" following the paragraph heading in Paragraph G, deleted "within thirty (30) days" following "if the writ is denied", and inserted "after filing" following "days" in Subparagraph G(3).

Cross references. — For post-conviction remedy statute, *see* Section 31-11-6 NMSA 1978.

For form on a petition for writ of habeas corpus, *see* Rule 9-701 NMRA.

Compiler's notes. — Pursuant to the court order of February 10, 1986, the 1986 amendment of this rule applies to all post-conviction motions filed after March 1, 1986.

I. GENERAL CONSIDERATION.

Standard for imposing the sanction of granting a petition for writ of habeas corpus. — The standard for granting a petition for writ of habeas corpus without a response from the state requires a determination of whether the state's conduct reached the point of stubborn resistance to the court's orders that would justify such an extreme sanction. *Quintana v. Bravo*, 2013-NMSC-011, 299 P.3d 414.

The court's sanction for the State's delay in responding to a petition for writ of habeas corpus was not justified. — Where petitioner filed a petition for writ of habeas corpus to vacate jury verdicts convicting petitioner of several felonies, including first-degree murder, on the ground that petitioner was denied effective assistance of counsel; one of petitioner's trial counsel, who admitted by affidavit that the representation of petitioner was ineffective, was then working for the district attorney's office; because of the conflict of interest, the district attorney did not file a response to

the petition and did not appear at motion hearings; the district attorney attempted to secure other counsel for the respondents; the district court was aware of the conflict and the confusion regarding whether an attorney from the attorney general's office or an attorney from a district attorney's office in another jurisdiction would represent the respondents; and the district court granted the petition based on the allegations in the petition and trial counsel's affidavit because the respondents had failed to timely file a response to the petition and to appear at scheduled motion hearings, refused to delay the hearing on the motion to rule on the pleadings, and subsequently denied a motion to reconsider, the conduct of the district attorney and the attorney general did not rise to the level of stubborn resistance to the district court's orders that would justify the extreme sanction of vacating petitioner's jury convictions without both considering a response from respondents and after having a full evidentiary hearing. *Quintana v. Bravo*, 2013-NMSC-011, 299 P.3d 414.

Depositions of defendant are prohibited in habeas corpus proceedings. — Rule 5-503 NMRA precludes a compelled statement or deposition of a criminal defendant, including one who is in the post-conviction habeas corpus phase of a criminal proceeding. *Allen v. LeMaster*, 2012-NMSC-001, 267 P.3d 806.

Where defendant filed a petition for habeas corpus alleging ineffective assistance of counsel; the district court ruled that defendant was subject to deposition on all issues related to the habeas corpus proceedings; when defendant refused to answer any questions, the district court ordered defendant to answer specified questions; and when defendant refused to answer the court-ordered questions, the district court dismissed defendant's petition as a sanction, it was improper for the district court to order defendant to answer questions at a deposition and to dismiss the habeas corpus petition or otherwise sanction defendant for defendant's refusal to answer the questions. *Allen v. LeMaster*, 2012-NMSC-001, 267 P.3d 806.

Claims of ineffective assistance of counsel. — A habeas corpus petitioner's claim of ineffective assistance of counsel removes from the protection of the attorney-client privilege those communications specifically relevant to the claim. A petitioner asserting the attorney-client privilege bears the burden of demonstrating that the privilege applies. It is then the judges' function to make evidentiary rulings determining whether attorney-client communications are relevant to the specific ineffective assistance of counsel claims raised by the petitioner and thereby subject to the exception in Subparagraph 3 of Paragraph D of Rule 11-503 NMRA. *Allen v. LeMaster*, 2012-NMSC-001, 267 P.3d 806.

Where defendant filed a petition for habeas corpus alleging ineffective assistance of counsel, any communications between defendant and trial counsel that were relevant to defendant's specific ineffectiveness claims were excepted from the attorney-client privilege, and those that were not relevant were neither excepted nor waived, because defendant filed a petition for writ of habeas corpus. *Allen v. LeMaster*, 2012-NMSC-001, 267 P.3d 806.

Criteria to determine if a new rule has been established. — A case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final. Thus, a court establishes a new rule when its decision is flatly inconsistent with the prior governing precedent and is an explicit overruling of an earlier holding. *Kersey v. Hatch*, 2010-NMSC-020, 148 N.M. 381, 237 P.3d 683.

Standard to determine whether new rule applies retroactively to finalized criminal convictions. — New rules should not be afforded retroactive effect unless (1) the rule is substantive in nature, in that it alters the range of conduct or class of persons that the law punishes; or (2) although procedural in nature, the rule announces a watershed rule of criminal procedure. *Kersey v. Hatch*, 2010-NMSC-020, 148 N.M. 381, 237 P.3d 683.

New rule in felony murder cases cannot be applied retroactively. — The court's opinion in *State v. Frazier*, 2007-NMSC-032, 142 N.M. 120, 164 P.3d 1, which held for the first time that multiple separate convictions of felony murder and the predicate felony violate the double jeopardy clause, announced a new rule that is procedural in nature and is not subject to retroactive application in habeas corpus proceedings. *Kersey v. Hatch*, 2010-NMSC-020, 148 N.M. 381, 237 P.3d 683.

New rule in felony murder cases not applied retroactively. — Where petitioner's multiple separate convictions of felony murder and the predicate felony of kidnapping had been finalized more than ten years before the court's opinion in *State v. Frazier*, 2007-NMSC-032, 142 N.M. 120, 164 P.3d 1 was filed, the rule announced in *Frazier* did not apply to defendant's convictions. *Kersey v. Hatch*, 2010-NMSC-020, 148 N.M. 381, 237 P.3d 683.

New rule in double jeopardy cases cannot be retroactively applied. — The supreme court's opinion in *State v. Montoya*, 2013-NMSC-020, which held that the double jeopardy clause of the United State Constitution, U.S. Const. amend. V, precludes a defendant from being cumulatively punished for both voluntary manslaughter and shooting at or from a motor vehicle resulting in great bodily harm in a situation where both convictions are based on the same shooting of the same victim, announced a new rule concerning a new methodology for reviewing double jeopardy claims; the new rule announced in *State v. Montoya*, which is neither a substantive change in the law nor a watershed rule, is not subject to retroactive application in habeas corpus proceedings. *Dominguez v. State*, 2015-NMSC-014.

Where petitioner's convictions for voluntary manslaughter and shooting at or from a motor vehicle resulting in the death of one person, and aggravated battery and shooting at or from a motor vehicle resulting in great bodily injury to a second person had been finalized eight years before the supreme court's opinion in *State v. Montoya*, 2013-NMSC-020 was filed, the new rule announced in *State v. Montoya* did not apply retroactively to petitioner's convictions. *Dominguez v. State*, 2015-NMSC-014.

Preemption. — This rule does not preempt Rules 5-614 or 5-801 NMRA, nor does it preempt Section 39-1-1 NMSA 1978, which allows post-conviction motion practice. *State v. Peppers*, 1990-NMCA-057, 110 N.M. 393, 796 P.2d 614.

This rule preempts Section 36-11-6 NMSA 1978, governing post-conviction remedy. *State v. Peppers*, 1990-NMCA-057, 110 N.M. 393, 796 P.2d 614.

The 1986 amendment of this rule has only prospective effect. *Enright v. State*, 1986-NMSC-070, 104 N.M. 672, 726 P.2d 349.

The main purpose of this rule is to provide a uniform procedure for determining if a prisoner is entitled to relief. *Blatchford v. Gonzales*, 1983-NMSC-060, 100 N.M. 333, 670 P.2d 944, appeal dismissed and cert. denied, 464 U.S. 1033, 104 S. Ct. 691, 79 L. Ed. 2d 158 (1984).

"In custody" construed where petitioner incarcerated in another jurisdiction. — A defendant is in "custody" for purposes of post-conviction relief under Rule 5-802 NMRA when the defendant is not physically restrained within the state of New Mexico, but is incarcerated in another state serving a sentence imposed by that state to be served concurrently or consecutively with the sentence imposed by the New Mexico court and is entitled to pursue post-conviction relief in New Mexico. *Howard v. Martin*, 1991-NMSC-001, 111 N.M. 203, 803 P.2d 1108.

Challenge of conviction while in immigration custody. — The proper mechanism for a defendant to challenge an underlying criminal conviction when in the custody of the United States Immigration and Customs Enforcement Services is to file a Rule 1-060(B)(4) NMRA motion. *State v. Favela*, 2013-NMCA-102, cert. granted, 2013-NMCERT-010.

Where defendant, who was a Mexican national, pleaded guilty to aggravated battery and driving under the influence; after serving defendant's prison service, defendant was taken into custody by the United States Immigration and Customs Enforcement Services; and while defendant was in immigration custody, defendant filed a Rule 1-060 NMRA motion to set aside the guilty plea on the grounds that defendant's counsel failed to advise defendant of the immigration consequences of a guilty plea, defendant properly challenged the underlying criminal conviction by filing a motion for relief from judgment under Rule 1-060 NMRA rather than a motion for writ of habeas corpus under Rule 5-802 NMRA because defendant's immigration custody did not satisfy the "in custody" requirement of habeas corpus. *State v. Favela*, 2013-NMCA-102, cert. granted, 2013-NMCERT-010.

Not exclusive post-conviction relief. — This rule was not intended to be the exclusive means for seeking post-conviction relief. *State v. Peppers*, 1990-NMCA-057, 110 N.M. 393, 796 P.2d 614.

Defendant must utilize rule before seeking habeas corpus. Like its federal counterpart, Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA) provides that an application for writ of habeas corpus by a prisoner authorized to apply for post-conviction relief shall not be entertained if the applicant has failed to apply for relief by motion to the sentencing court, unless it also appears that the remedy by motion to test the legality of his detention is inadequate or ineffective. *Lewis v. New Mexico*, 423 F.2d 1048 (10th Cir. 1970).

Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA) is comparable to the federal statute which sets forth the procedure for collateral attack on federal sentences. 28 U.S.C.A. § 2255. Like its federal counterpart, the rule requires that petitions seeking post-conviction relief be addressed to the sentencing court, and that habeas corpus petitions will not be entertained when the petitioner has failed to utilize the rule, unless it appears that the procedure under the rule is inadequate or ineffective to test the legality of the petitioner's detention. *Herring v. Rodriguez*, 372 F.2d 470 (10th Cir. 1967).

Exhaustion requirements for a plaintiff class. — To satisfy the habeas corpus exhaustion requirement under Rule 5-802(C) NMRA for an entire plaintiff class, one or more named class members must exhaust administrative remedies for each claim. *Anderson v. State*, 2022-NMSC-019.

Plaintiffs failed to exhaust administrative remedies. — Where eight named inmates and two nonprofit organizations filed a complaint in district court seeking a mixture of a classwide writ of habeas corpus and classwide injunctive and declaratory relief, alleging that the State's management of COVID-19 in New Mexico prisons violated inmates' rights under the New Mexico Constitution, the district court did not err in dismissing the complaint with respect to all Plaintiffs, because Plaintiffs acknowledged that none of the named plaintiffs exhausted or attempted to exhaust the New Mexico Correction Department's (NMCD) internal grievance procedures, and § 33-2-11(B) NMSA 1978 imposes an exhaustion requirement for statutorily created rights such as declaratory relief and Rule 5-802(C) NMRA imposes an independent duty to first exhaust administrative remedies of the NMCD before petitioning for writs of habeas corpus. Moreover, exhaustion would not be futile in this case because the NMCD has the authority to address the conditions in New Mexico's correctional facilities. *Anderson v. State*, 2022-NMSC-019.

State motion must be acted upon before state remedies exhausted. — Where a motion filed under this rule has not been acted upon, the motion must be acted upon before a prisoner has exhausted his state remedies and is permitted to petition for a federal writ of habeas corpus. *Martinez v. Romero*, 640 F.2d 1151 (10th Cir. 1981).

When state remedies not exhausted. — A petitioner has not exhausted state remedies, for purposes of federal habeas corpus, while his appeal of a first Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA) motion is still pending. *Barefield v. New Mexico*, 434 F.2d 307 (10th Cir. 1970), cert. denied, 401 U.S. 959, 91 S. Ct. 969, 28 L. Ed. 2d 244 (1971).

Although counsel advised that the state trial court had entered an order denying the appellant's petition under Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA) because the state trial court's order denying relief under that rule was not part of the record on appeal, because the extent and nature of the proceedings in the state trial court was not known and because the record did not disclose whether the appellant had appealed or could appeal from denial of his Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA) petition to the New Mexico supreme court, there was nothing in the record upon which the court might conclude that the remedy provided by that rule was inadequate or ineffective to test the legality of the appellant's detention under the constitutional grounds asserted in the appellant's petition to the United States district court. Appellant had not exhausted his available state remedies when the court below dismissed his habeas corpus petition, and dismissal, without prejudice, was not erroneous. *Herring v. Rodriguez*, 372 F.2d 470 (10th Cir. 1967).

When state remedies deemed exhausted. — Where a state prisoner's habeas corpus petition raises no factual issues, and the legal issues have all been considered and rejected by the highest court of the state in a direct appeal, a prisoner would not be denied a federal habeas corpus hearing simply because he had not re-presented the same issues in the state court in a post-conviction proceeding. *Sandoval v. Rodriguez*, 461 F.2d 1097 (10th Cir. 1972).

Federal court may proceed on merits. — Where defendant appealed his state court conviction to the state supreme court and lost, then filed for state post-conviction relief and was denied, and the Supreme Court of New Mexico decided the same questions in his post-conviction motion and in his subsequent habeas corpus motion, the defendant does not have to appeal the denial of his post-conviction relief under Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA) and the federal district court may proceed on the merits. *Cochran v. Rodriguez*, 438 F.2d 926 (10th Cir. 1971).

Motions under this rule are not appealable. *State v. McGuinty*, 1982-NMCA-011, 97 N.M. 360, 639 P.2d 1214.

Attempt to circumvent rule by remand followed by appeal. — The court of appeals would not remand the issue of effectiveness of counsel to the trial court for an evidentiary hearing, and then have the case returned for review, where such a procedure would circumvent the express wording of this rule, providing for review of postconviction evidentiary proceedings through certiorari to the supreme court. *State v. Powers*, 1990-NMCA-108, 111 N.M. 10, 800 P.2d 1067.

Remanding a case for an evidentiary hearing to develop facts supporting a defendant's claim on appeal would circumvent this rule, which provides review of post-conviction evidentiary proceedings by way of certiorari to the supreme court. *State v. Gomez*, 1991-NMCA-061, 112 N.M. 313, 815 P.2d 166.

Res judicata in habeas corpus proceedings. — If an application for a writ of habeas corpus is grounded in facts beyond the record previously presented on appeal, and if

the additional facts are those which could not, or customarily would not, be developed in a trial on criminal charges, there should be no issue preclusion. When a post-conviction application makes a substantial showing that due process or another fundamental right has been abridged - and the application is supported by facts ill-suited for development in the original trial - it should be addressed on its merits. Res judicata does not apply. *Duncan v. Kerby*, 1993-NMSC-011, 115 N.M. 344, 851 P.2d 466.

District court did not have discretion to amend a final judgment and sentence on a petition for habeas corpus. — Where defendant was convicted of first-degree murder in the stabbing and beating death of his elderly neighbor, and where defendant was sentenced, as a serious youthful offender, to a term of thirty years of incarceration followed by five years of parole, and where defendant filed a habeas corpus petition claiming that he was eligible to earn meritorious deductions because he was not serving a life sentence, the habeas court erred in granting defendant's petition and in ordering that defendant's judgment and sentence be amended to provide for good-time eligibility, because defendant's judgment and sentence was statutorily authorized and made within the sentencing court's sound discretion. The district court in the habeas proceeding had no authority to amend the judgment and sentence by way of habeas corpus. *State v. Cates*, 2023-NMSC-001.

Law reviews. — For note, "Post-Conviction Relief After Release From Custody: A Federal Message and a New Mexico Remedy," see 9 Nat. Resources J. 85 (1969).

For note, "Waiver; Right to Counsel; Certification of Juvenile to Criminal Proceedings," see 9 Nat. Resources J. 310 (1969).

For article, "Habeas Corpus in New Mexico," see 11 N.M.L. Rev. 291 (1981).

For survey of Indian law in New Mexico, see 18 N.M.L. Rev. 403 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 18 Am. Jur. 2d Coram Nobis and Allied Statutory Remedies §§ 44 to 60.

Insanity of accused at time of commission of offense not raised at trial, as ground for habeas corpus or coram nobis after conviction, 29 A.L.R.2d 703.

Delay as affecting right to coram nobis attacking criminal conviction, 62 A.L.R.2d 432.

Voluntary absence when sentence is pronounced, 59 A.L.R.5th 135.

Incompetency of counsel chosen by accused as affecting validity of conviction, 74 A.L.R.2d 1390, 34 A.L.R.3d 470, 2 A.L.R.4th 27, 2 A.L.R.4th 807, 13 A.L.R.4th 533, 15 A.L.R.4th 582, 18 A.L.R.4th 360, 26 A.L.R. Fed. 218, 53 A.L.R. Fed. 140.

When criminal case becomes moot so as to preclude review of or attack on conviction or sentence, 9 A.L.R.3d 462.

Judicial expunction of criminal record of convicted adult, 11 A.L.R.4th 956.

Coram nobis on ground of other's confession to crime, 46 A.L.R.4th 468.

Application of civil or criminal procedural rules in federal court proceeding on motion in nature of writ of error coram nobis, 53 A.L.R. Fed. 762.

24 C.J.S. Criminal Law § 1610 et seq.; 39 C.J.S. Habeas Corpus § 1 et seq.

II. SCOPE OF RULE; GROUNDS FOR RELIEF.

A. IN GENERAL.

The writ of habeas corpus cannot be used to restore a defendant's right to vote. *Cummings v. State*, 2007-NMSC-048, 142 N.M. 656, 168 P.3d 1080.

New evidence. — A habeas corpus petitioner may obtain relief, based on a freestanding claim of actual innocence, independent of any constitutional violation at trial, if he can establish by clear and convincing evidence that no reasonable juror would have convicted him in light of new evidence. *Montoya v. Ulibarri*, 2007-NMSC-035, 142 N.M. 89, 163 P.3d 476.

Purpose of rule. — The purpose of Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA) is to allow a collateral review as to the validity of a conviction. *Valles v. State*, 1977-NMCA-034, 90 N.M. 347, 563 P.2d 610, cert. denied, 90 N.M. 637, 567 P.2d 486.

In a post-conviction proceeding, the issue is not the guilt or innocence of the prisoner; the issue is the validity of the conviction. *State v. Ramirez*, 1967-NMSC-210, 78 N.M. 418, 432 P.2d 262.

The purpose of Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA) is to provide a ready remedy whereby a prisoner in custody under sentence of the court may be freed from custody upon a proper showing that the sentence was imposed in violation of the Constitution of the United States, or the Constitution or the law of New Mexico, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law or is otherwise subject to collateral attack. It is not intended as a means whereby prisoners can with complete abandon and contempt demean and burden the courts and legal profession, falsely accuse the law enforcement officials and impose upon the public great and unnecessary expense. *State v. Hansen*, 1968-NMCA-031, 79 N.M. 203, 441 P.2d 500.

Constitutionality. — This rule does not violate the 1965 amendment to N.M. Const., art. VI, § 2. *State v. Garcia*, 1984-NMCA-009, 101 N.M. 232, 680 P.2d 613.

No substitute for habeas corpus. — Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA) does not provide a substitute for appeal. It is a post-conviction remedy, civil

in nature, substantially equivalent to habeas corpus, and an issue not properly cognizable in a habeas corpus proceeding cannot furnish basis for relief under that rule. *Smith v. State*, 1968-NMSC-144, 79 N.M. 450, 444 P.2d 961.

Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA) is a post-conviction remedy not previously available to prisoners in custody. It has not replaced or supplanted habeas corpus which is not suspended, as indeed it could not be under the constitution. *State v. Weddle*, 1967-NMSC-028, 77 N.M. 420, 423 P.2d 611.

Showing of immediate release not necessary. — To obtain a writ of habeas corpus, a petitioner need not demonstrate a right to immediate release. He need prove only that he was denied mandatory credits against his sentence and that such credits affect the timing of his release or of a parole hearing. *Martinez v. State*, 1990-NMCA-033, 110 N.M. 357, 796 P.2d 250.

Prior appeal not required. — Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA) does not require there to have been an appeal before a post-conviction motion may be considered. *State v. Martinez*, 1973-NMCA-088, 85 N.M. 293, 511 P.2d 779.

Rule not limited to post-conviction habeas actions. — This rule is not limited by its terms to post-conviction habeas actions and on its face appears to apply to all habeas corpus proceedings, whether challenging confinement before or after conviction or, for that matter, civil custody. *Caristo v. Sullivan*, 1991-NMSC-088, 112 N.M. 623, 818 P.2d 401.

Available where legal custody under sentence of state court. — An attack on a judgment cannot be made under Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA) when petitioner is not in custody under a sentence from a New Mexico court. *Roessler v. State*, 1969-NMCA-003, 79 N.M. 787, 450 P.2d 196, cert. denied, 395 U.S. 967, 89 S. Ct. 2115, 23 L. Ed. 2d 754 (1969); *see also State v. Apodaca*, 1969-NMCA-020, 80 N.M. 155, 452 P.2d 489.

Where defendant is in legal custody under sentence of a New Mexico court, he may seek post-conviction relief under Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA), notwithstanding the lack of physical custody by New Mexico. *State v. Brill*, 1970-NMCA-093, 81 N.M. 785, 474 P.2d 77, cert. denied, 81 N.M. 784, 474 P.2d 76.

Petitioner must show deprivation of rights. — For a petitioner to be entitled to post-conviction relief, it is not enough to show that indigency occasioned the petitioner's inability to employ counsel or to appeal; the petitioner must show that the state deprived him of his rights under the fourteenth amendment. State action is shown when a responsible official in the state's system of justice rejects a request for counsel or fails to take proper steps toward appointment of counsel for a convicted defendant when he has knowledge of the defendant's indigency and desire for appellate counsel. *State v. Raines*, 1967-NMCA-026, 78 N.M. 579, 434 P.2d 698.

Unjust and illegal discrimination. — A motion for post-conviction relief under Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA) presents an issue which courts with uniformity have held is not one which will be the basis for relief unless there is shown to be present in it an element of intentional or purposeful discrimination, or intentional or arbitrary action amounting to an unjust and illegal discrimination between persons in similar circumstances. *State v. Baldonado*, 1968-NMCA-025, 79 N.M. 175, 441 P.2d 215.

Deprivation of fair trial. — It is only under circumstances where it appears that the defendant was fundamentally deprived of a fair trial that post-conviction relief is available. *Jones v. State*, 1970-NMSC-082, 81 N.M. 568, 469 P.2d 717.

The acts complained of must be of such quality as necessarily prevent a fair trial for review and reversal. *State v. Olguin*, 1968-NMSC-012, 78 N.M. 661, 437 P.2d 122.

No redetermination of issues previously reviewed. — In a motion for post-conviction relief, one is not entitled to successive determination on the merits of issues previously reviewed. *State v. Ortega*, 1970-NMCA-028, 81 N.M. 337, 466 P.2d 903, cert. denied, 81 N.M. 305, 466 P.2d 871.

No review unless cognizable claim. — Motion for post-conviction relief was not the proper procedure for obtaining relief on claim by defendant that parole authorities and penitentiary officials had improperly figured the time he had served on his sentence, since a distinction was drawn between an attack on the court's sentence, which was cognizable by post-conviction motion, and a claim against parole and penitentiary officials for the way sentence was executed, which was not cognizable. *State v. Bambrough*, 1970-NMCA-060, 81 N.M. 548, 469 P.2d 527.

No review of some constitutional issues. — Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA) does not require collateral review of constitutional issues where the facts submitted were known or available to the petitioner at the time of his trial. *Jones v. State*, 1970-NMSC-082, 81 N.M. 568, 469 P.2d 717.

And no review if clemency proper remedy. — Where defendant's conviction was based upon perjury his remedy is by application for executive clemency not by a motion pursuant to Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA). *State v. Minns*, 1970-NMCA-042, 81 N.M. 428, 467 P.2d 1000.

Habeas corpus relief inappropriate to modify probation condition. — When the district court failed to make a determination showing grounds for habeas corpus relief existed, the court abused its discretion by modifying defendant's probation condition which had been agreed upon pursuant to a plea bargain. *State v. Trujillo*, 1994-NMSC-066, 117 N.M. 769, 877 P.2d 575.

Remedy when prison discipline is vindicated by subsequent events. — Where the corrections department forfeited petitioner’s earned good time and placed petitioner in a

maximum security facility after a hearing officer determined that petitioner had raped another inmate; the corrections department violated petitioner's due process rights by denying petitioner an opportunity to call witnesses or elicit their written testimony at the prison disciplinary hearing; petitioner was subsequently tried and convicted of the rape in district court; and in petitioner's habeas corpus proceeding, the district court ordered the corrections department to restore petitioner's good-time credits, remove the disciplinary hearing findings from petitioner's record, never to use findings of the disciplinary hearing against defendant, and never to pursue the same factual allegations that were the subject of the disciplinary hearing in later proceedings against petitioner, the district court's remedies for the violation of petitioner's due process rights was an abuse of discretion because the discipline of the corrections department was vindicated by petitioner's intervening criminal conviction. *Perry v. Moya*, 2012-NMSC-040, 289 P.3d 1247.

Petitioner may file motion at any time. — The authorization contained in Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA), is not limited to the term of court during which the incorrect sentence was imposed, as a motion for such relief may be made at any time. *McCroskey v. State*, 1970-NMCA-109, 82 N.M. 49, 475 P.2d 49.

Defendant whose suspended sentence had been revoked was not required to wait until the claimed time, if credited, would entitle defendant to his release to bring post-conviction relief proceeding to obtain credit for probation time. *State v. Sublett*, 1968-NMCA-001, 78 N.M. 655, 436 P.2d 515.

Prison mailbox rule. — Because New Mexico's rules require receipt by the clerk before a habeas petition is filed, the prison mailbox rule, as articulated in *Houston v. Lack*, 487 U.S. 266, 101 L. Ed. 2d 245, 108 S. Ct. 2379 (1988), does not apply to prisoners requesting state post-conviction relief in New Mexico. *Adams v. LeMaster*, 223 F.3d 1177 (10th Cir. 2000), cert. denied, 531 U.S. 1195, 121 S. Ct. 1198, 149 L. Ed. 2d 113 (2001).

Commences civil proceeding. — A motion pursuant to Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA) is a civil proceeding, not criminal, and is governed by the rules of civil procedure. *State v. Brinkley*, 1967-NMSC-124, 78 N.M. 39, 428 P.2d 13; *see also State v. Eckles*, 1968-NMSC-079, 79 N.M. 138, 441 P.2d 36; *State v. Robbins*, 1967-NMSC-091, 77 N.M. 644, 427 P.2d 10, cert. denied, 389 U.S. 865, 88 S. Ct. 130, 19 L. Ed. 2d 137 (1967); *State v. Gilbert*, 1967-NMSC-226, 78 N.M. 437, 432 P.2d 402; *State v. Knight*, 1967-NMSC-241, 78 N.M. 482, 432 P.2d 838.

Where findings under similar federal rule deemed persuasive. — Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA) was adopted from 28 U.S.C. § 2255. The interpretation placed on that section by the federal courts is persuasive as to the meaning of the state rule. *Lewis v. New Mexico*, 423 F.2d 1048 (10th Cir. 1970); *State v. Weddle*, 1967-NMSC-028, 77 N.M. 420, 423 P.2d 611; *State v. Fines*, 1968-NMSC-022, 78 N.M. 737, 437 P.2d 1006; *State v. Guy*, 1968-NMCA-020, 79 N.M. 128, 440

P.2d 803; *State v. Hodnett*, 1968-NMCA-104, 79 N.M. 761, 449 P.2d 669; *see also State v. Eckles*, 1968-NMSC-079, 79 N.M. 138, 441 P.2d 36.

B. PRETRIAL MATTERS.

Absence of some facts from complaint not grounds for relief. — Defendant convicted of rape could not vacate his conviction on the ground the complaint failed to allege knowledge of the facts from which the complainant concluded that there was probable cause to believe that defendant had committed rape. *State v. Sedillo*, 1968-NMSC-049, 79 N.M. 9, 439 P.2d 226.

Where allegations sufficient to charge offense. — Where allegations, notwithstanding the misreference to offense, are sufficient to charge the offense they provide no grounds for error or for post-conviction relief. *State v. Holly*, 1968-NMCA-075, 79 N.M. 516, 445 P.2d 393.

Amendment of information permitted. — Unless prejudice to the defendant results, a reviewing court on motion for post-conviction relief will not disturb the trial court's discretion in permitting an amended information. *State v. Sanchez*, 1969-NMCA-098, 80 N.M. 688, 459 P.2d 850; *see also State v. Crouch*, 1967-NMSC-093, 77 N.M. 657, 427 P.2d 19.

That the court granted the prosecutor's motion to endorse the information thereby adding the witness' name who had testified, in the absence of abuse of discretion, was not error entitling defendant to post-conviction relief. *State v. Lujan*, 1968-NMSC-088, 79 N.M. 200, 441 P.2d 497.

Claim of illegal arrest, in itself, is not basis for post-conviction relief. *Herring v. State*, 1969-NMCA-117, 81 N.M. 21, 462 P.2d 468; *State v. Hudman*, 1967-NMSC-201, 78 N.M. 370, 431 P.2d 748; *State v. Gibby*, 1967-NMSC-219, 78 N.M. 414, 432 P.2d 258; *State v. Ramirez*, 1967-NMSC-210, 78 N.M. 418, 432 P.2d 262; *State v. Ramirez*, 1967-NMCA-028, 78 N.M. 584, 434 P.2d 703; *State v. Simien*, 1968-NMSC-025, 78 N.M. 709, 437 P.2d 708; *State v. Hansen*, 1968-NMCA-031, 79 N.M. 203, 441 P.2d 500.

And illegality waived by guilty plea. — That defendant's arrest on the worthless check charge was without a warrant provides no basis for relief. Illegality, if any, in defendant's arrest was waived by his guilty plea. *State v. Gorton*, 1969-NMCA-002, 79 N.M. 775, 449 P.2d 791; *see also State v. Baumgardner*, 1968-NMCA-047, 79 N.M. 341, 443 P.2d 511; *State v. Williams*, 1967-NMSC-162, 78 N.M. 211, 430 P.2d 105; *State v. Losolla*, 1968-NMSC-107, 79 N.M. 296, 442 P.2d 786.

That the arresting officer failed to have a warrant for defendant's arrest at the time he was taken into custody; that defendant was placed in a lineup for identification purposes before he had obtained an attorney to represent him; that a gun claimed to be material evidence was obtained through an unlawful search and seizure; and that defendant was

not served with the information constitute claimed defects in the proceedings that are waived by a subsequent plea of guilty entered with the advice of counsel. *State v. Tipton*, 1967-NMSC-270, 78 N.M. 600, 435 P.2d 430.

Or by proceeding to trial. — Where defendant pleaded not guilty and proceeded to trial, claim of illegal arrest was waived. *State v. Ramirez*, 1967-NMSC-210, 78 N.M. 418, 432 P.2d 262.

But relief available for delay in apprehension. — Where it is contended that the right of New Mexico to revoke defendant's probation was waived by reason of the long delay in apprehending defendant, based on the claim that defendant's whereabouts were known to the state or should have been known to the state had it exercised ordinary care to ascertain the location of defendant, such a claim provides a legal basis for relief. *State v. Murray*, 1970-NMCA-045, 81 N.M. 445, 468 P.2d 416.

Denial of use of telephone after arrest not grounds for relief. — Absent prejudice, no basis for release is established by denial of use of a telephone after arrest. *State v. Gibby*, 1967-NMSC-219, 78 N.M. 414, 432 P.2d 258.

Without showing of prejudice. — He does not claim, and the record does not suggest, any prejudice by reason of the claimed refusals of his requests to use the telephone. Absent some basis of prejudice, a claim that he was refused the use of a telephone is not ground for vacating a judgment and sentence. *State v. Knerr*, 1968-NMCA-022, 79 N.M. 133, 440 P.2d 808.

Defendant may waive statutory right to copy of information. — Statutory right to be furnished a copy of the information at least 24 hours prior to being required to plead was waived by plea of not guilty and so no grounds for relief were stated by defendant. *State v. Knight*, 1967-NMSC-241, 78 N.M. 482, 432 P.2d 838.

When illegal search not grounds for relief. — Illegal search of car, if it did occur, would not afford defendant a basis for post-conviction relief for the reason that no evidence so obtained was used against him. *State v. Baumgardner*, 1968-NMCA-047, 79 N.M. 341, 443 P.2d 511.

Where defendant asserts that an illegal search was made of his automobile, and that he was identified without being placed in a lineup, even if his claim of an illegal search be true, as no evidence secured thereby was used against him and he pleaded guilty, he cannot be heard to complain and he is not entitled to post-conviction relief. *State v. Hansen*, 1968-NMCA-031, 79 N.M. 203, 441 P.2d 500.

Where the circumstances of a claimed illegal search and seizure are known to defendant at the time of trial, the question of use of illegally seized evidence cannot properly be raised by motion under Rule 93, N.M.R. Civ. P. *State v. Barton*, 1968-NMSC-065, 79 N.M. 70, 439 P.2d 719.

When absence of preliminary hearing not grounds for relief. — The bare claim that defendant was never taken before a magistrate and advised of his rights without claim that this prejudiced him in any way, provides no basis for post-conviction relief. *Woods v. State*, 1972-NMCA-128, 84 N.M. 248, 501 P.2d 692.

Where, upon motion for post-conviction relief under Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA), defendant charged with aggravated battery claimed that he was charged in the criminal information with an offense concerning which there had been no preliminary examination, but where the record did not show any objection to the lack of preliminary examination on the aggravated battery charge, showing instead that defendant pleaded not guilty when arraigned and proceeded to trial without raising a question as to the propriety of the magistrate's bind over, defendant's claim for relief was waived. *State v. Hibbs*, 1971-NMCA-100, 82 N.M. 722, 487 P.2d 150.

Defendant's voluntary plea of guilty in the district court constituted a waiver of a preliminary hearing and precluded relief on grounds that waiver was obtained through undue influence. *State v. Baumgardner*, 1968-NMCA-047, 79 N.M. 341, 443 P.2d 511.

Nor delay in preliminary hearing. — That defendant was not taken before a magistrate for two and one-half days after his arrest provided no legal basis for relief as there is no showing, in fact no claim, that the delay deprived defendant of a fair trial or that he was prejudiced in any way. *Barela v. State*, 1970-NMCA-044, 81 N.M. 433, 467 P.2d 1005.

Where confession was made by appellant promptly upon being interrogated, without any claim of threats, force or psychological pressure, and within 30 hours of arrest, the fact that appellant was not taken forthwith before a magistrate cannot be held to make the statement inadmissible. *State v. Minor*, 1968-NMSC-016, 78 N.M. 680, 437 P.2d 141.

Irregularities which may have occurred prior to arraignment are not subject to inquiry by way of post-conviction relief. *State v. Martinez*, 1968-NMSC-097, 79 N.M. 232, 441 P.2d 761.

Unless fair trial prevented. — The acts complained of, such as unreasonable delay in arraignment, must be of such quality as necessarily prevent a fair trial, to obtain review and reversal. *State v. Olguin*, 1968-NMSC-012, 78 N.M. 661, 437 P.2d 122.

Constitutional validity of plea deemed proper subject of motion for relief. — Where the claims made, if true, would raise serious questions as to the constitutional validity of the guilty pleas, then these claims are to be asserted in a motion for post-conviction relief. *State v. Martinez*, 1973-NMCA-040, 84 N.M. 766, 508 P.2d 36.

Since plea deemed void if not voluntary. — A guilty plea must be voluntarily made, and if it is not so made but is in fact induced by promises or threats, then it is void and

subject to collateral attack. *State v. Baumgardner*, 1968-NMCA-047, 79 N.M. 341, 443 P.2d 511.

It is a fundamental rule of criminal procedure that a judgment and sentence cannot stand if based upon an involuntary plea of guilty induced by an unkept promise of leniency. A guilty plea induced by either promises or threats which deprive it of the character of a voluntary act is void and subject to collateral attack. *State v. Ortiz*, 1967-NMSC-104, 77 N.M. 751, 427 P.2d 264.

But where plea not grounds for relief. — The fact that alternatives were considered in reaching a decision to plead guilty does not necessarily render the decision involuntary, and where there is substantial evidence that the plea was made voluntarily after proper advice of counsel and with full understanding of the consequences, there is no basis for post-conviction relief. *Mondragon v. State*, 1972-NMCA-117, 84 N.M. 175, 500 P.2d 999.

The alleged facts of a need for a prostate operation, time in a mental hospital and prior conviction of a "finding" charge raise no issue as to an involuntary plea of guilty and provide no grounds for post-conviction relief. *Stafford v. State*, 1971-NMCA-014, 82 N.M. 365, 482 P.2d 68.

Defendant who was told by his attorney that if he didn't plead guilty to second-degree murder he would die in gas chamber could not claim on motion for post-conviction relief that his guilty plea was induced by coercion, threats or promise of leniency, because such plea represented a choice between two alternatives and a voluntary selection of a plea to a lesser charge. *State v. French*, 1970-NMSC-159, 82 N.M. 209, 478 P.2d 537.

If in fact defendant chose to rely on counsel's advice and plead guilty rather than trust his fate to a jury on a charge involving the death penalty, defendant does not gain thereby on a motion for post-conviction relief. Such a factual claim provides no legal basis for holding his plea involuntary. *State v. Kenney*, 1970-NMCA-038, 81 N.M. 368, 467 P.2d 34.

Absent any claim that anyone representing the state said or did anything to induce the guilty plea, the statement made to defendant by his own counsel did not provide a basis for post-conviction relief. *State v. Montoya*, 1970-NMCA-016, 81 N.M. 233, 465 P.2d 290; *Goodwin v. State*, 1968-NMCA-062, 79 N.M. 438, 444 P.2d 765.

That defendant pleaded guilty in exchange for dismissal of criminal charges against a young woman petitioner passed off as his wife, provides no basis for relief. *Roessler v. State*, 1969-NMCA-003, 79 N.M. 787, 450 P.2d 196, cert. denied, 395 U.S. 967, 89 S. Ct. 2115, 23 L. Ed. 2d 754 (1969).

If this is a claim that petitioner entered his plea on advice of counsel, it provides no basis for relief. If this is a claim that petitioner did not fully understand the consequences of his plea, it provides no basis for relief. If he did not understand, he could have asked

his attorney. If this is a claim that the trial court failed to explain the effect of the plea, it still provides no basis for relief. The trial court is not obligated to explain the effect of a guilty plea entered by a defendant represented by counsel. *Roessler v. State*, 1969-NMCA-003, 79 N.M. 787, 450 P.2d 196, cert. denied, 395 U.S. 967, 89 S. Ct. 2115, 23 L. Ed. 2d 754 (1969).

Where two attorneys represented defendant at different times, both being capable and competent attorneys, who appear to have done all defendant would permit them to do, and the defendant stands convicted upon his voluntary plea of guilty, which he made, after consulting, at his specific request, with a competent attorney at the arraignment proceedings, the plea is binding and the defendant is not entitled to post-conviction relief. *State v. Hansen*, 1968-NMCA-031, 79 N.M. 203, 441 P.2d 500.

It is, of course, unquestioned that a plea of guilty induced by an unkept promise of leniency is void. Where in this case, however, the allegation upon which the contention is based demonstrates that no "promises" were made either by the deputy sheriff or appellant's counsel and the statements attributed to the deputy sheriff and counsel on their face do not bear out the assertion that a promise or promises of leniency were made but amount to no more than speculation as to what the district attorney or the trial judge might do if appellant entered a plea of guilty, the plea of guilty is not void and the defendant is not entitled to post-conviction relief. *State v. McCain*, 1968-NMCA-029, 79 N.M. 197, 441 P.2d 237.

While the accused may have to take the consequences of a poor defense, he may at least say the fault was not his own. But this is not so when he pleads guilty. Here the deed is his own; here there are not the baffling complexities which require a lawyer for illumination; if voluntarily and understandingly made, even a layman should expect a plea of guilty to be treated as an honest confession of guilt and a waiver of all defenses known and unknown. And such is the law. A plea of guilty may not be withdrawn after sentence on a motion for post-conviction relief except to correct a "manifest injustice", and it is difficult to imagine how "manifest injustice" could be shown except by proof that the plea was not voluntarily or understandingly made, or a showing that defendant was ignorant of his right to counsel. Certainly ineffective assistance of counsel, as opposed to ignorance of the right to counsel, is immaterial in an attempt to impeach a plea of guilty, except perhaps to the extent that it bears on the issues of voluntariness and understanding. *State v. Knerr*, 1968-NMCA-022, 79 N.M. 133, 440 P.2d 808.

Where defendant stated to trial court that (1) he was familiar with and understood the charges, (2) he had received advice of counsel, (3) no one had indicated what the court might do, (4) no threats had been made, (5) he realized he had a right to be tried by a jury and (6) he was changing his plea freely and voluntarily and defendant denied that any promises had been made to induce him to change his plea, waived a presentencing report and asked the court to sentence him "at this time," motion for post-conviction relief was properly denied. *State v. Decker*, 1968-NMCA-016, 79 N.M. 41, 439 P.2d 559.

Increase in bail would not be basis for post-conviction relief unless petitioner was prejudiced by the increase. *Hernandez v. State*, 1970-NMCA-073, 81 N.M. 634, 471 P.2d 204.

Nor failure to set bond where plea of guilty. — The failure to set bond, like delay in bringing appellant before a magistrate, was waived by the entry of a plea of guilty. This contention presents no basis for relief under Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA). *State v. Helm*, 1968-NMSC-112, 79 N.M. 305, 442 P.2d 795.

Nondisclosure of information sufficient for relief. — Where nondisclosed information would have provided the defense with two independent witnesses not connected with defendant or his family who tended to corroborate the defense and to contradict police witnesses concerning the method of entry, which was relevant to defendant's intent upon entry, this deprivation is prejudicial; the order denying post-conviction relief is reversed and the cause remanded with instructions to set aside the judgment and sentence and grant defendant a new trial. *Chacon v. State*, 1975-NMCA-094, 88 N.M. 198, 539 P.2d 218.

Where defendant prejudiced by material nondisclosure. — Where a violation of Rule 27(a)(5) (*see now* Rule 5-501 NMRA) is not discovered until after trial, the standards to be applied in determining whether defendant is entitled to a new trial because of nondisclosure are that the nondisclosed items must be material to the guilt or innocence of the accused, or to the penalty to be imposed, and furthermore, that nondisclosure of items material to the preparation of the defense is not reversible error in the absence of prejudice. *Chacon v. State*, 1975-NMCA-094, 88 N.M. 198, 539 P.2d 218 (decided prior to 1980 amendment).

Separate interrogations not grounds for relief. — Appellant's claim that his conviction was illegal because he was interrogated apart from other witnesses during the investigation presents no grounds for post-conviction relief. *State v. Franklin*, 1968-NMSC-176, 79 N.M. 608, 446 P.2d 883, cert. denied, 394 U.S. 965, 89 S. Ct. 1318, 22 L. Ed. 2d 566 (1969).

Relitigation of issues previously decided. — When a habeas petitioner can show that there has been an intervening change of law or fact, or that the ends of justice would otherwise be served, principles of finality do not bar relitigation of an issue adversely decided on certiorari review; an intervening change in the law occurs when a court announces a new rule, and a court establishes a new rule when its decision is flatly inconsistent with the prior governing precedent and is an explicit overruling of an earlier holding. *Dominguez v. State*, 2015-NMSC-014.

Where *State v. Montoya*, 2013-NMSC-020, announced a new rule when it explicitly overruled both *State v. Dominguez*, 2005-NMSC-001 and *State v. Gonzales*, 1992-NMSC-003, holding that current New Mexico double jeopardy jurisprudence precludes a defendant from being cumulatively punished for both voluntary manslaughter and shooting at or from a motor vehicle resulting in great bodily harm in a situation where

both convictions are based on the same shooting of the same victim, habeas petitioner had a right to relitigate his double jeopardy claims that were similar to the double jeopardy claims raised in *State v. Montoya*. *Dominguez v. State*, 2015-NMSC-014.

No relitigation of admissibility of confession. — Where the issue as to the admissibility of the confession had been earlier decided, it could not be relitigated in post-conviction proceedings. *State v. Padilla*, 1973-NMSC-049, 85 N.M. 140, 509 P.2d 1335.

Defendant must litigate admissibility if presented opportunity. — The defendant has the right to a determination of the voluntariness of confession but a defendant cannot sit idly by and fail to accept an offer by the court for such a hearing and subsequently predicate error in a motion for post-conviction relief on the fact that he did not receive such a hearing. *State v. Soliz*, 1968-NMSC-101, 79 N.M. 263, 442 P.2d 575.

Limited education not grounds for relief. — The claim that defendant was improperly convicted because of his "limited education background" does not state a basis for post-conviction relief. *Maes v. State*, 1972-NMCA-124, 84 N.M. 251, 501 P.2d 695.

The fact that defendant was 20 years of age, had either an eighth or an eleventh grade education, was a mechanic and was not trained in court procedures, presented no issue upon his ability to understand and appreciate what he had done, or upon his capacity to knowingly, intelligently and understandingly waive his rights, which had been so fully explained to him and which he had so consistently stated he understood and therefore afforded no grounds for a post-conviction hearing on relief. *State v. Maples*, 1970-NMCA-106, 82 N.M. 36, 474 P.2d 718.

Claim that defendant was incompetent to stand trial because he was only 22 years old, lacked education and "in a general manner" did not understand the proceedings in the trial court did not provide a basis for post-conviction relief since he could have asked his appointed counsel. *State v. Montoya*, 1970-NMCA-016, 81 N.M. 233, 465 P.2d 290.

Nor limited ability to understand English where counsel present. — Petitioner's claim that he did not understand English well enough to understand the arraignment proceedings at which he entered a guilty plea or the advice of rights given him in English did not provide a basis for post-conviction relief where there was substantial evidence to support a finding of sufficient understanding of English, and where, even if he did not have such sufficient understanding, the record showed that he was represented by counsel at the arraignment proceedings and could have asked his attorney about what he did not comprehend. *Mondragon v. State*, 1972-NMCA-117, 84 N.M. 175, 500 P.2d 999.

Nor insanity where trial court found competency. — Where the trial court found as a fact that they were not suffering from withdrawal symptoms and that they were mentally competent at the time of their plea, there was no factual basis for the claim of insanity at

the time of their plea, and no basis for post-conviction relief. *State v. Botello*, 1969-NMCA-067, 80 N.M. 482, 457 P.2d 1001.

When competency properly considered. — Where defendant's motion raised the issue of his competency to plead guilty, and the question had not been previously raised, the question was properly before the court in post-conviction proceeding. *State v. Barefield*, 1969-NMCA-040, 80 N.M. 265, 454 P.2d 279.

Allegations of post-conviction confinement in a mental institution and diagnosis as a psychotic are sufficiently close to the date of his plea to raise a factual issue concerning his competency to plead. *State v. Cliett*, 1968-NMCA-099, 79 N.M. 719, 449 P.2d 89.

Right of confrontation deemed proper issue. — The question of a denial of a transcript of grand jury testimony, and thus of the constitutional right of confrontation, was cognizable under a proceeding pursuant to Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA). *Valles v. State*, 1977-NMCA-034, 90 N.M. 347, 563 P.2d 610, cert. denied, 90 N.M. 637, 567 P.2d 486.

But when may not raise issue. — Since proceedings under Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA) are civil in nature, question whether defendant was denied right of confrontation in pretrial hearing may not be raised for the first time on appeal. *State v. Trimble*, 1967-NMSC-192, 78 N.M. 346, 431 P.2d 488.

Absence of lineup is not basis for post-conviction relief. *State v. Jones*, 1972-NMCA-170, 84 N.M. 500, 505 P.2d 445.

That no police lineup was held and petitioner first faced his accuser at the time of trial in district court provides no basis for post-conviction relief as petitioner had no right to be identified in a lineup. *Hernandez v. State*, 1970-NMCA-073, 81 N.M. 634, 471 P.2d 204.

Nor showing of defendant's photograph in absence of counsel. — The showing of photographs of defendant to witnesses after defendant had been charged and counsel appointed but in absence of counsel was not prejudicial to defendant where witnesses produced clear and convincing evidence that their in-court identifications were not based on having seen the photographs and thus provided no basis for post-conviction relief. *State v. Carrothers*, 1968-NMCA-049, 79 N.M. 347, 443 P.2d 517.

Where illegal extradition not grounds for relief. — An illegal extradition provides no basis for relief as the claim was waived by the guilty plea. *State v. Gorton*, 1969-NMCA-002, 79 N.M. 775, 449 P.2d 791.

It is well established that where a person accused of crime is found within the territorial jurisdiction where he is charged, the jurisdiction of the court where the charge is so pending is not impaired by the fact he was brought from another jurisdiction by illegal means and so defendant has not stated a basis for post-conviction relief. *State v. Martinez*, 1968-NMSC-097, 79 N.M. 232, 441 P.2d 761.

Nor transfer of action from juvenile court. — Petitioner just as effectively waives the shortcomings in the transfer proceedings out of the juvenile court, if they were shortcomings, as he waived his right to counsel, when he did not assert the rights in the district court upon arraignment after counsel had been appointed and they had had an opportunity to consult. *Neller v. State*, 1968-NMSC-130, 79 N.M. 528, 445 P.2d 949.

Where pretrial publicity not grounds for relief. — Where defendant moved to vacate judgment and sentences pursuant to Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA), contending that pretrial publicity in county caused him to enter pleas of guilty, the trial court's finding in denying motion for change of venue, that the publicity given the case had not prejudiced the minds of inhabitants of the county, was conclusive where no abuse of discretion was shown. *State v. Barela*, 1967-NMSC-185, 78 N.M. 323, 431 P.2d 56.

Where insufficient time to prepare case not grounds for relief. — Defendant, who, through his attorney, waived both his statutory right to be furnished a copy of amended information and a preliminary hearing thereon, was not denied equal justice under the law because his trial counsel did not have time to prepare his case and trial court properly denied, without hearing, defendant's motion for post-conviction relief. *State v. Sanchez*, 1969-NMCA-098, 80 N.M. 688, 459 P.2d 850.

C. TRIAL MATTERS.

Recantation of testimony. — A petitioner seeking a new trial through a writ of habeas corpus because of recanted testimony must prove, based upon the entire record, including the original trial proceedings at issue, that the recantation is credible and was significant to the original verdict. In assessing the recantation’s credibility, the trial court, in addition to weighing the credibility to the witnesses, must consider the following factors, none of which is dispositive by itself: (1) the original verdict was based upon uncorroborated testimony; (2) the recantation is corroborated by additional new evidence; (3) the recantation occurred under circumstances free from suspicion of undue influence or pressure from any source; (4) the record fails to disclose any possibility of collusion between the defendant and the witness between the time of the trial and the retraction; and (5) the witness admitted the perjury on the witness stand and thereby subjected himself or herself to prosecution. To show that a credible recantation was significant, the petitioner must prove that the evidence meets each of the following requirements: (1) it must have been discovered since the trial; (2) it could not have been discovered before the trial by the exercise of due diligence; (3) it must be material; (4) it must not be merely cumulative; (5) it must not be merely impeaching or contradictory; and (6) the court is left with a firm belief that but for the perjured testimony, the defendant would most likely not have been convicted. *Case v. Hatch*, 2008-NMSC-024, 144 N.M. 20, 183 P.3d 905.

Recantation was not newly discovered evidence. — Where the recantation of a witness was an effort to revert to the original statement the witness gave to the police that the witness did not know anything about the event leading to the victim’s death and

where the inconsistency of the original statement and the witness's subsequent statement to the police implicating the defendant were the subject of the original trial, the recantation was not newly discovered evidence. *Case v. Hatch*, 2008-NMSC-024, 144 N.M. 20, 183 P.3d 905.

Defendant's claim of actual innocence was not supported by new evidence. — Where defendant was convicted of first-degree murder and criminal sexual penetration (CSP), and where defendant petitioned for a writ of habeas corpus alleging that he was actually innocent and that new evidence in the form of recanted testimony and new DNA evidence undermined confidence in the verdict, the district court erred in granting defendant's petition for writ of habeas corpus, because defendant's assertion of innocence does not alter the nature of the recantations, which were merely contradictory and impeaching; at trial, the witnesses admitted that they previously lied to the police, and the recantations do not appear to be qualitatively different from their original statements, but instead go to the question of the weight of their testimony concerning conflicting statements they previously made. Further, other testimony corroborated the facts supporting defendant's convictions, and this testimony has not been recanted. The recantations, therefore, were not new evidence. Moreover, the new DNA test evidence also fails to fulfill all the requirements of new evidence, because at trial the jury convicted defendant of criminal sexual penetration despite expert testimony that the testing of samples taken from the victim's body revealed no sperm cells in any samples, and although the sensitivity of the more recent DNA testing is likely an improvement over the testing performed for the original trial, the new DNA test result is qualitatively the same type of evidence, the absence of male DNA evidence. *State v. Worley*, 2020-NMSC-021.

Where instructions by court not grounds for relief. — Where self-defense was not at issue, fundamental error did not occur when the court failed to include the element of unlawfulness in the deliberate-intent murder instruction and when the court failed to explicitly tell the jury that the state had to disprove self-defense beyond a reasonable doubt. *State v. Sutphin*, 2007-NMSC-045, 142 N.M. 191, 164 P.3d 72.

State court's decision not to hold evidentiary hearing is not cognizable as a federal habeas claim. LaVoy v. Snedeker, ____F.Supp.____(D.N.M. 2004).

Claim based on absence of essential facts in record. — Spanish-speaking defendant's claim regarding the inadequacy of his interpreter was rejected by the court of appeals, based on the absence of essential facts in the record, not because the court examined the evidence and found the issues to be without merit, and defendant was not precluded from pursuing post-conviction relief involving the alleged inadequacy. *State v. Gomez*, 1991-NMCA-061, 112 N.M. 313, 815 P.2d 166.

Issue of speedy trial does not provide basis for post-conviction relief. *Salazar v. State*, 1973-NMCA-097, 85 N.M. 372, 512 P.2d 700; *see also State v. Padilla*, 1973-NMSC-049, 85 N.M. 140, 509 P.2d 1335.

Where appellant pleaded guilty to one count of robbery, but was not at that time sentenced because an information was immediately filed charging him with being an habitual offender; and where, following a jury verdict with respect to the habitual offender proceeding, appellant was sentenced to life imprisonment; and where supreme court reversed the habitual conviction, but whereas no issue was raised in that case as to appellant's plea of guilty, the reversal did not grant a new trial as to the plea of guilty, so that thereafter the habitual criminal information was dismissed and the court sentenced appellant to a prison term upon the charge to which he had originally pleaded guilty, appellant's motion for post-conviction relief under Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA) asserting a claimed denial of a speedy trial and sentence because of the delay between the guilty plea and the sentence was completely without merit, where he was promptly sentenced after supreme court's decision in the first case and received full credit for the time he had served under the prior illegal sentence. *Dalrymple v. State*, 1967-NMSC-200, 78 N.M. 368, 431 P.2d 746.

Defendant may waive right to speedy trial. — Regardless of the fact that a delay in a particular case might have been construed to be a deprivation of the right to a speedy trial, the defendant cannot be heard to complain in a motion for post-conviction relief if he consented to or acquiesced in the delay. *State v. McCroskey*, 1968-NMCA-074, 79 N.M. 502, 445 P.2d 105.

The entry of a voluntary plea of guilty constitutes a waiver of whatever right a defendant may have had to a speedy trial. *State v. McCroskey*, 1968-NMCA-074, 79 N.M. 502, 445 P.2d 105.

Where joinder of unrelated offenses not sufficient grounds for relief. — As his two offenses were unrelated, defendant asserts that he should have had two separate trials. However, the pleas on the unrelated charges were accepted at the same proceeding and there was no trial as pleas waived trial; therefore, this claim provides no basis for relief. *State v. Gorton*, 1969-NMCA-002, 79 N.M. 775, 449 P.2d 791.

Claims as to jurors. — Appellant's claim that his conviction was illegal because the jurors should have been called and picked, one at a time, and to do otherwise constituted improper impaneling, is frivolous and constitutes no grounds for post-conviction relief. *State v. Franklin*, 1968-NMSC-176, 79 N.M. 608, 446 P.2d 883, cert. denied, 394 U.S. 965, 89 S. Ct. 1318, 22 L. Ed. 2d 566 (1969).

Where defendant contends he was denied trial by an impartial jury because one juror was a personal friend of the prosecutor, but there was no claim that this friendship, if a fact, prejudiced the defendant, the claim does not provide a basis for post-conviction relief. *State v. Sharp*, 1968-NMCA-073, 79 N.M. 498, 445 P.2d 101.

The mere allegation that persons of a certain nationality were not included among jurors trying the case forms no basis upon which to consider it was the result of such scheme or design as necessary to establish prejudice needed to allow post-conviction relief. *State v. Martinez*, 1968-NMSC-097, 79 N.M. 232, 441 P.2d 761.

Failure of state to call witnesses. — Defendant's contention on Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA) motion that in not calling certain witnesses who would have supported defendant's testimony and then in arguing to the jury that the evidence introduced failed to support defendant's testimony, the prosecutor's arguments were misconduct, was without merit where the witnesses, not called at the trial, testified at the post-conviction hearing, but their testimony failed to support defendant's testimony. *State v. Hodnett*, 1971-NMCA-099, 82 N.M. 710, 487 P.2d 138; *see also State v. Hibbs*, 1968-NMCA-093, 79 N.M. 709, 448 P.2d 815; *State v. Lujan*, 1968-NMSC-088, 79 N.M. 200, 441 P.2d 497.

Use by state of new witnesses at trial. — The trial court found the state used certain witnesses at the trial who had not testified at the preliminary hearing. This fact provides no legal basis for relief. *Barela v. State*, 1970-NMCA-044, 81 N.M. 433, 467 P.2d 1005; *see also Pena v. State*, 1970-NMCA-026, 81 N.M. 331, 466 P.2d 897.

Claim concerning credibility of evidence introduced at trial provides no basis for post-conviction relief. *State v. Reid*, 1968-NMSC-094, 79 N.M. 213, 441 P.2d 742.

Claim that the main witness changed his testimony two or three times on the witness stand is an attack on the credibility of the witness and provided no basis for post-conviction relief. *Pena v. State*, 1970-NMCA-026, 81 N.M. 331, 466 P.2d 897.

Claims concerning the credibility of witnesses and the weight to be given their testimony are matters decided by the jury when they convict defendant, and they provide no basis for post-conviction relief. *State v. Tapia*, 1969-NMCA-066, 80 N.M. 477, 457 P.2d 996.

Defendant's motion containing a statement to the effect that material testimony at the trial was false, even if the affidavit be true, does not establish a basis for post-conviction relief, as the defendant has not shown, nor does he assert, that the particular testimony was known to be false by the agents of or counsel for the state. *State v. Minns*, 1970-NMCA-042, 81 N.M. 428, 467 P.2d 1000.

Claim that defendant was convicted on prejudiced testimony states no basis for relief. *Andrada v. State*, 1971-NMCA-184, 83 N.M. 393, 492 P.2d 1010.

Stipulation by counsel. — Where the trial court found that a stipulation, wherein it was agreed that the jury should not be permitted to return a verdict calling for the death penalty, was entered into by counsel for defendant in murder trial as a part of the trial strategy, it should not be made the basis for relief under Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA) since there was no prejudice in appellant having been given a trial free from the risks incident to having the jury consider the possibility of imposing death as the penalty, in the event of a verdict of guilty of murder in the first degree. *Smith v. State*, 1968-NMSC-144, 79 N.M. 450, 444 P.2d 961.

Errors committed in overruling objections at trial. — Any error committed in overruling objections made at trial cannot properly be raised in a post-conviction

proceeding, under Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA), where they do not constitute violations of the United States or New Mexico Constitutions, and they are not matters which form a basis for a collateral attack upon the judgment of conviction or the sentence as they are evidentiary matters which may be raised only on a direct appeal. *State v. Sisneros*, 1968-NMSC-175, 79 N.M. 600, 446 P.2d 875.

Whether defendant tried for proper degree of murder. — Whether defendant was properly tried for first-degree murder rather than voluntary manslaughter is a factual question which the jury resolved by its verdict and presents no grounds for relief. *State v. Williams*, 1967-NMSC-224, 78 N.M. 431, 432 P.2d 396.

Where instructions by court not grounds for relief. — The claimed error as to the failure to properly instruct on right of self-defense cannot be raised on a motion for post-conviction relief. *State v. Williams*, 1969-NMSC-026, 80 N.M. 63, 451 P.2d 556.

"Shotgun" or supplementary instruction given by the court some time after the jury had received the case for its deliberations and had failed to reach a verdict does not establish grounds for relief on fundamental error. *State v. Travis*, 1968-NMCA-036, 79 N.M. 307, 442 P.2d 797.

Giving of instruction on self-defense that it is for jury to determine from all of the evidence whether the claim of the defendant that he acted in self-defense is made in good faith or is a mere pretense was not fundamental error which could be raised on motion to vacate judgment. *State v. Travis*, 1968-NMCA-036, 79 N.M. 307, 442 P.2d 797.

Entrapment does not state basis for post-conviction relief after a trial. *State v. Dominguez*, 1969-NMCA-045, 80 N.M. 328, 455 P.2d 194; *State v. Apodaca*, 1967-NMSC-218, 78 N.M. 412, 432 P.2d 256; *State v. Simien*, 1968-NMSC-025, 78 N.M. 709, 437 P.2d 708.

Although the supreme court has recognized entrapment as a defense, it clearly pertains to the merits of the cause, it is to be determined at trial and it is subject to review on appeal. A claim of entrapment does not state a basis for post-conviction relief under Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA). *State v. Losolla*, 1968-NMSC-107, 79 N.M. 296, 442 P.2d 786.

Where defendant's allegations of conspiracy and entrapment were found by trial court to be unsupported by the record and in conflict with it and that there were no facts on which entrapment could be based, conspiracy and entrapment claims did not state a basis for post-conviction relief. *State v. Dominguez*, 1969-NMCA-045, 80 N.M. 328, 455 P.2d 194.

Sufficiency of evidence does not provide basis for post-conviction relief. *Woods v. State*, 1972-NMCA-128, 84 N.M. 248, 501 P.2d 692; *State v. Gray*, 1969-NMCA-102, 80 N.M. 751, 461 P.2d 233; *Herring v. State*, 1969-NMCA-117, 81 N.M. 21, 462 P.2d

468; *State v. Jacoby*, 1971-NMCA-025, 82 N.M. 447, 483 P.2d 502; *Andrada v. State*, 1971-NMCA-184, 83 N.M. 393, 492 P.2d 1010.

Where defendant raises the question of substantial evidence to support the jury's determination of sane at the time of the alleged crime and at the time of trial, defendant's claim is without merit because insufficiency of the evidence is not a basis for granting post-conviction relief. *Faulkner v. State*, 1972-NMCA-061, 83 N.M. 742, 497 P.2d 744.

The claim that defendant did not commit aggravated battery because his victim was not permanently disfigured goes to the sufficiency of the evidence for conviction and is not cognizable in a proceeding under Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA). *State v. Hibbs*, 1971-NMCA-100, 82 N.M. 722, 487 P.2d 150.

Question of whether there was substantial evidence to support the verdict of guilty of armed robbery which was affirmed on appeal, could not be raised on a motion under Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA). *Nance v. State*, 1969-NMCA-018, 80 N.M. 123, 452 P.2d 192.

Allegations as to the insufficiency of the evidence, or claimed errors which may have occurred during trial pertaining to the introduction or failure of introduction of certain evidence, are not matters upon which relief can be granted in a proceeding under Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA). *State v. Sedillo*, 1968-NMCA-032, 79 N.M. 254, 442 P.2d 212.

Fundamental error deemed sufficient for relief. — Where there is a total absence of evidence to support a conviction as well as evidence of an exculpatory nature, there is a duty to apply the doctrine of fundamental error and to reverse the trial court conviction on a post-conviction motion. *State v. Salazar*, 1967-NMSC-187, 78 N.M. 329, 431 P.2d 62.

Scope of fundamental error. — Error that is fundamental must be such error as goes to the foundation or basis of a defendant's rights or must go to the foundation of the case or take from the defendant a right which was essential to his defense and no court could or ought to permit the defendant to waive this right, and in determining whether fundamental error exists, each case must stand on its own. *State v. Gillihan*, 1973-NMSC-090, 85 N.M. 514, 514 P.2d 33; *State v. Garcia*, 1942-NMSC-030, 46 N.M. 302, 128 P.2d 459.

Doctrine of fundamental error seldom used. — Insufficiency of the evidence of a degree amounting to fundamental error is resorted to only under exceptional circumstances and is applied as a means of preventing a miscarriage of justice. *State v. Jacoby*, 1971-NMCA-025, 82 N.M. 447, 483 P.2d 502.

Where the innocence of defendant does not appear indisputable, or that the question of his guilt is so doubtful that it would shock the conscience to permit his conviction to

stand, the doctrine of fundamental error cannot properly be invoked and applied. *State v. Sisneros*, 1968-NMSC-175, 79 N.M. 600, 446 P.2d 875.

Relief provided where defendant denied constitutional right. — Comment by the prosecution which calls attention to defendant's failure to testify violates the accused's privilege against self-incrimination and when certain constitutional guaranties are denied, overlooked or omitted, the conviction or sentence is not by a "competent" court. This lack of or loss of jurisdiction by the court imposing sentence renders such judgment and sentence subject to collateral attack and sentences subject to collateral attack may be questioned by post-conviction proceedings. *State v. Buchanan*, 1967-NMSC-267, 78 N.M. 588, 435 P.2d 207.

D. POST-TRIAL MATTERS.

This rule supersedes any conflicting provisions found in 31-11-6 NMSA 1978, thus no appeal may be taken from a trial court's denial of a post-conviction motion. *State v. Garcia*, 1984-NMCA-009, 101 N.M. 232, 680 P.2d 613.

Nonuniform enforcement of laws not basis for relief. — The statute under which appellant was sentenced applies equally to members of a given class. The fact that the statute may not be enforced diligently, does not give rise to a right which would amount to denial of equal protection and does not provide a basis for post-conviction relief. In other words, equal protection does not entail uniform enforcement. *State v. Baldonado*, 1968-NMCA-025, 79 N.M. 175, 441 P.2d 215.

Citizens are entitled to equal protection of the law but citizens are not entitled to equal protection from the law. The fact that not all criminals are prosecuted is no valid defense to the one prosecuted and cannot provide a basis for post-conviction relief. *State v. Baldonado*, 1968-NMCA-025, 79 N.M. 175, 441 P.2d 215.

Where interference with stay of execution of sentence not grounds for relief. — Where defendant's authorized stay of execution of sentence did not exceed 90 days, any district attorney's "interference" subsequent to the 90-day period would not be a basis for post-conviction relief because defendant was not legally authorized to be out of the penitentiary after the 90 days expired. *State v. Deats*, 1971-NMCA-136, 83 N.M. 154, 489 P.2d 662.

Imposition of sentence authorized by law provides no basis for relief. *State v. Hall*, 1972-NMCA-065, 83 N.M. 764, 497 P.2d 975; *State v. McCain*, 1968-NMCA-029, 79 N.M. 197, 441 P.2d 237; *Hernandez v. State*, 1970-NMCA-073, 81 N.M. 634, 471 P.2d 204; *State v. Follis*, 1970-NMCA-083, 81 N.M. 690, 472 P.2d 655.

Alleged inequality in sentences. — Alleged inequality in sentences for the same offense, if true, does not provide a basis for post-conviction relief. The "equal protection of the law" provisions of the United States and New Mexico Constitutions do not require

uniform enforcement of the law and do not protect defendant from the consequences of his crime. *State v. Sharp*, 1968-NMCA-073, 79 N.M. 498, 445 P.2d 101.

Where defendant's absence not grounds for relief. — Appellant argues that the fact that he was not present at the time the district court vacated a portion of its sentence pursuant to our mandate justifies his motion for post-conviction relief; however, as the district court merely eliminated the erroneous portion of the sentence, and the mandate under which appellant is now serving was issued by this court, there was no need for a hearing at all as the trial court merely corrected the record and did not resentence appellant. *State v. Lujan*, 1968-NMSC-088, 79 N.M. 200, 441 P.2d 497.

As to awareness of possible sentences. — Ordinarily an accused should be advised of the maximum possible sentence and the minimum mandatory sentence which can be imposed. This the court did. Although it is true that the court did not expressly state what were the maximum and mandatory minimum sentences which could be imposed, and that the court's statement as to what the sentence would be was not made until after defendant had announced his plea of guilty, but it was made as a part of the arraignment proceedings and before the entry of the judgment of conviction. It is therefore apparent from the record that defendant understood the consequences of a guilty plea, and understood what sentence could and would be imposed and his motion for post-conviction relief must be denied. *State v. Knerr*, 1968-NMCA-022, 79 N.M. 133, 440 P.2d 808.

Where defendant argues that he is entitled to have the judgment of conviction and sentence vacated because the trial judge failed to advise him of the sentence which might be imposed, he must fail in this contention for at least two reasons: first, this question was not presented to the trial court, and, therefore, cannot be raised on appeal; second, the record shows that in a trial court colloquy, defendant's attorney referred to the sentence of three to 25 years, and shortly thereafter the court announced this is what the sentence would be. It was not until 10 years later that defendant first claimed a lack of understanding as to the length of time he could be confined under the sentence which could be and was imposed. *State v. Knerr*, 1968-NMCA-022, 79 N.M. 133, 440 P.2d 808.

When sentence deemed void. — Where a court informs a defendant prior to accepting his plea that a certain number of years is the maximum sentence, this must in fact be the maximum, and resentencing imposing an increased sentence is void upon a post-conviction. *Williams v. State*, 1970-NMSC-092, 81 N.M. 605, 471 P.2d 175.

Forfeiture of good-time credits. — *State v. Aqui,* 1986-NMSC-048, 104 N.M. 345, 721 P.2d 771, cert. denied, 479 U.S. 917, 107 S. Ct. 321, 93 L. Ed. 2d 294, should not be read as holding or implying that district courts should never analyze whether a forfeiture or termination of good-time credits has been carried out so as to violate an inmate's right to due process. If a petition demonstrates on its face that a forfeiture or termination has been imposed in a manner that departs from or circumvents the statutory and administrative procedures prescribing how such a forfeiture or termination should be

effected, the petition may be alleging a deprivation of the petitioner's right to due process that should be addressed by the court; when presented with such a petition the trial court must hold an evidentiary hearing to verify or discredit the petitioner's factual allegations, unless it plainly appears that the petitioner is not entitled to relief as a matter of law, based on: (1) the facts alleged in the petition, including any attachments thereto, or (2) the uncontroverted facts shown by either the court record or the respondent's response to the petition. *Brooks v. Shanks*, 1994-NMSC-113, 118 N.M. 716, 885 P.2d 637.

Where deviation from statutory procedures not grounds for relief. — Where, at the time defendant's suspended sentence was revoked, the statutory procedure was not followed, but the record shows that counsel was present with defendant at the time of the revocation, that neither the defendant nor his counsel had any objections to the procedure that was in fact followed and defendant, in response to the court's question, stated that he did not desire further hearing on the motion to revoke the suspended sentence, this is a claim concerning the conduct of the proceeding and how it was managed and it does not set forth a basis for relief. *State v. Raines*, 1967-NMCA-026, 78 N.M. 579, 434 P.2d 698.

Error in remanding cause to trial court. — A claim that the supreme court committed error in remanding this cause to the trial court for a determination of indigency does not state a basis for relief under Rule 93, R. Civ. P. (Dist. Cts.) (now Rule 1-093 NMRA), as these post-conviction proceedings are not intended as a substitute for a motion for rehearing or reconsideration of a decision or order of an appellate court, nor are they intended as a substitute for an appeal from a judgment or decision of a court exercising appellate jurisdiction. *Anaya v. State*, 1968-NMCA-101, 79 N.M. 755, 449 P.2d 663.

Denial of medical treatment. — The cruelty against which the constitution protects a convicted man is cruelty inherent in the method of punishment. Defendant's claim of denial of medical treatment does not provide a basis for relief. *State v. Blankenship*, 1968-NMCA-026, 79 N.M. 178, 441 P.2d 218.

Misconduct of district attorney after conviction. — Contention that the district attorney may have been partially responsible for the divorce obtained by defendant's husband since her conviction and imprisonment has no merit as a basis for relief. *State v. Knight*, 1967-NMSC-241, 78 N.M. 482, 432 P.2d 838.

Questionable arrangement between informer and police. — The question of the legal effect of the arrangement between the informer and the police could not be raised as an issue in the post-conviction proceeding. *Nieto v. State*, 1968-NMCA-045, 79 N.M. 330, 443 P.2d 500.

Motion cannot be employed to question action of warden of the state penitentiary or his interpretation of the judgment, commitment or applicable statute under Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA). *State v. Walburt*, 1967-NMSC-271, 78 N.M. 605, 435 P.2d 435.

E. RIGHT TO COUNSEL; OTHER RIGHTS.

Motion under rule preferred procedure. — A defendant may raise the issue of ineffective assistance of counsel by motion under this rule; in fact, motions under this rule appear to be the preferred procedure for addressing such issues. *State v. Jordan*, 1993-NMCA-091, 116 N.M. 76, 860 P.2d 206, *overruled in part by State v. Marquez*, 2021-NMCA-046.

Aggrieved defendant may petition supreme court. — This rule allows a defendant to raise issues that are not of record on direct appeal, such as ineffective assistance of counsel; while the trial court's decisions on such matters are not appealable, an aggrieved defendant may petition the supreme court for certiorari from the denial of the motion under this rule. *State v. Jordan*, 1993-NMCA-091, 116 N.M. 76, 860 P.2d 206, *overruled in part by State v. Marquez*, 2021-NMCA-046.

Where denial of effective counsel entitles petitioner to relief. — An appellant is denied effective assistance of counsel and entitled to post-conviction relief only where the trial is considered a mockery of justice, a sham or a farce. *State v. Gillihan*, 1973-NMSC-090, 85 N.M. 514, 514 P.2d 33.

Court appointed counsel has a duty to represent his client until relieved and if a defendant requests counsel to appeal and counsel refuses to do so, this is state action entitling a defendant to post-conviction relief. *Maimona v. State*, 1971-NMCA-002, 82 N.M. 281, 480 P.2d 171; *Barela v. State*, 1970-NMCA-044, 81 N.M. 433, 467 P.2d 1005.

Former criminal judgment may be collaterally attacked on denial of counsel grounds by a motion under Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA). *State v. Hardy*, 1967-NMSC-203, 78 N.M. 374, 431 P.2d 752.

Retroactive application of *State v. Paredaz*. — The holding of *State v. Paredaz*, 2004-NMSC-036, 136 N.M. 533, 101 P.3d 799, that a criminal defense attorney who represents a noncitizen client must advise that client of the specific immigration consequences of pleading guilty to pending charges and that an attorney's failure to do so will be ineffective assistance of counsel if the client was prejudiced applies retroactively to 1990 when New Mexico rules and forms were amended to require attorneys to advise their client about the possible immigration consequences of a guilty plea. *Ramirez v. State*, 2014-NMSC-023, *aff'g* 2012-NMCA-057, 278 P.3d 569.

Where in 1997, petitioner pleaded guilty to misdemeanors; in 2009, petitioner learned that the guilty pleas rendered petitioner inadmissible to the United States; petitioner's attorney never advised petitioner about any immigration consequences of petitioner's guilty pleas; had petitioner known about the immigration consequences of petitioner's guilty pleas, petitioner would not have pleaded guilty; and petitioner sought to vacate the guilty pleas on the basis of ineffective assistance of counsel, petitioner had a viable

claim for withdrawal of petitioner's 1997 guilty pleas based on ineffective assistance of counsel. *Ramirez v. State*, 2014-NMSC-023, *aff'g* 2012-NMCA-057, 278 P.3d 569.

Lack of advice concerning immigration consequences of plea. — The ineffective assistance of counsel rules stated in *State v. Paredez*, 2004-NMSC-036, 136 N.M. 533, 101 P.3d 799 and *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010), which require criminal defense attorneys to determine the immigration status of their clients and advise non-citizen clients of the specific immigration consequences of pleading guilty, including whether deportation would be virtually certain, applies retroactively to cases on collateral review. *State v. Ramirez,* 2012-NMCA-057, 278 P.3d 569, *aff'd*, *Ramirez v. State*, 2014-NMSC-023.

Where petitioner filed a writ of coram nobis requesting the court to vacate petitioner's 1997 misdemeanor convictions for possession of marijuana and drug paraphernalia, and concealing identity; petitioner was facing definite deportation at the time petitioner plead guilty to the charges; and petitioner's counsel failed to advise petitioner about any immigration consequences of pleading guilty and petitioner was prejudiced by that, petitioner should have been advised, as required by *State v. Paredez*, 2004-NMSC-036, 136 N.M. 533, 101 P.3d 799 and *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010), that deportation would almost certainly result from petitioner's convictions and because petitioner established ineffective assistance of counsel and prejudice, petitioner should have an opportunity to withdraw the guilty plea. *State v. Ramirez,* 2012-NMCA-057, 278 P.3d 569, *aff'd*, *Ramirez v. State*, 2014-NMSC-023.

Counsel's trial tactics not grounds for relief. — Counsel's decision not to allow defendant to testify, to call witnesses or to seek a change of venue are trial tactics and not the basis for relief. *State v. Gillihan*, 1973-NMSC-090, 85 N.M. 514, 514 P.2d 33.

Claim that counsel did not adequately cross-examine witnesses for the state provides no basis for relief. *Barela v. State*, 1970-NMCA-044, 81 N.M. 433, 467 P.2d 1005.

The petitioner is not entitled to post-conviction relief on the grounds that the result might have been different if different trial tactics and strategy had been employed. An attorney of record has the exclusive power and control with respect to procedural and remedial matters over the litigation with which he is charged. *State v. Ramirez*, 1970-NMCA-010, 81 N.M. 150, 464 P.2d 569.

Where defendant's counsel refused to contest the juror who allegedly was the prosecutor's friend, and when objecting, failed to inform the court as to the basis of his objection, these are claims as to counsel's conduct of the trial, and they are not claims that defendant's trial was a sham or mockery of justice. These claims do not provide a basis for post-conviction relief. *State v. Sharp*, 1968-NMCA-073, 79 N.M. 498, 445 P.2d 101.

Failure to advise of all possible defenses. — The failure of an attorney to advise a defendant of all possible defenses is no basis for post-conviction claim of incompetency of counsel. *Burton v. State*, 1971-NMSC-028, 82 N.M. 328, 481 P.2d 407.

Joint representation of defendants. — Joint representation of defendants is not inherent error; it is error only if there was a conflict of interest or if prejudice resulted. *Patterson v. State*, 1970-NMCA-007, 81 N.M. 210, 465 P.2d 93.

Where defendant and codefendant were tried jointly and convicted for murder, defendant's assertion on motion for post-conviction relief that he was denied effective counsel on basis of conflict between interests of the two defendants due to fact that codefendant did the actual killing while defendant was convicted of aiding and abetting, and due to variations in their confessions concerning details of the crime, was without merit where trial court's unattacked finding was that confessions were consistent with one another, and that information concerning defendant in the confession of codefendant was cumulative only, and did not prejudice defendant. *Patterson v. State*, 1970-NMCA-007, 81 N.M. 210, 465 P.2d 93.

Advice to plead guilty. — The fact that his counsel advised defendant to plead guilty did not establish incompetence and did not provide a basis for post-conviction relief. *State v. Montoya*, 1970-NMCA-016, 81 N.M. 233, 465 P.2d 290.

The bare fact that counsel advised appellant to plead guilty to one count rather than to risk the consequences of conviction of other charges does not indicate ineffectual representation by counsel nor provide a basis for post-conviction relief. The plea by the appellant may well have been most beneficial to him. *State v. Pavlich*, 1969-NMSC-155, 80 N.M. 747, 461 P.2d 229.

Advice to defendant to testify. — Advice to testify does not raise an issue as to whether the proceedings were a sham or mockery and provides no basis for post-conviction relief. *Barela v. State*, 1970-NMCA-044, 81 N.M. 433, 467 P.2d 1005.

Shortness of time spent with defendant. — The amount of time counsel spent with defendant prior to the hearing provides no basis for post-conviction relief as the competence and effectiveness of counsel cannot be determined by the amount of time counsel spent or failed to spend with defendant. *Maimona v. State*, 1971-NMCA-002, 82 N.M. 281, 480 P.2d 171.

If it is being suggested that, by reason of the limited time within which to confer with counsel, the defendant was thereby denied the effective assistance of counsel, entitling him to post-conviction relief, he must fail in this suggestion; first, because of his voluntary plea of guilty to the charge, and second, because the competence and effectiveness of counsel cannot be determined by the amount of time counsel spent or failed to spend with defendant. *State v. Knerr*, 1968-NMCA-022, 79 N.M. 133, 440 P.2d 808.

The competence of court-appointed counsel at probation revocation hearings could not be determined by the amount of time he spent or failed to spend with the accused. Such an allegation, therefore, did not constitute grounds upon which relief could be granted under Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA). The failure of an attorney to confer with his client, without more, could not establish the incompetence of that attorney. *State v. Brusenhan*, 1968-NMCA-006, 78 N.M. 764, 438 P.2d 174.

Failure to give certain advice. — Defendant's post-conviction claim that he was denied adequate counsel because his attorney had failed to advise him that the judge who resentenced him could be precluded from sitting, since that judge had been district attorney at original criminal proceedings, was without merit where defendant was aware that the judge had been prosecuting attorney, had been so informed by both the judge and his attorneys, and had specifically consented to the judge. *State v. French*, 1970-NMSC-159, 82 N.M. 209, 478 P.2d 537.

That counsel did not advise defendant he could appeal as an indigent provides no basis for relief. *Barela v. State*, 1970-NMCA-044, 81 N.M. 433, 467 P.2d 1005.

Defendant's bare claim that counsel did not advise him that he could appeal, in the absence of any other showing, does not set forth a basis for post-conviction relief. *Chavez v. State*, 1969-NMCA-085, 80 N.M. 560, 458 P.2d 812.

Inexperience of counsel. — Where defendant's counsel admitted that he was inexperienced in criminal practice to the extent that he could not competently represent this petitioner; this general claim, not being supported by specific factual allegation, does not provide a basis for post-conviction relief. *State v. Sharp*, 1968-NMCA-073, 79 N.M. 498, 445 P.2d 101.

Assertion of pro forma representation. — The mere assertion that attorney was "pro forma rather than zealous and active" provides no basis for relief. *State v. Gonzales*, 1969-NMCA-028, 80 N.M. 168, 452 P.2d 696.

Denial of request for change of attorney. — The claim that defendant's request for a change of attorney was denied, in itself, was insufficient to support motion for post-conviction relief. *State v. Hibbs*, 1971-NMCA-100, 82 N.M. 722, 487 P.2d 150.

Dissatisfaction with results of counsel. — Dissatisfaction with the results obtained through the efforts of attorney does not provide a basis for post-conviction relief. *State v. Apodaca*, 1967-NMSC-218, 78 N.M. 412, 432 P.2d 256.

Complaint concerning inadequacy of representation by counsel furnishes no basis for relief. *State v. Lobb*, 1968-NMSC-021, 78 N.M. 735, 437 P.2d 1004.

Defendants must cooperate with counsel. — Where defendants refused to cooperate with appointed counsel they cannot now complain about the consequences of their

actions and, therefore, their motion for post-conviction relief was appropriately denied. *Bobrick v. State*, 1972-NMCA-048, 83 N.M. 657, 495 P.2d 1104.

Burden of showing incompetency of counsel is on appellant. *Smith v. Ninth Judicial Dist.*, 1967-NMSC-229, 78 N.M. 449, 432 P.2d 414.

Defendant's burden. — Absent infidelity on the part of his attorney, a defendant should not be permitted to urge the ignorance or incompetence of, or mismanagement by, his attorney as a ground for a new trial, unless there be a strong showing of both incompetence and prejudice. *State v. Gibby*, 1967-NMSC-219, 78 N.M. 414, 432 P.2d 258.

Where alleged mixed allegiance of counsel not grounds for relief. — Defendant's claim that he was entitled to a new trial as a matter of law because, when he was tried, his former defense attorney was an employee of the district attorney's office which prosecuted the case did not provide a basis for relief, where an appearance of unfairness was dissipated by an evidentiary hearing which showed that the attorney in question had nothing to do with the trial of defendant's case, never entered the courtroom when the case was tried, never talked or consulted with the prosecutor and lent no assistance in the prosecution. *State v. Mata*, 1975-NMCA-135, 88 N.M. 560, 543 P.2d 1188 (Ct. App. 1975).

When lack of counsel not grounds for relief. — Motion for post-conviction relief was properly denied because it stated no basis for post-conviction relief as defendant's claim that he was not furnished counsel at the juvenile transfer proceeding, nor advised of any right to counsel in that proceeding, was invalid as such a right can be, and here was, waived. *State v. Gallegos*, 1971-NMCA-067, 82 N.M. 618, 485 P.2d 374, cert. denied, 82 N.M. 601, 485 P.2d 357.

Where defendant was given a hearing to ascertain if his confession was in fact involuntary on his Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA) motion and the trial court found the statement or confession was voluntary, the fact that he was not furnished counsel prior to giving the statement is not a basis for setting aside his conviction. *Burton v. State*, 1971-NMSC-028, 82 N.M. 328, 481 P.2d 407 (1971).

Where both the justice of the peace (magistrate) and the district court advised defendant that, if indigent, counsel would be appointed to represent him and defendant affirmatively waived counsel in both courts and the district court questioned defendant extensively as to his understanding of the charges, the penalties if convicted, his various rights including the right to counsel, to a jury trial and to an appeal if found guilty, defendant's motion for post-conviction relief on the grounds of lack of counsel was denied as defendant effectively waived his right to counsel. *State v. Martin*, 1969-NMCA-079, 80 N.M. 531, 458 P.2d 606.

As defendant was financially able to procure counsel and he was informed at the time of arraignment of his right to counsel in his defense, and, further, that counsel would not

be appointed for him, his appearance pro se does not present grounds to overturn his conviction on a post-conviction motion. *Anaya v. State*, 1968-NMCA-101, 79 N.M. 755, 449 P.2d 663.

Where petitioners were neither advised of their right to counsel nor given counsel during the juvenile proceedings, but counsel was appointed to represent them in the district court, and did represent them at a preliminary hearing and at their arraignment in the district court where, with the advice of counsel, they each entered pleas of guilty to murder in the second degree and no objection was then made concerning the failure to provide counsel at the juvenile waiver hearing, the entry of a plea at the arraignment in the district court, with the advice of counsel and without objection to the failure to provide counsel at the juvenile hearing, constitutes an effective waiver of the right to counsel at such juvenile proceeding and provides no basis for post-conviction relief. *State v. Salazar*, 1968-NMSC-171, 79 N.M. 592, 446 P.2d 644.

The supreme court has repeatedly held that the right to have a preliminary hearing may be and is waived upon entry of a plea in the district court. And, as the preliminary hearing can be thus waived, the right to counsel at the preliminary hearing can likewise be waived, when competently and intelligently done, and so the defendant has stated no basis for post-conviction relief. *State v. Sanders*, 1968-NMSC-169, 79 N.M. 587, 446 P.2d 639.

Where defendant upon being brought before the magistrate, was advised of his right to counsel and he then expressly waived such right and likewise waived preliminary hearing, defendant cannot later assert a right to post-conviction relief in this proceeding on the ground that counsel was not provided for him. *State v. Baumgardner*, 1968-NMCA-047, 79 N.M. 341, 443 P.2d 511.

Absent a showing of prejudice, plea of guilty constituted a waiver of the claim that defendant was denied counsel in proceedings prior to arraignment and the defendant is not entitled to post-conviction relief. *State v. McCormick*, 1968-NMSC-053, 79 N.M. 22, 439 P.2d 239.

Claim that defendant was entitled to counsel when he appeared before the magistrate states no basis for post-conviction relief where defendant was represented by counsel at preliminary hearing. *State v. Apodaca*, 1967-NMSC-218, 78 N.M. 412, 432 P.2d 256.

In case where sentencing court repeatedly cautioned appellant concerning gravity of habitual criminal charge, and where appellant's answers to questions by the court were by his own admission voluntarily given and where each of the prior convictions was freely acknowledged, the waiver of counsel was intelligently made, the appellant was not deprived of due process and, therefore, the district court's denial of the motion to vacate sentence made under Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA) was correct. *State v. Coates*, 1967-NMSC-199, 78 N.M. 366, 431 P.2d 744.

Rules applicable for overcoming waiver where a plea of guilty is entered were announced in Moore v. Michigan, 355 U.S. 155, 78 S. Ct. 191, 2 L. Ed. 2d 167 (1957), where it was held that petitioner had the burden of showing by a preponderance of the evidence that he did not intelligently and understandably waive his right to counsel and a finding of waiver is not lightly to be made. *State v. Lopez*, 1968-NMSC-098, 79 N.M. 235, 441 P.2d 764.

No hard and fast rule can be laid down as to what must be stated in each case in order to adequately explain a prisoner's rights before permitting him to waive counsel. Each case must be decided on its own peculiar facts which shall include consideration of the background, education, training, experience and conduct of the defendant and should proceed as long and as thoroughly as the circumstances demand. *State v. Lopez*, 1968-NMSC-098, 79 N.M. 235, 441 P.2d 764.

When lack of advice as to rights not grounds for relief. — The lack of advice as to petitioner's rights, without a showing of prejudice, provides no basis for post-conviction relief. *Hernandez v. State*, 1970-NMCA-073, 81 N.M. 634, 471 P.2d 204.

Where defendant's assertions that he was not advised of his right to remain silent; that he was at no time afforded counsel; that he signed a statement without assistance of counsel; and that the district attorney's office advised him as to what to do when he entered his plea were not sustained by the record, the claims stated no basis for relief. *State v. King*, 1970-NMCA-124, 82 N.M. 200, 477 P.2d 1015.

Claims that accused was not advised of his rights when arrested, that he was interrogated without having the assistance of counsel, that he did not have counsel at his preliminary hearing and that no attorney was appointed to represent him until weeks after the preliminary hearing provided no basis for post-conviction relief because there was no contention that accused was in any way prejudiced by the lack of advice as to his constitutional rights, by the absence of counsel or the delay in appointment of counsel. *Pena v. State*, 1970-NMCA-026, 81 N.M. 331, 466 P.2d 897.

Whether defendant had been advised prior to making the statement or confession of his right to remain silent and of his right to counsel were issues of fact submitted to the trial court upon defendant's motion to suppress the statement. The same issues were again submitted to the jury at the trial upon the indictment. Defendant is not entitled to a retrial of these issues of fact in a post-conviction proceeding. *State v. Gray*, 1969-NMCA-102, 80 N.M. 751, 461 P.2d 233.

Mere failure of police to advise accused of his rights to counsel and to remain silent, without any showing of prejudice, constitutes no basis for relief under Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA). *State v. Bryant*, 1968-NMCA-081, 79 N.M. 620, 447 P.2d 281, cert. denied, 79 N.M. 688, 448 P.2d 489.

Claim must show prejudice to defendant. — As defendant does not claim that he was prejudiced by the alleged failure to advise him of his right to counsel, his claim is

only that such advice was not given; this, therefore, provides no basis for relief. *State v. Gorton*, 1969-NMCA-002, 79 N.M. 775, 449 P.2d 791.

Defendant was not entitled to habeas relief where suppressed statement was merely cumulative of other evidence and was not materially exculpatory. — Where defendant was convicted of first-degree felony murder and criminal sexual penetration, and where defendant petitioned for a writ of habeas corpus alleging that the prosecution failed to turn over an audio recording or transcript of a witness's statement to law enforcement and that the failure violated his constitutional right to due process, the district court erred in granting defendant's petition for writ of habeas corpus, because although the witness's statement, in which he admitted lying about his relationship to the victim, may have been favorable to the defense because it could have affected the jury's assessment of the witness's credibility, the statement was only cumulative evidence that the witness did not always tell the truth, and the statement was not materially exculpatory as defendant claimed, because evidence that another person had a motive to commit the crime for which a defendant is on trial is generally inadmissible, absent direct or circumstantial evidence linking the third person to the crime. When viewed in context, there is not a reasonable probability that the suppressed statement, if it had been produced and effectively used by defense counsel, would have delivered a different verdict. *State v. Worley*, 2020-NMSC-021.

Guilty plea may bar hearing on denial of rights. — Defendant, who voluntarily pleaded guilty, was not entitled to a post-conviction hearing under Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA), for the purpose of determining whether or not the state obtained evidence, which warranted the filing of the complaint, as a result of a claimed questioning of him contrary to his constitutional rights to remain silent and to the aid of counsel. *State v. Brewster*, 1968-NMSC-035, 78 N.M. 760, 438 P.2d 170.

III. DELAYED OR SUCCESSIVE MOTIONS AND DIRECT APPEAL ISSUES.

A. IN GENERAL.

The doctrine of laches does not apply in habeas corpus. *State v. Sutphin*, 2007-NMSC-045, 142 N.M. 191, 164 P.3d 72.

Per se fundamental error. — It is per se fundamental error for aggravated battery to be used as an alternative predicate for felony murder and a habeas corpus petitioner may assert the error even if the issue could have been raised on appeal. *Campos v. Bravo*, 2007-NMSC-021, 141 N.M. 801, 161 P.3d 846.

Denial of motion not ban to subsequent motions. — Objection to the request for amendment of a Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA) motion was based on untimeliness and because the state was not prepared to meet the matters sought to be raised. The trial court's denial of the motion was without prejudice to the filing of a subsequent motion asserting the same grounds. Appellant is not foreclosed

from filing a new motion based on matters he sought to include by way of amendment. *State v. Hodnett*, 1968-NMCA-104, 79 N.M. 761, 449 P.2d 669.

B. GROUNDS COULD HAVE BEEN RAISED ON APPEAL.

A habeas corpus petitioner may assert fundamental error even if the claim could have been raised on appeal. *State v. Sutphin*, 2007-NMSC-045, 142 N.M. 191, 164 P.3d 72.

No review of issues not raised on appeal. — Defendant may not obtain review in a post-conviction proceeding of issues that could have been raised on appeal. *State v. Martinez*, 1973-NMCA-088, 85 N.M. 293, 511 P.2d 779.

Post-conviction proceedings are not a method of obtaining consideration of questions which might have been raised on appeal, and as defendant did not raise these issues on his direct appeal, he may not properly raise them in post-conviction proceedings. *State v. Lee*, 1972-NMCA-047, 83 N.M. 655, 495 P.2d 1102; *see also*, *State v. Sedillo*, 1972-NMCA-134, 84 N.M. 293, 502 P.2d 318.

Defendant may not raise claims for first time in motion for post-conviction relief. *State v. Sharp*, 1968-NMCA-073, 79 N.M. 498, 445 P.2d 101.

No relief given. — Relief predicated upon Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA) cannot be obtained upon grounds which could have been, but were not, raised on direct appeal. *State v. Gillihan*, 1974-NMSC-060, 86 N.M. 439, 524 P.2d 1335.

Case is affirmed where the matters urged for reversal are ones which have already been decided or should have been submitted to the court of appeals on the original appeal. *State v. Manlove*, 1973-NMCA-109, 85 N.M. 438, 512 P.2d 1274.

Even where constitutional rights involved. — Where defendant did not appeal from his original conviction, and is later seeking release from prison under Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA), his contention that he was denied his constitutional right to a fair and impartial trial due to the remarks and actions of the trial judge in connection with prospective and excused jurors on the issue of impartiality is without merit because this issue should have been raised on appeal following the original trial and is not a proper subject for an appeal under Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA). *State v. Hall*, 1972-NMCA-065, 83 N.M. 764, 497 P.2d 975.

Error in preliminary hearing. — The question of error in a preliminary hearing is foreclosed by failure to take an appeal from original conviction. *State v. Anderson*, 1973-NMCA-078, 84 N.M. 786, 508 P.2d 1019.

Errors at trial. — Proceedings under Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA) are not intended as a substitute for an appeal as a means for correcting errors which may have occurred during the course of the trial, and neither is a post-conviction proceeding a method by which one can obtain consideration of questions which might have been raised on appeal. *State v. Beachum*, 1972-NMCA-023, 83 N.M. 526, 494 P.2d 188.

Sufficiency of evidence questioned. — Even if defendant had been found guilty after a trial, post-conviction proceedings are not a method for obtaining a retrial of his case, and thus, insufficiency of the evidence is not a basis for granting post-conviction relief. *State v. Bonney*, 1971-NMCA-041, 82 N.M. 508, 484 P.2d 350.

Where defendant's contention that there was no substantial evidence upon which the verdict of the jury could be based was not raised in the original appeal, it could not be considered on motion for post-conviction relief under Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA), since ordinarily such proceedings could not be used as a substitute for an appeal. *State v. Clark*, 1972-NMCA-112, 84 N.M. 150, 500 P.2d 435.

Defendant's claim that the district attorney's action in changing charges indicated that he had no case against defendant could only be construed as an allegation of lack of substantial evidence to sustain his conviction. Such allegation, even if proven, would suggest error that could be remedied on direct review and not in a post-conviction proceeding. A post-conviction proceeding was neither a substitute for an appeal nor a method by which to obtain consideration of questions which might have been raised on appeal. *State v. Sanchez*, 1969-NMCA-098, 80 N.M. 688, 459 P.2d 850.

Court’s inquiry as to numerical division within the jury was not error. — Where defendant was charged with several counts of criminal sexual contact of a minor and aggravated indecent exposure; the jury informed the court that the jury could not reach a unanimous decision on any of the charges; the court asked the foreman to give a numerical breakdown of the division within the jury, without disclosing which way the vote was going; the court asked whether further deliberations would result in a verdict on any of the counts; the foreman stated that the jury might be able to reach a verdict on one count; the court sent the jury back for further deliberations; and the jury returned a guilty verdict on one count of criminal sexual contact of a minor, the court did not err in asking the jury for a numerical breakdown and in directing the jury to continue its deliberations. *State v. Romero*, 2013-NMCA-101, cert. denied, 2013-NMCERT-009.

Voluntariness of defendant's statement. — At the trial it was determined that defendant's statement was freely and voluntarily made. If this determination was in error, it could have been corrected on direct review. Defendant's direct appeal was dismissed at his own request. A post-conviction proceeding is not a method of obtaining a retrial of the case or a consideration of questions which might have been raised on appeal. *State v. Reid*, 1968-NMSC-094, 79 N.M. 213, 441 P.2d 742.

Knowledge of right to appeal. — Where defendant's motion for post-conviction relief claimed that the record was silent as to whether he was advised of his right to appeal, that he did not waive the right to be represented by counsel on appeal and that he did not waive the right to appeal, none of the claims made in the motion amounted to an assertion that defendant ever asked for or even desired an appeal. Therefore post-conviction relief was not afforded because an appeal was not taken, and there was no denial of such right by the state. *State v. Montoya*, 1970-NMCA-016, 81 N.M. 233, 465 P.2d 290.

Legality of detention and escape. — Neither the assertion that he was illegally detained nor the claim that at the time of the alleged escape he was not guarded and assumed he could go home, presents a proper issue for post-conviction relief. These are matters for consideration on appeal. Proceedings under Rule 93, N.M.R. Civ. P. (former Rule 1-093 NMRA) are not a substitute for appeal. *State v. Martinez*, 1968-NMSC-097, 79 N.M. 232, 441 P.2d 761.

While new evidence not to be asserted. — Petitioner's claim in a fifth post-conviction motion that his daughters were physically absent and had never been in the state prior to and including the dates of the incest offenses of which he was convicted, along with a claim of ineffective assistance of counsel based on the alleged facts regarding the daughters' absence, were matters which could have been raised on direct appeal, and not being claims of fundamental error, did not state a basis for post-conviction relief. *Cisneros v. State*, 1975-NMCA-109, 88 N.M. 368, 540 P.2d 848.

Issue concerning prior convictions and the state's use of an "F.B.I. rap sheet" was raised and decided on defendant's appeal and may not be relitigated in post-conviction proceedings. *State v. Williams*, 1967-NMSC-224, 78 N.M. 431, 432 P.2d 396.

Settled issues not to be relitigated. — Where the record shows that the issue of seizure of the item was raised and ruled on against defendant at his 1958 trial, defendant cannot relitigate that issue in a post-conviction proceeding. *Salazar v. State*, 1971-NMCA-076, 82 N.M. 630, 485 P.2d 741.

Relief available if fundamental deprivation of fairness. — Post-conviction relief is available, regardless of whether the issue could have been raised on direct appeal, if the defendant has been fundamentally deprived of a fair trial. *State v. Hall*, 1972-NMCA-065, 83 N.M. 764, 497 P.2d 975; *State v. Williams*, 1969-NMSC-026, 80 N.M. 63, 451 P.2d 556.

Ordinarily post-conviction proceedings are not intended to be utilized as a substitute for appeal as a means of correcting error occurring during the course of trial even though the errors relate to constitutional rights. It is only where there has been a denial of the substance of fair trial that the validity of the proceeding may be attacked collaterally. *State v. Garcia*, 1969-NMSC-017, 80 N.M. 21, 450 P.2d 621.

A petitioner is not entitled upon a motion to vacate a sentence to have his case retried on the facts, and only rarely may he raise questions of law which could have been raised by appeal. *State v. Selgado*, 1967-NMSC-147, 78 N.M. 165, 429 P.2d 363.

Right to appeal not affected by motion. — The fact that defendant filed a Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA) motion does not affect his right to a direct appeal. *State v. Reyes*, 1968-NMSC-182, 79 N.M. 632, 447 P.2d 512.

C. PREVIOUS CONSIDERATION ON APPEAL OR HABEAS CORPUS.

No reconsideration of matters already appealed. — A Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA) motion may not be used to reconsider matters previously considered on appeal. *State v. Clark*, 1972-NMCA-112, 84 N.M. 150, 500 P.2d 435.

Defendant may not properly convert a proceeding under Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA) into another review of matters previously considered on appeal. *Miller v. State*, 1970-NMCA-112, 82 N.M. 68, 475 P.2d 462.

Issues considered and found without merit on appeal may not be relitigated in post-conviction proceeding. *Patterson v. State*, 1970-NMCA-007, 81 N.M. 210, 465 P.2d 93; *Herring v. State*, 1969-NMCA-117, 81 N.M. 21, 462 P.2d 468.

Where no new facts or law. — Where defendant does not claim, allege or argue the discovery of new facts or the pronouncement of new law, issues raised and decided on a prior appeal may not be relitigated in post-conviction proceedings. *Nance v. State*, 1969-NMCA-018, 80 N.M. 123, 452 P.2d 192.

Not method to obtain retrial of case. — A Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA) motion may not be used to reconsider matters considered on appeal, nor a method of obtaining a retrial of a case or considerations of questions which would have been raised on appeal. *State v. Blackwell*, 1968-NMSC-089, 79 N.M. 230, 441 P.2d 759.

Even if cognizable issue. — Even if the sufficiency of the evidence is a cognizable issue in post-conviction proceedings, it cannot be relitigated after having been previously decided on appeal. *Woods v. State*, 1972-NMCA-128, 84 N.M. 248, 501 P.2d 692.

Review proper if change in law governing error. — The trial court's denial of defendant's post-conviction motion on the ground that the issue of the denial of the grand jury minutes had been considered on the prior appeal is in error since although Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA) is not intended to allow collateral review of claimed error which has already been raised and decided on direct appeal, in cases where there has been a change in the law governing the error, such a review is proper. *Valles v. State*, 1977-NMCA-034, 90 N.M. 347, 563 P.2d 610, cert. denied, 90 N.M. 637, 567 P.2d 486.

No hearing on matters decided adversely in habeas corpus proceeding. — The defendant is not entitled to a successive determination on the merits of contentions previously held against him in the habeas corpus proceeding. *State v. Sisneros*, 1968-NMSC-175, 79 N.M. 600, 446 P.2d 875.

Where petitioner unsuccessfully sought relief through habeas corpus in this court on the same grounds advanced in the court below, although not res judicata, he is not entitled to again seek relief on the identical grounds as a matter of right. *State v. Sisk*, 1968-NMSC-087, 79 N.M. 167, 441 P.2d 207.

When grounds substantially similar. — Where defendant filed a motion to vacate judgment and sentence, pursuant to Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA), alleging substantially the same grounds as contained in denied habeas corpus petition, the trial court order denying the motion was correct. *State v. Thompson*, 1969-NMSC-037, 80 N.M. 134, 452 P.2d 468.

No new grounds raised. — Motion to vacate sentence, which raised no new grounds for relief not raised in previous habeas corpus proceeding, was properly found to be repetitious, even though transcript of habeas corpus proceeding was never admitted into evidence. *Lott v. State*, 1967-NMSC-073, 77 N.M. 612, 426 P.2d 588.

D. GROUNDS NOT RAISED BEFORE APPEAL OR MOTION.

Hearing on claims denied unless raised at trial. — Claim that the trial record is not truthful, based on defendant's view of his trial and his view as to what witnesses knew and testified about, was not raised before the trial court, and would not be considered for the first time in post-conviction proceeding. *State v. Hibbs*, 1971-NMCA-100, 82 N.M. 722, 487 P.2d 150.

The claim of an illegal search and the claim that pictures of the room where the crime occurred were illegally obtained were insufficient where the circumstance of the alleged illegal search and seizure was known to defendant at trial and should have been raised there rather than on motion for post-conviction relief. *State v. Hibbs*, 1971-NMCA-100, 82 N.M. 722, 487 P.2d 150.

The admissibility of illegally obtained evidence is not an issue reviewable under this rule, if the circumstances of the search and seizure were fully known to defendant at the time of trial. *State v. Rodriguez*, 1971-NMSC-098, 83 N.M. 180, 489 P.2d 1178.

Prior to trial. — A claimed lack of a speedy trial does not provide a basis for post-conviction relief where the claim was not raised prior to trial. *Patterson v. State*, 1970-NMCA-007, 81 N.M. 210, 465 P.2d 93.

A claim of denial of the right to a speedy trial is not sufficient basis for a collateral attack by post-conviction proceedings upon a judgment and sentence, and especially so if the

claim was not raised at or prior to the time of trial or entry of a plea of guilty. *State v. McCroskey*, 1968-NMCA-074, 79 N.M. 502, 445 P.2d 105.

Defendant's contentions that he was denied due process because he was held in custody for 20 days prior to the preliminary hearing; that he was not advised of his rights nor granted counsel during this period; that no attorney was appointed until after the preliminary hearing; and that the bail set was excessive and unreasonable are invalid. By proceeding to trial, he effectively waived his right to object to prior defects in the proceedings. *State v. Blackwell*, 1968-NMSC-089, 79 N.M. 230, 441 P.2d 759.

At any time prior to filing of motion. — Failure to object to the statements of the prosecutor at the time they were made, before the jury retired or, in fact, at any time prior to the filing of this motion will foreclose defendant from seeking relief under Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA). *State v. Gillihan*, 1974-NMSC-060, 86 N.M. 439, 524 P.2d 1335.

No prejudice for failure to raise competency before trial court. — If one is mentally incompetent, then, by definition, he cannot be expected to raise that contention before the trial court and thus cannot be prejudiced by his failure to do so, as it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently "waive" his right to have the court determine his capacity to stand trial. *State v. Guy*, 1968-NMCA-020, 79 N.M. 128, 440 P.2d 803.

E. SUCCESSIVE MOTIONS.

It is within court's discretion to grant or deny successive motions to vacate conviction. *State v. Lobb*, 1968-NMSC-021, 78 N.M. 735, 437 P.2d 1004; *Lott v. State*, 1967-NMSC-073, 77 N.M. 612, 426 P.2d 588.

No bar where no hearing on first motion. — Defendant was not barred from having a second motion for post-conviction relief heard where no hearing had been held in which the issues of the first Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA) motion could have been litigated and determined. *State v. Patton*, 1970-NMCA-105, 82 N.M. 29, 474 P.2d 711.

A second or successive motion may be refused only if the prior denial rested on an adjudication of the merits of the ground presented in the subsequent application. *State v. Blankenship*, 1968-NMCA-026, 79 N.M. 178, 441 P.2d 218.

Only when an evidentiary hearing has been held or the matters asserted are otherwise determined on their merits can a second motion be denied under Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA) wherein the court is relieved of the duty to entertain successive motions for similar relief. *State v. Lobb*, 1968-NMSC-021, 78 N.M. 735, 437 P.2d 1004.

A second or successive application may be refused only if the prior denial rested on an adjudication of the merits of the ground presented in the subsequent application. This means that an evidentiary hearing must have been held in the prior application if factual issues were raised and it was not denied on the basis that the files and records conclusively resolved those issues. *State v. Canales*, 1967-NMSC-221, 78 N.M. 429, 432 P.2d 394.

Nor if new grounds asserted. — Where defendant's motion was based on grounds different from the ground asserted in his first motion, the basis for denying his second motion was improper. *State v. Blankenship*, 1968-NMCA-026, 79 N.M. 178, 441 P.2d 218.

Where the 1969 motion attacked the legality of the 1959 conviction and the 1967 motion related to defendant's admission that he was the person convicted in 1959 and to his subsequent waiver of a right to trial on that issue, the trial court's denial of the 1969 motion without a hearing upon the ground that the allegation of that motion is the same as in the 1967 motion is error. *State v. Chavez*, 1970-NMCA-041, 81 N.M. 427, 467 P.2d 999.

Benefit of doubt to defendant. — If doubts arise in particular cases as to whether the grounds in a subsequent application are different, they should be resolved in favor of the applicant. *State v. Canales*, 1967-NMSC-221, 78 N.M. 429, 432 P.2d 394.

While within court's discretion to redetermine issues. — Even if the prior application was rejected on the merits on the same ground, it is within the sound discretion of the court to permit a redetermination of those issues if the ends of justice would thereby be served. *State v. Canales*, 1967-NMSC-221, 78 N.M. 429, 432 P.2d 394 .

But burden on defendant to show justice of redetermination. — The burden is on the applicant to show that, although the ground of the new application was determined against him on the merits on a prior application, the ends of justice would be served by a redetermination of the ground. *State v. Canales*, 1967-NMSC-221, 78 N.M. 429, 432 P.2d 394.

And coram nobis proceeding deemed prior motion. — Claim for post-conviction relief under Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA), upon the same grounds as a claim for such relief in a coram nobis proceeding, constitutes a second or successive motion for similar relief within the meaning of that rule. *State v. Canales*, 1967-NMSC-221, 78 N.M. 429, 432 P.2d 394.

F. GROUNDS COULD HAVE BEEN RAISED ON PRIOR MOTIONS.

Grounds omitted from previous motions deemed waived. — Where the denial of petitioner's first motion for post-conviction relief was affirmed, and the contention made in the second motion could have been raised in the first motion, such grounds omitted in

the prior proceedings are deemed waived. *Faulkner v. State*, 1974-NMCA-108, 86 N.M. 715, 526 P.2d 1308.

Unless fundamental error present. — Grounds for relief asserted in second or successive post-conviction proceedings will not be considered if those grounds could have been asserted in prior proceedings unless these grounds constitute fundamental error, which is error which goes to the foundation or basis of a defendant's rights, or error which goes to the foundation of the case, or error which takes from defendant a right which was essential to his defense. *Cisneros v. State*, 1975-NMCA-109, 88 N.M. 368, 540 P.2d 848.

IV. FORM OF MOTION; TRANSCRIPT.

No error to deny request for transcript. — Assertion that the trial court erred in denying defendant's request for a transcript of the trial did not state a basis for post-conviction relief. *Ewing v. State*, 1969-NMCA-080, 80 N.M. 558, 458 P.2d 810.

Where no evidence transcript would aid appellant. — Where appellant failed to particularize or to set forth any factual basis and made no attempt to show how the transcript of the trial would have aided in the presentation of his claims of error, which is essential before any of these issues may be considered in a motion under Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA), the trial court did not err in refusing to provide a transcript. *State v. Hodnett*, 1968-NMCA-104, 79 N.M. 761, 449 P.2d 669.

Where there was nothing on which to base relief and no attempt to show how the transcript of the trial would have aided in the presentation of the claims of error, the trial court did not err in refusing to provide a transcript. *State v. Reid*, 1968-NMSC-094, 79 N.M. 213, 441 P.2d 742.

Or where errors raised on matters outside record. — The trial court correctly denied a complete transcript where the errors raised by the motions dealt with matters outside the record or with issues which were not the proper subject for consideration under motion for post-conviction relief. *State v. Martinez*, 1968-NMSC-097, 79 N.M. 232, 441 P.2d 761.

And not denial of equal protection. — The refusal of the trial court to provide defendant with a free transcript does not deny him equal protection of the laws as guaranteed by the United States Constitution. *State v. Brewton*, 1973-NMCA-037, 84 N.M. 763, 508 P.2d 33.

Because no constitutional right to copy of transcript. — Absent a showing of special circumstances, defendant had no federal constitutional right to a copy of the transcript for use in preparation of a motion for post-conviction relief or a petition for habeas corpus. *State v. Toussaint*, 1973-NMCA-027, 84 N.M. 677, 506 P.2d 1224.

V. MOTION TO BE SPECIFIC.

General conclusions without supporting facts deemed insufficient. — A defendant who seeks post-conviction relief must allege some specific factual basis for the relief sought and not vague conclusional charges. *State v. Anderson*, 1973-NMCA-078, 84 N.M. 786, 508 P.2d 1019.

Claim that attorney failed to object to testimony of the state's witnesses, as alleged by the defendant, constitutes a general claim and is not substantiated by specific facts which would serve as a basis for post-conviction relief. *State v. Gillihan*, 1973-NMSC-090, 85 N.M. 514, 514 P.2d 33.

Defendant's conclusionary charges that his constitutional rights were violated in the revocation of suspended sentence proceedings are insufficient to provide a basis for post-conviction relief. *State v. Carr*, 1973-NMCA-118, 85 N.M. 463, 513 P.2d 397.

A motion for post-conviction relief based solely upon conclusions with no supporting factual base does not state a basis for relief as there must be adequate allegations to support any conclusory statement; it is insufficient to allege that threats and coercion occurred and nothing more. *State v. Gillihan*, 1973-NMSC-090, 85 N.M. 514, 514 P.2d 33.

As defendant has failed to allege a specific factual basis sufficient to raise the issue of fundamental error, such relief as prayed for pursuant to Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA), may not be granted. *State v. Gillihan*, 1973-NMSC-090, 85 N.M. 514, 514 P.2d 33.

An allegation of denial of effective assistance of counsel or that trial counsel was incompetent must be supported by allegations in the petition stating why counsel's representation was such that defendant's trial was a sham, farce or mockery, lest the court not know whether defendant's claims fall within the cases where post-conviction relief has been denied where the claim was incompetent counsel. *State v. Anderson*, 1973-NMCA-078, 84 N.M. 786, 508 P.2d 1019.

Assertion that defendant was coerced into taking the stand where there were no allegations as to the facts of the alleged coercion was too vague to provide a basis for post-conviction relief. *State v. Lee*, 1972-NMCA-047, 83 N.M. 655, 495 P.2d 1102.

Assertion that aggravation of the offense was prompted by discrimination against defendant because of his Mexican heritage did not present a claim since it was not set forth with adequate specificity or factual basis to afford relief. *Andrada v. State*, 1971-NMCA-184, 83 N.M. 393, 492 P.2d 1010.

Claim that the trial judge was prejudiced in that he condoned and allowed perjury was a conclusion and too vague, and therefore insufficient to support a motion for post-conviction relief. *State v. Hibbs*, 1971-NMCA-100, 82 N.M. 722, 487 P.2d 150.

Defendant's post-conviction claim that his counsel was incompetent because he failed to bring "perjury" to the attention of the trial judge, apart from the vagueness of the claim, was insufficient in that it is not contended that counsel knew of the alleged "perjury". *State v. Hibbs*, 1971-NMCA-100, 82 N.M. 722, 487 P.2d 150.

Claim that the jury was incompetent and predetermined on a guilty verdict was insufficient to support claim for post-conviction relief because it was a conclusion and too vague. *State v. Hibbs*, 1971-NMCA-100, 82 N.M. 722, 487 P.2d 150.

Defendant's claims that he was inadequately represented by his court-appointed counsel which alleged no factual basis in support of his conclusions did not state a basis for post-conviction relief. *State v. Dominguez*, 1969-NMCA-045, 80 N.M. 328, 455 P.2d 194.

Since there were no specific factual allegations on which to base a claim that defendant's constitutional rights were violated and that defendant was subjected to double jeopardy and as only conclusory allegations were stated, there is no basis for relief. *State v. Jacoby*, 1971-NMCA-025, 82 N.M. 447, 483 P.2d 502.

Conclusory claims that defendant was held under excessive bail are too vague to provide a basis for post-conviction relief. *State v. Jacoby*, 1971-NMCA-025, 82 N.M. 447, 483 P.2d 502.

Where defendant did not factually support his claims that by harassment and trickery his guilty plea was induced, his claims were factually insufficient and, therefore, too vague to state a basis for post-conviction relief. *State v. Martinez*, 1970-NMCA-110, 82 N.M. 51, 475 P.2d 51.

Where defendant has not shown how he was prejudiced, his contention cannot form a basis for post-conviction relief. *State v. Ortega*, 1970-NMCA-028, 81 N.M. 337, 466 P.2d 903, cert. denied, 81 N.M. 305, 466 P.2d 871.

Claims that defendant's trial counsel did not advise him of the right to appeal provided no basis for post-conviction relief, since it was not a claim that he was denied the right to an appeal. *State v. Montoya*, 1970-NMCA-016, 81 N.M. 233, 465 P.2d 290.

Defendant must show the manner in which his constitutional rights were violated for this court to consider his claim on a motion for post-conviction relief. *Chavez v. State*, 1969-NMCA-085, 80 N.M. 560, 458 P.2d 812.

An allegation of narcotics addiction in a Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA) motion, without more, is insufficient to raise a question as to defendant's sanity at the time of the offense. *State v. Botello*, 1969-NMCA-067, 80 N.M. 482, 457 P.2d 1001.

A general claim that language trouble between defendant and his counsel hindered the preparation of his defense, unsupported by specific factual allegations either as to the nature of the trouble or its effect upon the defense, provided no basis for post-conviction relief. *State v. Tapia*, 1969-NMCA-066, 80 N.M. 477, 457 P.2d 996.

Defendant's claims that an assistant district attorney, a state police officer and two other persons violated New Mexico conspiracy statute, 30-28-2 NMSA 1978, that this conspiracy was directed against him and that as a result his conviction, judgment and sentence were illegal, but which did not allege in what manner the alleged conspiracy affected him did not state a basis for post-conviction relief. *State v. Dominguez*, 1969-NMCA-045, 80 N.M. 328, 455 P.2d 194.

Defendant raising issue of incompetency to plead must allege a specific factual basis for the relief sought. The motion is insufficient if it fails to allege facts indicating mental incompetence at the time of the plea. *State v. Barefield*, 1969-NMCA-040, 80 N.M. 265, 454 P.2d 279.

Defendant does not allege a factual basis for this claim and absent a factual allegation, a claim of absence of due process fails to state a basis for relief. *State v. Gorton*, 1969-NMCA-002, 79 N.M. 775, 449 P.2d 791.

Claim that the trial court showed prejudice to defendant by overruling all objections made by defendant's counsel was too general and did not provide a basis for post-conviction relief. *State v. Hibbs*, 1968-NMCA-093, 79 N.M. 709, 448 P.2d 815.

Allegations of perjury without specification of the details thereof would not suffice to raise an issue on a motion under Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA). *State v. Lobb*, 1968-NMSC-021, 78 N.M. 735, 437 P.2d 1004.

When defendant asserts that his counsel failed to subpoena witnesses in his behalf, but does not name or otherwise identify the witnesses he claims were not called, and does not indicate what their testimony might have been had they been called, a mere assertion of failure to subpoena witnesses on his behalf is not ground for relief under Rule 93, N.M.R. Civ. P. (former Rule 1-093 NMRA). *State v. Crouch*, 1967-NMSC-093, 77 N.M. 657, 427 P.2d 19.

In petition or affidavit. — Where defendant failed to set forth sufficient facts in his petition, or by affidavit, to warrant consideration by the trial court, as the contended newly discovered evidence was not disclosed, nor is it revealed by the record in this court, his post-conviction petition must fail. *State v. Till*, 1971-NMSC-056, 82 N.M. 555, 484 P.2d 1265.

When defendant entitled to evidentiary hearing. — To be entitled to an evidentiary hearing, defendant must have alleged a factual basis for relief; vague conclusional charges are insufficient. Further, defendant's claims must raise issues which cannot be conclusively determined from the files and records and those claims must be such that,

if true, provide a legal basis for the relief sought. *State v. Kenney*, 1970-NMCA-038, 81 N.M. 368, 467 P.2d 34.

Where a petition for post-conviction relief alleges facts, set out in particularity, of a claim of inadequate criminal representation, defendant is entitled to a hearing on the question under Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA). *State v. Moser*, 1967-NMSC-163, 78 N.M. 212, 430 P.2d 106.

VI. INITIAL CONSIDERATION; SUMMARY DISMISSAL.

A. IN GENERAL.

Hearing properly denied if no basis for relief stated. — Contention that the trial court erred in not conducting an evidentiary hearing on the motion for post-conviction relief was invalid; as no basis for relief was asserted, an evidentiary hearing was not required. *State v. Lee*, 1972-NMCA-047, 83 N.M. 655, 495 P.2d 1102.

It is incumbent on defendant to merit a hearing on the motion for post-conviction relief, to set forth matters therein which, if proved, would require the setting aside of the conviction. Where an examination of the motion discloses a total absence of ground which could accomplish the end sought by petitioner, the trial court is not required to grant a hearing. *State v. Bruce*, 1971-NMSC-022, 82 N.M. 315, 481 P.2d 103.

Where motion stated no basis for post-conviction relief, the trial court properly denied the motion without a hearing. *State v. Tafoya*, 1970-NMCA-088, 81 N.M. 686, 472 P.2d 651, cert. denied, 81 N.M. 721, 472 P.2d 984.

Where defendant's claims did not provide a basis for post-conviction relief, the trial court did not err in deciding defendant's motion without an evidentiary hearing and without appointing counsel to represent him at that hearing. *State v. Ramirez*, 1970-NMCA-010, 81 N.M. 150, 464 P.2d 569.

The trial court did not err in denying the motion after a discussion between the court and the defendant's appointed counsel. No hearing is required on a motion under Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA) if the motion alleges no basis for relief. *Ewing v. State*, 1969-NMCA-080, 80 N.M. 558, 458 P.2d 810.

Where the post-conviction motion did not present an issue on which post-conviction relief could be granted, the trial court did not err in denying the motion without a hearing. *Nieto v. State*, 1968-NMCA-045, 79 N.M. 330, 443 P.2d 500.

A motion, to merit a hearing and consideration, must set forth matters therein which, if proved, would require the setting aside of the conviction. Where an examination of the motion discloses a total absence of grounds which could accomplish the end sought by the petitioner, the trial court is not required to appoint counsel or grant a hearing. *State v. Lobb*, 1968-NMSC-021, 78 N.M. 735, 437 P.2d 1004.

In motion, files and records of trial. — Where the motions, files and records of the case show conclusively that defendant is not entitled to relief, a hearing is not required. *State v. Sanders*, 1970-NMSC-123, 82 N.M. 61, 475 P.2d 327 (1970).

Where the trial record shows conclusively that an appellant is not entitled to relief under Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA), the court may deny the motion without a hearing or appointment of counsel. *State v. Gillihan*, 1973-NMSC-090, 85 N.M. 514, 514 P.2d 33.

Where the file and records conclusively establish that this claim of lack of competency to stand trial was false, defendant was not entitled to a hearing on this claim. *State v. Kenney*, 1970-NMCA-038, 81 N.M. 368, 467 P.2d 34.

Since the files and records conclusively establish that this claim of inadequate representation of counsel was false, defendant was not entitled to a hearing on this claim. *State v. Kenney*, 1970-NMCA-038, 81 N.M. 368, 467 P.2d 34.

Even though the motion for relief alleges a factual basis concerning an alleged mental incompetency to plead, a hearing on the motion is not required if the motion, files and records conclusively show that the petitioner is not entitled to relief. *State v. Guy*, 1968-NMCA-020, 79 N.M. 128, 440 P.2d 803.

As judged on their face. — Where defendant's allegations do not state sufficient grounds for relief, on their face, defendant is not entitled to have counsel appointed and a hearing on his motion. *State v. Sedillo*, 1968-NMCA-032, 79 N.M. 254, 442 P.2d 212.

Defendant's contention that he was entitled to a hearing on "issue raised by motion of no consideration of leniency given him", was upon its face without merit. Leniency in the imposition of sentence involves a matter of judicial discretion. *State v. Baumgardner*, 1968-NMCA-047, 79 N.M. 341, 443 P.2d 511.

Must appear defendant in no way entitled to relief. — Dismissal of defendant's motion for post-conviction relief for failure to state a claim upon which relief can be granted was improper unless it appeared that defendant was not entitled to relief under any state of facts provable under the claim. *Maes v. State*, 1972-NMCA-124, 84 N.M. 251, 501 P.2d 695.

There being nothing in the record indicating that being with a minor after curfew hours was a violation of the conditions of probation, the trial court could not properly rule that defendant was not entitled to post-conviction relief under any state of facts provable under his claim that his probation was revoked because he was with a minor after curfew hours. *Maes v. State*, 1972-NMCA-124, 84 N.M. 251, 501 P.2d 695.

So court must consider what defendant might offer. — Where defendant claimed that his guilty plea was coerced, court's overruling claim without a hearing and without

considering what the defendant might offer to support it was improper. *State v. Byrd*, 1968-NMSC-051, 79 N.M. 13, 439 P.2d 230.

Not matters outside of record. — The physician's report was not a part of the files and records of the original proceeding. It could not serve as a basis for denying defendant a hearing upon his post-conviction motion. *State v. Guy*, 1968-NMCA-020, 79 N.M. 128, 440 P.2d 803.

Hearing necessary if record not conclusive. — Unless record conclusively shows that defendant is not entitled to relief, he is entitled to an evidentiary hearing on his claim that he was not competent to stand trial. *Roman v. State*, 1970-NMCA-048, 81 N.M. 477, 468 P.2d 878.

Since petitioner's claim of double jeopardy went outside the record and thus the files and records of the case did not conclusively show petitioner was not entitled to relief under that claim, he was entitled to an evidentiary hearing on that claim where the burden would be on him to prove a factual basis showing double jeopardy. *Woods v. State*, 1972-NMCA-128, 84 N.M. 248, 501 P.2d 692.

Where the only record before court of appeals was the petitioner's motion and the proceedings in connection therewith, and court was unable to determine what the files and records of the case showed, but the motion itself did not conclusively show that the prisoner was entitled to no relief, a hearing should have been held in accordance with Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA), for a determination of the issues and for the filing of findings of fact and conclusions of law with respect thereto. *Salazar v. State*, 1971-NMCA-169, 83 N.M. 352, 491 P.2d 1163.

Although no hearing if records conclusive. — If the files and records conclusively show that defendant's probation was properly revoked, a ruling may be based on those files and records. *Maes v. State*, 1972-NMCA-124, 84 N.M. 251, 501 P.2d 695.

Hearing barred because of similar hearing by different court. — A district court was without jurisdiction to grant an evidentiary hearing, pursuant to a petition for writ of habeas corpus, when a different district court had previously conducted a full evidentiary hearing on the same alleged facts and issues pursuant to a post-conviction motion for relief under this rule. *State ex rel. Sullivan v. Kaufman*, 1985-NMSC-094, 103 N.M. 410, 708 P.2d 322.

B. GRANT OF EVIDENTIARY HEARING.

Hearing not automatic. — A claim in a Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA), motion that a coerced plea resulted from some act, verbal or otherwise, which occurred outside the courtroom and under such circumstances that the occurrence would not ordinarily come to the attention of the trial court, and reference thereto would not ordinarily be made a part of the record, does not always entitle a defendant to a hearing. *State v. Hansen*, 1968-NMCA-031, 79 N.M. 203, 441 P.2d 500.

When facts raise sufficient issue. — Allegations of post-conviction confinement in a mental institution in 1962 and early 1963 when sufficiently close to the date of his plea raise a factual issue concerning his mental competency to plead. *State v. Guy*, 1968-NMCA-020, 79 N.M. 128, 440 P.2d 803.

Where the trial court recommended that defendant be given psychiatric and medical care, that is sufficient grounds to require an evidentiary hearing. *State v. Guy*, 1968-NMCA-020, 79 N.M. 128, 440 P.2d 803.

Where a prisoner's motion asserts that his counsel in a former felony conviction was unknown to him, related to the complaining witness and the motion further charged specific instances of misconduct at the trial of his case, including failure of the attorney to challenge the jurors who were uncles of the complaining witness, then under such circumstances the prisoner was just as much without counsel as if he was represented by ineffectual appointed counsel and due process requires the right to a hearing and presentation of evidence thereon. *State v. Moser*, 1967-NMSC-163, 78 N.M. 212, 430 P.2d 106.

There were sufficient facts to at least warrant an evidentiary hearing on the issue of actual notice where the petitioner was not notified before his disciplinary hearing that a conviction of a minor level offense would possibly result in major level punishment due to the presence of elevating factors. *Miller v. Tafoya*, 2003-NMSC-025, 134 N.M. 335, 76 P.3d 1092.

When asserted claims conflict with record. — Where defendants' claims asserted in their petitions and affidavits are in conflict with the record made at the time the pleas were accepted and defendants' claims involve matters which allegedly occurred outside the courtroom and, if established would warrant vacating the sentences, such a conflict cannot be resolved in the absence of an evidentiary hearing at which the facts can be fully developed even though the circumstances surrounding the acceptance of the plea of guilty would constitute sufficient support for a finding and determination that the pleas were voluntarily made. *State v. Swim*, 1971-NMCA-035, 82 N.M. 478, 483 P.2d 1318.

Right to hearing to prove matters outside record. — Where factual allegations relating primarily to purported occurrences outside of the courtroom put in issue matters upon which the record could cast no real light, the court must hold a hearing at which the prisoner is permitted to offer evidence. *State v. Swim*, 1971-NMCA-035, 82 N.M. 478, 483 P.2d 1318.

Where defendants' allegations of pleas coerced or induced by threats to use statements, allegedly improperly obtained, would be sufficient, if true, to collaterally attack the judgments against defendants, and which could not be conclusively determined from the files or records, the court held that a hearing on motion for post-conviction relief was required. *State v. Patton*, 1970-NMCA-105, 82 N.M. 29, 474 P.2d 711.

Defendant is entitled to an evidentiary hearing on the question of whether there was an unreasonable delay in executing the arrest warrants where the record indicates the probation authorities promptly had a warrant issued on the basis of the probation violations, but nothing is indicated in the record of their attempts to execute the warrants for defendant's arrest. *State v. Murray*, 1970-NMCA-045, 81 N.M. 445, 468 P.2d 416.

Defendant's claims of the refusal of court-appointed counsel to process his appeal as requested concern matters outside the record and are such that defendant is entitled to a hearing where he has the burden of proving them and if defendant fails to establish that he made either of the alleged requests then he is not entitled to post-conviction relief. *State v. Gorton*, 1969-NMCA-002, 79 N.M. 775, 449 P.2d 791.

Where among claims made by petitioner there are several concerning occurrences outside the record which, if true, would be grounds for vacating his sentence, these assertions cannot be resolved without a hearing. Admittedly, these allegations conflict with the record made at the time of the arraignment. However, absent a hearing at which testimony is adduced, no method is available for determining the truth. Therefore, the court erred in denying the motion without counsel and an evidentiary hearing. *State v. Reece*, 1968-NMSC-080, 79 N.M. 142, 441 P.2d 40.

Machibroda v. United States, 368 U.S. 487, 82 S. Ct. 510, 7 L. Ed. 2d 473 (1962), held that there must be a hearing where issues raised by the motion related primarily to purported occurrences outside the courtroom and upon which the record could, therefore, cast no real light and where the allegations did not concern circumstances of a kind that the district judge could completely resolve by drawing upon his own personal knowledge or recollection. *State v. Buchanan*, 1967-NMSC-267, 78 N.M. 588, 435 P.2d 207.

In trial resulting in conviction of armed robbery, refusal of the trial court to allow defendant to be present and submit testimony with respect to his allegation of comment by the state in closing argument in the original case on appellant's failure to testify was error requiring reversal; and because this related to a question not raised in prior appeal, nor could it have been because there was no record made of the closing arguments, the defendant had a right in an evidentiary hearing to submit evidence outside of the original record. *State v. Henry*, 1967-NMSC-265, 78 N.M. 573, 434 P.2d 692.

Ineffective-assistance claim. — The remand of a case to the district court for an evidentiary hearing on an ineffective assistance claim is limited to those cases in which the record on appeal establishes a prima facie case of ineffective assistance. *State v. Swavola*, 1992-NMCA-089, 114 N.M. 472, 840 P.2d 1238; *State v. Hosteen*, 1996-NMCA-084, 122 N.M. 228, 923 P.2d 595, *aff'd*, 1997-NMSC-063, 124 N.M. 402, 951 P.2d 619.

VII. EVIDENTIARY HEARING.

A. COUNSEL.

Right to counsel provided by the U.S. Constitution does not apply to post-conviction relief proceedings. *State v. Ramirez*, 1967-NMSC-210, 78 N.M. 418, 432 P.2d 262.

Absent constitutional requirement, appointment of counsel is within discretion of court. *State v. Ramirez*, 1967-NMSC-210, 78 N.M. 418, 432 P.2d 262.

No appointment of counsel to explore post-conviction relief. — Where the conviction has been affirmed on direct review, the trial court is not required to appoint counsel to assist the prisoner in exploring the possibilities for post-conviction relief. *State v. Ramirez*, 1967-NMSC-210, 78 N.M. 418, 432 P.2d 262.

Appointment of counsel is not required for assistance in formulating claim or exploratory evolutions in cases under Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA). *Birdo v. Rodriguez*, 1972-NMSC-062, 84 N.M. 207, 501 P.2d 195.

No violation of equal justice. — Denial of the appointment of counsel to assist defendant in exploring the possibilities for post-conviction relief did not constitute a violation of equal justice. *State v. Tapia*, 1969-NMCA-066, 80 N.M. 477, 457 P.2d 996.

No appointment if motion for relief groundless. — Where the motion for post-conviction relief is completely groundless, the trial court need not appoint counsel to represent defendant in connection with the motion and may determine the motion without the presence of defendant. *State v. Sanchez*, 1966-NMCA-002, 78 N.M. 25, 420 P.2d 786.

Where a motion has been filed in a post-conviction proceeding, but is completely groundless, counsel need not be appointed to represent the defendant. *State v. Ramirez*, 1967-NMSC-210, 78 N.M. 418, 432 P.2d 262.

If motion states no basis for relief. — Appointment of counsel to represent defendant in connection with the motion for post-conviction relief is not necessary in denying the motion without a hearing, where the motion stated no basis for relief. *State v. Tafoya*, 1970-NMCA-088, 81 N.M. 686, 472 P.2d 651, cert. denied, 81 N.M. 721, 472 P.2d 984.

Where defendant's motion was a successive motion and stated no basis for relief, appointment of counsel was not required and court did not err in denying his motion without a hearing. *State v. Ramirez*, 1971-NMSC-050, 82 N.M. 486, 484 P.2d 328.

Where defendant's motion presented no basis for post-conviction relief, the trial court was not required to appoint counsel to represent defendant in connection with the motion. *State v. Tapia*, 1969-NMCA-066, 80 N.M. 477, 457 P.2d 996.

Where files and records conclusively show that defendant was not entitled to post-conviction relief, trial court did not err in failing to appoint counsel or hold a hearing on the motion. *State v. Decker*, 1968-NMCA-016, 79 N.M. 41, 439 P.2d 559.

Once prisoner alleges some factual basis raising substantial issue, counsel must be appointed. *State v. Ramirez*, 1967-NMSC-210, 78 N.M. 418, 432 P.2d 262.

Counsel was not required to be appointed to represent defendant in connection with his post-conviction motion until a factual basis was alleged which raises a substantial issue. *State v. Barefield*, 1969-NMCA-040, 80 N.M. 265, 454 P.2d 279.

Appointed counsel to act as advocate. — The requirement by the United States supreme court is that court appointed counsel be an advocate rather than amicus curiae. *State v. Selgado*, 1967-NMSC-147, 78 N.M. 165, 429 P.2d 363.

Setting forth contentions urged by petitioner and necessary for review. — Appointed counsel should set forth contentions urged by a petitioner whether or not counsel feels they have merit and whether such contentions are in fact argued by counsel, and it is incumbent upon counsel for the petitioner to have included in record such parts as may be necessary to assure a review by this court, whether or not counsel considers such contentions to have any merit and whether or not he intends to advance any argument thereon. *State v. Franklin*, 1967-NMSC-151, 78 N.M. 127, 428 P.2d 982.

When denial of motion to dismiss counsel not abuse of discretion. — The denial of defendants' motions to dismiss counsel and grant a continuance so they could retain counsel immediately prior to post-conviction hearing was not an abuse of discretion nor was it a denial of due process. *Bobrick v. State*, 1972-NMCA-048, 83 N.M. 657, 495 P.2d 1104.

B. PROCEDURE OF HEARING.

Rules to apply to proceedings. — R. Civ. P. (Dist. Cts.), including the rule concerning findings of fact, apply to proceedings under Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA). *McCroskey v. State*, 1970-NMCA-109, 82 N.M. 49, 475 P.2d 49.

A Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA) or 31-11-6 NMSA 1978 proceeding is an independent civil action, and, therefore, Rule 52, R. Civ. P. (Dist. Cts.) (*see now* Rule 1-052 NMRA), requiring the making of findings of fact, applies to such proceedings. *State v. Hardy*, 1967-NMSC-203, 78 N.M. 374, 431 P.2d 752.

Burden of proof at proceedings on defendant. — Proceedings under Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA) are civil and the burden of establishing the charges set forth in a motion under the rule rests upon the defendant. *State v. Botello*, 1969-NMCA-067, 80 N.M. 482, 457 P.2d 1001.

Proceedings under Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA) are civil and the burden is on defendant to prove his claims. *State v. Marquez*, 1968-NMSC-046, 79 N.M. 6, 438 P.2d 890.

Defendant has the burden of establishing his claims. *State v. Chavez*, 1967-NMSC-228, 78 N.M. 446, 432 P.2d 411.

By a preponderance of the evidence. — It is the settled rule that appellant has the burden of proving his allegations at the hearing under Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA) by a preponderance of the evidence. *State v. Baughman*, 1968-NMCA-067, 79 N.M. 442, 444 P.2d 769.

The burden of proof at the hearing under Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA) rests upon appellant to convince the court of his allegations by a preponderance of the evidence. *State v. Simien*, 1968-NMSC-025, 78 N.M. 709, 437 P.2d 708.

Fairness of trial. — Claim that the newspaper articles or evidence as to their contents deprived defendant of a fair trial is without merit as defendant had the burden of proof and he did not meet this burden. *Barela v. State*, 1970-NMCA-044, 81 N.M. 433, 467 P.2d 1005.

Burden of sustaining charge of attorney's incompetence rests upon appellant. *State v. Walburt*, 1967-NMSC-271, 78 N.M. 605, 435 P.2d 435.

Waiver of right to counsel. — Burden of proof at the Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA) hearing rests on defendant to establish that he did not competently and intelligently waive his right to counsel by a preponderance of the evidence. *State v. Gilbert*, 1967-NMSC-226, 78 N.M. 437, 432 P.2d 402.

Want of jurisdiction. — It is a fundamental rule that the burden of demonstrating want of jurisdiction rests upon the party asserting such want, particularly where the challenge is applied to a court exercising general jurisdiction. *State v. Reyes*, 1967-NMCA-023, 78 N.M. 527, 433 P.2d 506.

Credibility of witnesses. — Trial court is the judge of the credibility of the witnesses and of the weight to be given evidence at a hearing for post-conviction relief and the petitioner has the burden of establishing his claims. *State v. Sandoval*, 1969-NMSC-075, 80 N.M. 333, 455 P.2d 837.

Perjured testimony. — The rule is that before relief may be granted on a claim that conviction was obtained on perjured testimony the moving party must show by a preponderance of the evidence that: (1) the testimony was perjured; and (2) the prosecuting officials knowingly and intentionally used such testimony to secure a conviction, and the mere allegation that conviction was based on perjured testimony

was insufficient to raise the issue. *State v. Hodnett*, 1968-NMCA-104, 79 N.M. 761, 449 P.2d 669.

Voluntariness of plea. — The burden of proof is on defendant to show that the plea is involuntary. *State v. Ortiz*, 1967-NMSC-104, 77 N.M. 751, 427 P.2d 264.

C. SCOPE OF HEARING.

Decisions of trial court entitled to all reasonable support. — The proceedings, decision and judgment of the trial court are entitled to the support of every reasonable intendment and presumption in their favor. *State v. Travis*, 1968-NMCA-036, 79 N.M. 307, 442 P.2d 797.

Unattacked findings of trial court deemed facts for hearing. — Findings by the trial court that defendant was confronted by and had opportunity to cross-examine all state's witnesses, that testimony of state's witnesses was adequate to sustain conviction, and that counsel for the defendant was both able and experienced, being unattacked were facts which could not be questioned on motion for post-conviction relief. *State v. Hibbs*, 1968-NMCA-093, 79 N.M. 709, 448 P.2d 815.

Credibility of witness is issue for determination by trier of facts. *State v. Holly*, 1968-NMCA-075, 79 N.M. 516, 445 P.2d 393.

Issues at trial not to be redetermined. — Where the extent of defendant's drinking was an issue at the trial, it is not to be redetermined in a post-conviction proceeding. *State v. Williams*, 1967-NMSC-224, 78 N.M. 431, 432 P.2d 396.

Where the jury decided defendant violated statute, and the judgment of conviction entered pursuant to the jury verdict was affirmed by supreme court, defendant may not be heard to contend he did not violate the statute in his motion for post-conviction relief. *State v. Crouch*, 1967-NMSC-093, 77 N.M. 657, 427 P.2d 19.

Where there is a conflict in testimony, appellant's attack on the district court's conclusion of law, that appellant knowingly, intelligently and voluntarily, while being advised by competent counsel, entered a plea of guilty, must fail. *State v. Simien*, 1968-NMSC-025, 78 N.M. 709, 437 P.2d 708.

While substantially supported trial court decisions upheld. — Where hearing under Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA) has been held, nothing more is required than that the evidence and reasonable inferences arising therefrom furnish substantial support for trial court decision. *Smith v. State*, 1968-NMSC-144, 79 N.M. 450, 444 P.2d 961.

Refusal to make inconsistent findings not error. — When findings are supported by substantial evidence, refusal to make other findings opposed to or inconsistent with

those findings is not error. *State v. Johnson*, 1970-NMCA-033, 81 N.M. 318, 466 P.2d 884.

Refusal to accept inconsistent testimony. — Where defendant's testimony at the hearing on his motion for post-conviction relief differed greatly in many respects from what is contained in his earlier signed statement as to the events leading to the homicide and his actions thereafter, the trial court was not obliged to accept his testimony as to the claimed coercion and threats by the state police in securing the statement from him. *Burton v. State*, 1971-NMSC-028, 82 N.M. 328, 481 P.2d 407.

Refusal to believe testimony under suspicious circumstances. — Delay in asserting claim of denial of right to appeal and failure to assert this claim in habeas corpus and post-conviction proceedings were suspicious circumstances which cast doubt on the truth of petitioner's testimony and so the trial court was not required to accept petitioner's testimony as true and did not err in denying post-conviction relief. *Robinson v. State*, 1971-NMCA-080, 82 N.M. 660, 486 P.2d 69.

Voluntariness of plea open to review. *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969), does not hold that where there has been no direct review, voluntariness of a plea of guilty may not be determined as a question of fact in a post-conviction proceeding. *State v. Elledge*, 1969-NMCA-114, 81 N.M. 18, 462 P.2d 152; *State v. Cruz*, 1971-NMCA-047, 82 N.M. 522, 484 P.2d 364.

D. PRESENCE OF DEFENDANT.

Presence of prisoner not constitutionally required. — Under Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA), a court may hear and determine a post-conviction motion without the presence of the prisoner. To do so is not a denial of the constitutional right "to appear and defend" in criminal proceedings because post-conviction proceedings are civil, not criminal. *State v. Hibbs*, 1971-NMCA-100, 82 N.M. 722, 487 P.2d 150.

Presence not required at inconclusive hearing. — Where nothing asserted required a hearing to conclusively establish the absence of merit in the claims advanced and counsel was appointed and heard, it was not error to determine the issue without the presence of applicant. His presence would have added nothing. *State v. Sisk*, 1968-NMSC-087, 79 N.M. 167, 441 P.2d 207.

No right to be heard in particular place. — The due process clause of the fourteenth amendment does not require a judge to have a convicted person present for the hearing on a motion under Rule 93, R. Civ. P. (Dist. Cts.) (now Rule 1-093 NMRA). If appellant did not have a right to be present at the hearing, a fortiori he had no right to be heard in a particular place, absent a showing of prejudice. *State v. Eckles*, 1968-NMSC-079, 79 N.M. 138, 441 P.2d 36.

Presence necessary for sentencing. — Where appellant entered pleas of guilty to charges of burglary and conspiracy to sell a narcotic drug and was thereupon sentenced on these charges, was later charged as an habitual offender and, upon his plea of guilty, was sentenced as an habitual offender, and then filed a motion under Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA) to vacate the latter sentence, and the court granted his motion, vacated the sentence imposed and then resentenced the appellant in his absence on the original charges, the sentence must be vacated and the cause remanded to the district court so that sentence may be passed on the appellant in his presence. *State v. Verdugo*, 1967-NMSC-202, 78 N.M. 372, 431 P.2d 750.

5-803. Petitions for post-sentence relief.

A. **Application.** A petition to set aside a judgment and sentence may be filed in the district court of the jurisdiction which rendered the judgment by one who has been convicted of a criminal offense, and who is not in custody or under restraint as a result of such sentence. The petition shall be assigned to the judge that originally heard the matter, or if that judge is no longer serving on the bench, the successor criminal division.

B. **Grounds.** Relief under this rule is available to correct convictions obtained in violation of the constitution or laws of the United States or the State of New Mexico.

C. **Time for filing.** A petition for post-sentence relief shall be filed within a reasonable time after the completion of the petitioner's sentence, unless the court finds good cause, excusable neglect, or extraordinary circumstances beyond the control of the petitioner that justify filing the petition beyond that time.

D. **Procedure.** A petition for post-sentence relief under this rule may be granted only upon filing with the clerk of the court a petition on behalf of the party seeking relief. If the petition is filed by a petitioner who is not represented by an attorney and who is confined to an institution or other detention facility, the petition is deemed to be filed with the clerk of the court on the date the petition is deposited in the institution's internal mail system for forwarding to the court provided that the petitioner states within the petition, under penalty of perjury, the date on which the petition was deposited in the institution's internal mail system. The petition shall contain the following:

(1) The respondent in proceedings under this rule, which shall be the State of New Mexico;

(2) The petitioner's full name and address, if petitioner is not represented by counsel;

(3) A statement of the steps taken to exhaust all other available remedies, including a statement of the name of the case, the docket number of the case, the court, administrative agency or institutional grievance committee from which relief was sought,

and the result of each previous judicial proceeding. If a claim has been raised in prior proceedings, a statement explaining why the ends of justice require additional consideration of the petition;

(4) if the petitioner has previously filed a petition seeking relief under this rule or Rule 5-802 NMRA, a statement explaining why the petition should not be dismissed under Paragraph G;

(5) a statement as to whether:

(a) the petition seeks to vacate, set aside or correct the sentence or order of confinement; or

(b) the petition challenges matters other than Subparagraph (a) of this subparagraph;

(6) A concise statement of the facts and law upon which the application is based; and

(7) a concise statement of the relief sought.

E. **Papers attached to the petition.** The following shall be attached to the petition:

(1) any opinion, order, transcript, or other written material reasonably available to petitioner indicating any court's ruling on the petitioner's prior custody or restraint or on the issued raised in the petition, or a statement explaining why the materials are not attached;

(2) a certificate of service showing service on the district attorney in the district in which the application is filed.

F. **Procedure for adjudicating petition.**

(1) **Summary dismissal; return of petition.** Upon receipt of a petition for post-sentence relief, the court shall promptly examine the petition together with all attachments. If it plainly appears from the face of the petition, any exhibits, and the prior court proceedings in the case, that the petitioner is not entitled to relief as a matter of law, the court shall summarily dismiss the petition.

If the court is unable to determine from the face of the petition whether petitioner is entitled to relief as a matter of law, the court may return a copy of the petition to the petitioner for additional factual information or a restatement of the legal claims. If the petition is returned to the petitioner, the petitioner has forty-five (45) days to resubmit a revised petition. Upon receipt of the revised petition, the court has forty-five (45) days to examine the petition together with all attachments. If no revised petition is filed, the court may dismiss the petition.

(2) **Response.** If the court determines that summary dismissal is not appropriate, the court shall order the state to submit a response within one-hundred twenty (120) days.

(3) **Preliminary disposition hearing.** After the response is filed, at the request of a party or upon its own motion, the court may conduct a preliminary disposition hearing for the purpose of clarifying the issues and petitioner's evidence in support of the claims in the petition. At the preliminary disposition hearing, the court will attempt to resolve any of the issues presented by the petition based on the filings by counsel for the parties. The court shall then determine whether an evidentiary hearing is required. If it appears that an evidentiary hearing is not required, the court may dispose of the petition without a further hearing, but may ask for briefs and/or oral arguments on legal issues;

(4) **Evidentiary hearing.** If an evidentiary hearing is ordered, the hearing shall be conducted as promptly as practicable.

G. **Second and successive petitions.** If the petitioner has previously filed a petition seeking relief under this rule or Rule 5-802, the court shall have the discretion to:

(1) dismiss any claim not raised in a prior petition unless fundamental error has occurred, or unless an adequate record to address the claim properly was not available at the time of the prior petition; and

(2) dismiss any claim raised and rejected in a prior petition unless there has been an intervening change of law or fact or the ends of justice would otherwise be served by rehearing the claim.

H. **Discovery procedures.**

(1) **Discovery procedures for parties represented by counsel.** At any time, counsel for a party may make a formal written request to opposing counsel for production of documents and other discovery materials that are available under Rules 5-501 or 5-502 NMRA. The written request shall describe the good faith efforts by counsel to obtain the discovery materials from previous counsel or any other sources and shall show that these efforts were unsuccessful. Counsel for the opposing party shall comply with the request within thirty (30) days after service or notify the court in writing of any objection to the request. Any objection based on privilege should clearly identify the material withheld and the basis of the privilege claim. The court shall then hold a hearing to rule on any objection to the discovery request. The court shall grant a challenged request for discovery when the requesting party demonstrates that the materials are relevant to advance the claims that are alleged in the petition or the materials are relevant to defend against the claims that are alleged in the petition.

(2) For purposes of this rule, "discovery materials" are:

(a) materials in the possession of a party;

(b) materials in the possession of law enforcement authorities to which the petitioner would have been entitled to at the time of trial; or

(c) materials in the possession of the New Mexico Corrections Department.

(3) Counsel for a party may make use of any other discovery procedure under the Rules of Criminal Procedure for the District Courts only after notice to opposing counsel and prior written authorization from the court. In determining whether to authorize such proceedings, the court may consider any of the factors contained in Paragraph A of Rule 5-507 NMRA.

(4) **Discovery procedures for pro-se petitioners.** Petitioners not represented by counsel shall petition the court before requesting discovery under this rule and the Rules of Criminal Procedure for the District Courts. In determining whether to authorize a discovery request, the court may consider any of the factors contained in Paragraph A of Rule 5-507.

(5) **Motions to compel.** If the state or the petitioner fails to comply with any of the provisions of this rule, the court may enter an order under Rule 5-505 or Rule 5-112 NMRA.

I. **Appeal.** Within thirty (30) days after the district court's decision:

(1) if the petition is granted, the state may appeal as of right to the Court of Appeals under the Rules of Appellate Procedure.

(2) if the petition is denied, the petitioner may appeal to the Court of Appeals under the Rules of Appellate Procedure.

[Adopted by Supreme Court Order No. 14-8300-014, effective for all cases filed on or after December 31, 2014.]

Committee commentary. — Rule 5-803 NMRA was adopted in 2014 and is designed to be used when relief under Rule 5-802 NMRA is unavailable. This rule is deemed to have superseded former Rule 1-060(B) NMRA for post-sentence matters involving criminal convictions, including the writ of coram nobis. *See State v. Lucero*, 1977-NMCA-021, ¶ 2, 90 N.M. 342, 563 P.2d 605. "The writ is available to one who, though convicted, is no longer in custody, to provide relief from collateral consequences of an unconstitutional conviction due to error of fact or egregious legal errors which are of such a fundamental character that the proceeding itself is rendered invalid, permitting the court to vacate the judgment." *State v. Tran*, 2009-NMCA-010, ¶ 15, 145, N.M. 487, 200 P.3d 537.

The Public Defender Department cannot be appointed to represent a petitioner under this rule. *See* NMSA 1978, §§ 31-15-10(F) (1973) (requiring a person to be "detained" in order to provide representation); 31-16-3(A) (defining the "right to representation" as applying to indigent persons detained by law enforcement or under formal charge or conviction for having committed a serious crime). Unlike petitioners under Rule 5-802 NMRA (habeas corpus), petitioners under this rule are not "in custody or under restraint" as they have completed their sentence. *See* Rule 5-802(A); *Tran*, 2009-NMCA-010, ¶ 15. The term "in custody" includes probation and parole. *See State v. Barraza*, 2011-NMCA-111, ¶ 10, 267 P.3d 815. The district court, however, retains its inherent authority to appoint counsel from either the private bar or pro bono immigration service agencies who have licensed counsel on staff.

Petitions may often be filed late under this rule because of the development of serious unforeseen collateral consequences which are beyond the control of the petitioner, such as deportation.

For example, the time limitations contained in Paragraph C may be tolled in instances when a decision from a court applies retroactively. *Cf. Kersey v. Hatch*, 2010-NMSC-020, 148 N.M. 381, 237 P.3d 683 (declining to retroactively apply holding in *State v. Frazier*, 2007-NMSC-032, 142 N.M. 120, 164 P.3d 1, which held that a defendant cannot be convicted of both felony murder and the predicate felony).

The provisions of this rule are similar to those of Rule 5-802. Please see the commentary to Rule 5-802 for further information.

[Adopted by Supreme Court Order No. 14-8300-014, effective for all cases filed on or after December 31, 2014.]

ANNOTATIONS

Application of rule is not limited to pleas in district court. — Where, between 1989 and 2001, Petitioner pleaded guilty three times to misdemeanor driving while intoxicated charges in San Juan County municipal courts, and where, in 2003, Petitioner pleaded guilty to a fourth DWI in the Eleventh Judicial District Court, which resulted in a fourth degree felony conviction pursuant to NMSA 1978, Section 66-8-102(G), and where Petitioner was sentenced to eighteen months incarceration which ended in 2006, and where, in 2020, Petitioner filed a Rule 5-803 petition and sought to invalidate all four pleas, asserting that the judges in each plea hearing failed to advise the petitioner on the record of the essential elements of the charged crime and ensure that he understood those elements, and where the district court summarily dismissed the petition, the district court erred in finding that Rule 5-803 NMRA only provides relief from a judgment rendered in the district court and erred in determining that it did not have jurisdiction to set aside the three DWI pleas taken in the municipal courts; Rule 5-803(A) requires petitions to be filed in the district court of the jurisdiction which rendered the judgment, and the three prior misdemeanor DWI convictions were entered in municipal courts located in the Eleventh Judicial District Court, where the petition was properly

filed. Rule 5-803(A) is not limited to pleas made in district courts. *McGarrh v. State*, 2022-NMCA-036.

The district court did not abuse its discretion in determining that the petition was untimely. — Where, between 1989 and 2001, Petitioner pleaded guilty three times to misdemeanor driving while intoxicated charges in San Juan County municipal courts, and where, in 2003, Petitioner pleaded guilty to a fourth DWI in the Eleventh Judicial District Court, which resulted in a fourth degree felony conviction pursuant to NMSA 1978, Section 66-8-102(G), and where Petitioner was sentenced to eighteen months incarceration which ended in 2006, and where, in 2020, Petitioner filed a Rule 5-803 petition and sought to invalidate all four pleas, asserting that the judges in each plea hearing failed to advise the petitioner on the record of the essential elements of the charged crime and ensure that he understood those elements, and where the district court summarily dismissed the petition, the district court did not abuse its discretion in determining the petition to be untimely, because the Rule 5-803(C) NMRA explicitly requires a petition to be filed within a reasonable time after the completion of the petitioner's sentence, unless the court finds good cause, excusable neglect, or extraordinary circumstances beyond the control of the petitioner that justify filing the petition beyond that time, and in this case, the district court found that the petition was not brought in a reasonable time, fifteen years after the final sentence was completed, and that no Rule 5-803(C) excuse justified the late filing. *McGarrh v. State*, 2022-NMCA-036.

The district court did not abuse its discretion in summarily dismissing petition to withdraw guilty pleas. — Where, between 1989 and 2001, Petitioner pleaded guilty three times to misdemeanor driving while intoxicated charges in San Juan County municipal courts, and where, in 2003, Petitioner pleaded guilty to a fourth DWI in the Eleventh Judicial District Court, which resulted in a fourth degree felony conviction pursuant to NMSA 1978, Section 66-8-102(G), and where Petitioner was sentenced to eighteen months incarceration which ended in 2006, and where, in 2020, Petitioner filed a Rule 5-803 petition and sought to invalidate all four pleas, asserting that the judges in each plea hearing failed to advise the petitioner on the record of the essential elements of the charged crime and ensure that he understood those elements, and where the district court summarily dismissed the petition, the district court did not abuse its discretion in summarily dismissing the petition, because Petitioner failed to meet his burden of establishing that the misdemeanor pleas, which were not on the record, were not knowing and voluntary, and the record of the fourth plea colloquy demonstrated that Petitioner actually understood how his conduct satisfied the elements of the charges against him and therefore his guilty plea was knowing and voluntary. *State v. McGarrh*, 2022-NMCA-036.

5-805. Probation; violations.

A. **Violation of probation.** At any time during probation if it appears that the probationer may have violated the conditions of probation:

(1) the court may issue a warrant for the arrest of the probationer. If conditions of release are provided in the warrant, the probationer may be released on bond pending an adjudicatory hearing on the charges; or

(2) the court or the probation office may issue a notice to appear before the court to answer a charge of violation of the conditions of probation.

B. **Notice of arrest without warrant.** If the probationer is arrested by the probation office without a warrant the probation office shall provide the district attorney with a written notice within one (1) day of the arrest. The notice shall contain a brief description of each alleged probation violation. A copy of the notice shall be given to the probationer and filed with the court.

C. **Technical violation program.** A judicial district may by local rule approved by the Supreme Court in the manner provided by Rule 5-102 NMRA [withdrawn], establish a program for sanctions for probationers who agree to automatic sanctions for a technical violation of the conditions of probation. Under the program a probationer may agree:

(1) not to contest the alleged violation of probation;

(2) to submit to sanctions in accordance with the local rule; and

(3) to waive the provisions of Paragraphs D through L of this rule. For purposes of this rule, a “technical violation” means any violation that does not involve new criminal charges.

D. **Conditions of release.** If a probationer is arrested and not released on conditions of release, within five (5) days of the arrest of the probationer the sentencing judge or a judge designated by the sentencing judge shall review the notice of arrest or warrant and consider conditions of release pending adjudication of the probation violation. If no conditions for release are set, the probationer may file a motion to appear before the judge to consider conditions of release.

E. **Filing of report.** If there is a recommendation that probation be revoked, within five (5) days of the arrest of probationer the probation office shall submit a written violation or a summary report to the district attorney and the court describing the essential facts of each violation. A copy of the report shall be served on the probationer and the probationer’s attorney of record.

F. **District attorney duty.** Within five (5) days of receiving the probation violation or a summary report, the district attorney shall either file a motion to revoke probation setting forth each of the alleged violations or file a notice of intent not to prosecute the alleged violations.

G. **Initial hearing.** If the probationer is in custody and an initial hearing is not timely commenced as required by this paragraph, upon its own motion or upon presentation of a release order without a hearing required, the court shall order the probationer immediately released back to probation supervision pending final adjudication. An initial hearing on a motion to revoke probation shall be commenced within thirty (30) days after the latest of the following events:

(1) the date of the filing of a motion to revoke probation;

(2) if the proceedings have been stayed to determine the competency of the probationer, the date an order is filed finding the probationer competent to participate in the revocation proceedings;

(3) if an interlocutory or other appeal is filed, the date the mandate or order is filed in the district court disposing of the appeal;

(4) if the probationer is arrested or surrenders in another state, the date the probationer is returned to this state; or

(5) the date of arrest or surrender of a probationer in this state based on a bench warrant issued for failing to report.

H. **Adjudicatory hearing.** If the probationer is in custody and an adjudicatory hearing is not timely commenced as required by this paragraph, upon its own motion or upon presentation of a release order without a hearing required, the court shall order the probationer immediately released back to probation supervision pending final adjudication. The adjudicatory hearing shall commence no later than sixty (60) days after the initial hearing is conducted.

I. **Discovery.** The parties shall exchange witness lists and disclose proposed exhibits no later than ten (10) days after the initial hearing.

J. **Waiver of time limits.** The probationer may waive the time limits for commencement of the adjudicatory hearing.

K. **Extensions of time.** Extensions of time for commencement of a hearing on a motion to revoke probation may be granted in the court's discretion upon the request of any party.

L. **Sanctions for noncompliance with time limits.** In addition to any release of the probationer that may be required by Paragraphs G or H of this rule, the court may dismiss the motion to revoke probation for violating any of the time limits in this rule.

M. **Applicability.** Paragraphs E and F of this rule are not applicable to revocation of probation proceedings that are initiated by the district attorney without a prior recommendation of the probation office to revoke probation.

[Approved by Supreme Court Order No. 07-8300-008, effective June 1, 2007; as amended by Supreme Court Order No. 10-8300-040, effective January 31, 2011; by Supreme Court Order No. 10-8300-040, suspending Paragraph L until further order of the Court for all cases pending in the district court on or after January 7, 2011; by Supreme Court Order No. 11-8300-043, effective for all hearings held in the district court on or after November 1, 2011.]

ANNOTATIONS

Compiler's notes. — The bracketed material was inserted by the compiler and is not part of the rule. Pursuant to Supreme Court Order No. S-1-RCR-2024-00078, withdrew 5-102 NMRA, effective July 1, 2024.

The 2011 amendment, approved by Supreme Court Order No. 11-8300-043, effective for all hearings held in the district court on or after November 1, 2011, required the court to order a probationer in custody released to probation supervision pending final adjudication if an initial hearing or an adjudicatory hearing on a motion to revoke probation is not timely commenced and permitted the court to dismiss the motion to revoke probation for violation of the time limits for commencing an initial hearing or an adjudicatory hearing; in Paragraph G, added the first sentence; in Paragraph H, added the first sentence; and in Paragraph L, deleted the former paragraph which required the dismissal of a motion to revoke probation if an adjudicatory hearing was not timely commenced and added the title and language of Paragraph L.

The 2010 amendment, approved by Supreme Court Order No. 10-8300-040, effective January 31, 2011, in Paragraph I, after "proposed exhibits no", changed "less" to "later"; and in Paragraph K, after "may be granted in the", deleted "manner provided by Rule 5-604 NMRA for extension of time for commencement of trial" and added the remainder of the sentence.

Compiler's note. — Pursuant to Supreme Court Order No. 11-8300-001 Paragraph L of Rule 5-805 NMRA is suspended until further order of the Court for all cases pending in the district court on or after January 7, 2011.

Cross references. For statutory provision governing the revocation of probation, *see* Section 31-21-15 NMSA 1978.

Rule is constitutional. — Subsection H of Rule 5-805 NMRA, which requires dismissal of a probation violation proceeding if the time limits to hold an adjudicatory hearing are not met, does not infringe upon the substantive rights granted by the legislature in Sections 31-11-1 and 31-21-15 NMSA 1978 and does not violate the separation of powers doctrine. *State v. Montoya*, 2011-NMCA-009, 149 N.M. 242, 247 P.3d 1127, cert. denied, 2011-NMCERT-001, 150 N.M. 558, 263 P.3d 900.

Time limit for adjudicatory hearing. — An adjudicatory hearing must be held within 100 days after a defendant is arrested. *State v. Montoya*, 2011-NMCA-009, 149 N.M. 242, 247 P.3d 1127, cert. denied, 2011-NMCERT-001, 150 N.M. 558, 263 P.3d 900.

Where defendant was arrested on October 12, 2007 for probation violation; the state filed a request for a hearing on January 4, 2008; an initial hearing was held on January 28, 2008; and an adjudicatory hearing was held on February 25, 2008, the adjudicatory hearing was not held within 100 days after defendant was arrested and the district court was required to dismiss the state's motion to revoke probation. *State v. Montoya*, 2011-NMCA-009, 149 N.M. 242, 247 P.3d 1127, cert. denied, 2011-NMCERT-001, 150 N.M. 558, 263 P.3d 900.

For warrantless search of probation violator's vehicle, *see State v. Ponce*, 2004-NMCA-137, 136 N.M. 614, 103 P.3d 54, cert quashed, 2006-NMCERT-004.

Paragraph C construed. — In specifying the technical violations under a technical violation program, the only limitation is that the judicial district may not include new criminal charges among those technical violations. The phrase "any violation" permits a judicial district to define a technical violation for itself, as long as the violation does not include new criminal charges. *State v. Aslin*, 2020-NMSC-004, *rev'g* 2018-NMCA-043, 421 P.3d 843.

Each judicial district has the discretion to determine technical violations of the conditions of probation. — Where the state filed a petition to revoke defendant's probation on the ground that defendant failed to enter a drug treatment program as ordered by his probation officer, and where the district court found that defendant violated his conditions of probation by failing to enroll in treatment as ordered and that this was not a technical violation, and where the New Mexico Court of Appeals reversed the district court, holding that 5-805(C) NMRA provides that a technical violation is limited to violations that do not involve new criminal charges and that defendant's failure to enter and complete outpatient drug treatment must be construed as a technical violation under 5-805(C) NMRA, the Court of Appeals misinterpreted 5-805(C) NMRA when it held that all probation violations that do not involve new criminal charges must be treated as technical under the technical violation program (TVP). Rule 5-805(C) NMRA gives each judicial district the discretion to determine, outside of new criminal charges, what its TVP includes as technical violations. *State v. Aslin*, 2020-NMSC-004, *rev'g* 2018-NMCA-043, 421 P.3d 843.

Technical violation program. — Where defendant, while on probation, opted into a technical violation program (TVP) where a probationer who commits a technical violation of his or her order of probation could waive the right to due process procedures as provided by Rule 5-805 NMRA and would instead be sanctioned based on a progressive disciplinary scheme, and where the district court found that defendant violated his conditions of probation by failing to enroll in treatment as ordered by his probation officer, the district court erred in revoking defendant's probation based on the court's finding that the violation was not a mere technical violation under the TVP,

because there was no finding below that defendant committed a new violation of state law, and Rule 5-805(C)(3) clearly and unambiguously defines a "technical violation" as any violation that does not involve new criminal charges. *State v. Aslin*, 2018-NMCA-043, cert. granted.

5-820. Fugitive complaint.

A. **Complaint.** A fugitive action may be commenced in the district court by filing a sworn fugitive complaint:

(1) identifying the defendant;

(2) identifying the demanding state for which the defendant's arrest is being made;

(3) stating the grounds for extradition; and

(4) stating either that a governor's warrant for the arrest of the defendant is sought or the date and time of arrest for extradition.

The complaint may be amended by the state without leave of court prior to arraignment. The complaint shall be substantially in the form approved by the Supreme Court.

B. **Where commenced.** A fugitive action shall be commenced in the county in which the defendant has been arrested or where the defendant is expected to be found.

C. **Service of complaint.** If the fugitive is arrested without a warrant, a fugitive complaint shall be prepared and given to the defendant prior to transferring the defendant to the custody of the detention facility. The complaint shall be filed with the district court at the time it is given to the defendant. If the court is not open at the time the copy of the complaint is given to the defendant, the complaint shall be filed the next business day of the court.

[Approved, effective January 1, 2002.]

ANNOTATIONS

Cross references. — For the fugitive complaint approved by the Supreme Court, *see* Rule 9-805 NMRA.

5-821. Arraignment and commitment hearing prior to issuance of the governor's rendition warrant.

A. **Time.** If the defendant has not been arraigned in the magistrate or metropolitan court, the defendant shall be brought before the district court for an arraignment and

commitment hearing, as soon as practicable, but in no event later than forty-eight (48) hours after arrest as a fugitive.

B. **Procedure.** At the arraignment, the court shall:

(1) inform the defendant of the defendant's right to retain counsel;

(2) provide the defendant with copies of any documents on which the prosecution has relied;

(3) inform the defendant of the right to the issuance and service of a warrant of extradition before being extradited and of the right to petition for a writ of habeas corpus pursuant to law; and

(4) ask the defendant to admit or deny that the defendant is the person described in the fugitive complaint.

C. **Waiver of extradition.** The defendant may waive extradition proceedings by signing a written waiver of extradition substantially in the form approved by the Supreme Court. If the court finds the waiver is voluntary, the court shall issue an order to hold the defendant without bail for delivery to an authorized agent of the demanding state.

D. **Identity question.** If the defendant denies being the person described in the fugitive warrant, the court shall examine the information on which the arrest was made and determine whether it appears that the defendant is the person sought.

E. **Conditions of release.** If the defendant does not waive extradition or denies being the person described in the fugitive complaint, the court may set conditions of release pending the issuance of the rendition warrant by the governor.

F. **Time limits for governor's rendition.** If the defendant does not waive extradition or denies being the person described in the fugitive complaint, the defendant may be held in custody for a period of not more than thirty (30) days pending arrest on a rendition warrant from the governor. On motion, the court may extend the commitment or conditions of release pending arrest on a governor's rendition warrant for a period of not more than sixty (60) additional days.

G. **Dismissal of fugitive complaint.** If a governor's rendition warrant is not filed pursuant to Rule 5-822 NMRA before the expiration of the time for holding the defendant in custody as provided by Paragraph F of this rule, the fugitive complaint shall be dismissed without prejudice and the defendant released. The time limits set forth in Paragraph F in this rule do not constitute the deadline for the completion of extradition proceedings under Rule 5-822 NMRA.

[Approved, effective January 1, 2002; as amended by Supreme Court Order No. 10-8300-028, effective December 3, 2010.]

ANNOTATIONS

The 2010 amendment, approved by Supreme Court Order No. 10-8300-028, effective December 3, 2010, in Paragraph F, after "thirty (30) days pending", deleted "receipt of" and added "arrest on", and in the second sentence, after "release pending", deleted "issuance of" and added "arrest on"; and in Paragraph G, in the first sentence, after "governor's rendition warrant is not filed", deleted "within the times" and added "pursuant to Rule 5-822 NMRA before the expiration of the time for holding the defendant in custody as", after "Paragraph F", added "of this rule", and added the last sentence.

5-822. Commencement and continuation of fugitive actions after issuance of a governor's rendition warrant.

A. **Filing of warrant and return.** If a person accused to be a fugitive is arrested on a rendition warrant for extradition issued by the governor, and a fugitive action based on the same demand is not pending in the district court, a fugitive action shall be commenced by filing in accordance with Paragraph F of Rule 5-103 NMRA the following:

(1) a copy of the demand for extradition on which the rendition warrant is based together with the documents required by statute to accompany the demand;

(2) the name and address of the agent of the demanding state authorized to receive the alleged fugitive; and

(3) the rendition warrant together with supporting documents.

B. **Where commenced.** If a fugitive action based on the same demand is pending in the district court, the warrant shall be filed in that action. If no fugitive action based on the same demand is pending in the district court when the fugitive is arrested on the governor's rendition warrant, the action shall be commenced in a district court of the district where the fugitive was arrested. If a fugitive action based on the same demand is pending in a magistrate or metropolitan court of this state, the action shall be transferred to the district court for further proceedings pursuant to these rules.

[Approved, effective January 1, 2002; as amended by Supreme Court Order No. 10-8300-028, effective December 3, 2010.]

ANNOTATIONS

The 2010 amendment, approved by Supreme Court Order No. 10-8300-028, effective December 3, 2010, in Paragraph A, after "a fugitive action shall be commenced by filing", added the remainder of the introductory sentence.

5-823. Rights hearing; filing of demand for extradition.

A. **Rights explained.** As soon as practicable after the governor's rendition warrant is filed, but in any event within seven (7) days, the alleged fugitive shall be brought before the court. At that time, the court shall:

(1) inform the accused of the right to counsel and determine whether the accused is entitled to appointed counsel;

(2) inform the accused of the demand for extradition and of the crime which is charged or other basis for extradition which is alleged; and

(3) determine whether the accused wishes to test the legality of the governor's rendition warrant.

B. **Time for filing petition for writ of habeas corpus.** If the alleged fugitive wishes to contest the legality of the arrest pursuant to the governor's rendition warrant, the court shall fix a reasonable time for the alleged fugitive to file a petition for writ of habeas corpus in the fugitive action.

[Approved, effective January 1, 2002.]

5-824. Petition for writ of habeas corpus.

A. **Grounds.** If a person accused as a fugitive files a petition for writ of habeas corpus, the court may consider only if:

(1) the extradition documents on their face do not authorize the arrest or the issuance of the governor's rendition warrant;

(2) the person accused to be a fugitive has not been charged with a crime in the demanding state;

(3) the person alleged to be a fugitive is not the person demanded; or

(4) the person alleged to be a fugitive is not a fugitive or otherwise subject to extradition pursuant to statute.

The petition for writ of habeas corpus shall state the factual basis for the grounds alleged.

B. **Notice of hearing.** If a petition is filed, the court shall set a date for hearing and give notice of the hearing to the defendant, the state and the agent of the demanding state.

C. **Determination.** The governor's warrant of extradition is prima facie evidence that the constitutional and statutory requirements for extradition have been met. Unless the court finds beyond a reasonable doubt that the rendition warrant is invalid for one or

more of the grounds set forth in Paragraph A of this rule, the court shall order the accused to be delivered to the agent of the demanding state.

[Approved, effective January 1, 2002.]

Committee commentary. — If a petition for writ of habeas corpus is filed, the grounds on which relief can be granted are very narrow. *See Michigan v. Doran*, 439 U.S. 282, 99 S. Ct. 530, 58 L. Ed. 2d 521 (1978) and *New Mexico ex rel. Ortiz v. Reed*, 524 U.S. 151, 118 S. Ct. 1860, 141 L. Ed. 2d 131 (1998). Questions relating to guilt or innocence, alibi, speedy trial, res judicata, and double jeopardy are not for the asylum state, but for the demanding state to determine after the defendant is returned. *State v. Sandoval*, 95 N.M. 254, 620 P.2d 1279 (1980). Even if arrest on a previous governor's rendition warrant was held to be illegal, that is not res judicata on whether a subsequent rendition warrant is proper. *Id.*; *see generally* Annot., "Discharge on Habeas Corpus of One Held in Extradition Proceedings as Precluding Subsequent Extradition Proceedings," 33 A.L.R.3d 1443.

The grounds stated here are generally those listed in *Sandoval*, which based them on *Michigan v. Doran*, 439 U.S. 282, 99 S. Ct. 530, 58 L. Ed. 2d 521 (1980). The issue of whether the extradition documents are "in order" has been restated for clarity. *Sandoval* and *Doran* are true fugitive cases. Since there are statutory grounds for extradition in addition to fugitive status, provision also is made for them in this rule. *See also Colfax County Bd. of Commr's v. State of N.H.*, 16 F.3d 1107 (10th Cir. 1994) (a habeas proceeding cannot be transformed into an inquiry into the appropriateness of the demanding state's actions. "'Surrender is not to be interfered with by the summary process of habeas corpus upon speculations as to what ought to be the result of a trial in the place where the Constitution provides for its taking place.'" *Id.* (*quoting Drew v. Thaw*, 235 U.S. 432, 440, 59 L. Ed. 302, 35 S. Ct. 137 (1914)); *Hopper v. State ex. rel. Schiff*, 101 N.M. 71, 678 P.2d 699 (1984) (court may not look behind the charging documents to determine the applicability of the demanding state's criminal statute); *State v. Sandoval*, 95 N.M. 254, 620 P.2d 1279 (1980) (district court may not consider questions of res judicata or delays in the extradition hearing); and *Bazaldua v. Hanrahan*, 92 N.M. 596, 592 P.2d 512 (1979) (governor's warrant is prima facie evidence that the constitutional and statutory requirements have been met and fugitive must prove alibi beyond a reasonable doubt).

That the defendant's name is the same as the name of the person sought is prima facie evidence that the defendant is the person sought, even if the name is common. *Wright v. Florida*, 497 So.2d 1313 (Fla. App. 1986).

The petition is required to state the factual basis for the grounds alleged so that the prosecutor and demanding state will have a fair opportunity to prepare for the hearing on the petition. More specificity is required than for other motions in order to avoid needing extra time for discovery, so that the defendant can be delivered to the demanding state quickly if extradition is proper.

Notice to the agent of the demanding state is required by Section 31-4-10 NMSA 1978.

In general, conflicting evidence concerning a crime must be resolved in the state where the crime is charged, and extradition is proper. *Bazaldua v. Hanrahan*, 92 N.M. 596, 592 P.2d 512 (1979); accord, *South Carolina v. Bailey*, 289 U.S. 412, 53 S. Ct. 667, 77 L.Ed 1292 (1933) (alibi in another state).

5-825. Bail after arrest on a governor's rendition warrant; dismissal for failure to deliver defendant.

After arrest on a governor's rendition warrant, the accused person shall be ordered held without bail pending delivery to agents of the demanding state for at least thirty (30) days after the arrest. The accused person shall be ordered held without bail pending delivery to agents of the demanding state for at least thirty (30) days after final action on a petition for writ of habeas corpus if the accused files a timely petition for writ of habeas corpus. After arrest on a governor’s rendition warrant, if the accused person has pending criminal charges in New Mexico, and the governor exercises the governor’s discretion under New Mexico law to hold the accused person until the accused person has been tried and discharged, or convicted and punished, the accused person shall be ordered held in detention or upon conditions of release pending delivery to agents of the demanding state while those charges are pending and for at least thirty (30) days after final action on those charges. If agents of the demanding state do not appear within those time periods, the court may dismiss the action and discharge the accused, or, upon good cause shown, may extend the time period for not more than thirty (30) days, during which time the accused person shall be eligible for release on bail.

[Approved, effective January 1, 2002; as amended by Supreme Court Order No. 10-8300-028, effective December 3, 2010.]

ANNOTATIONS

The 2010 amendment, approved by Supreme Court Order No. 10-8300-028, effective December 3, 2010, added the third sentence.

5-826. Appeals from magistrate or municipal court.

A. **Right of appeal.** A party who is aggrieved by the judgment or final order in a criminal action in magistrate or municipal court may appeal, as permitted by law, to the district court of the county within which the magistrate or municipal court is located. The notice of appeal shall be filed in the district court within fifteen (15) days after the judgment or final order appealed from is filed in the magistrate or municipal court clerk's office. The three (3) day mailing period set forth in Rule 6-104 NMRA does not apply to the time limits set forth above. A notice of appeal filed after the announcement of a decision, or return of the verdict, but before the judgment or order is filed in the magistrate or municipal court clerk's office, shall be treated as timely filed and shall

become effective when the judgment or order appealed from is filed in the magistrate or municipal court clerk's office. Notwithstanding any other provision of this rule, no docket fee or other cost shall be imposed against the state or its political subdivisions or against a defendant who is represented by a public defender or court appointed counsel.

B. **Notice of appeal.** An appeal from the magistrate or municipal court is taken by doing the following:

(1) filing with the clerk of the district court a notice of appeal with a copy of the written judgment or final order appealed from (if available) and with proof of service; and

(2) promptly filing with the magistrate or municipal court, as applicable:

(a) a copy of the notice of appeal which has been endorsed by the clerk of the district court; and

(b) unless the appeal has been filed by the state, a political subdivision of the state or by a defendant represented by a public defender or court appointed counsel, a copy of the receipt of payment of the docket fee.

C. **Content of the notice of appeal.** The notice of appeal shall be substantially in the form approved by the Supreme Court.

D. **Service of notice of appeal.** At the time the notice of appeal is filed in the district court, the appellant shall do the following:

(1) serve each party or each party's attorney in the proceedings in the magistrate or municipal court, as applicable, with a copy of the notice of appeal in accordance with Rule 5-103 NMRA; and

(2) file proof of service with the clerk of the district court that a copy of the notice of appeal has been served in accordance with Rule 5-103 NMRA.

E. **Docketing the appeal.** Upon the filing of the notice of appeal and proof of service and payment of the docket fee, if required, the clerk of the district court shall docket the appeal in the district court.

F. **Record on appeal.** Within fifteen (15) days after the appellant files a copy of the notice of appeal in the magistrate or municipal court pursuant to Paragraph B of this rule, the magistrate or municipal court shall file with the clerk of the district court the record on appeal taken in the action in the magistrate or municipal court. For purposes of this rule, the record on appeal shall consist of the following:

(1) a title page containing the caption of the case in the magistrate or municipal court and the names and mailing addresses of each party or, if the party is represented by counsel, the name and address of the attorney;

(2) a copy of all papers and pleadings filed in the magistrate or municipal court;

(3) a copy of the judgment or final order sought to be reviewed with date of filing; and

(4) any exhibits.

The magistrate or municipal court clerk shall give prompt notice to all parties of the filing of the record on appeal with the district court. Any party desiring a copy of the record on appeal shall be responsible for paying the cost of preparing the copy.

G. **Correction or modification of the record.** If anything material to either party is omitted from the record on appeal by error or accident, the parties by stipulation, or the magistrate or municipal court or the district court, on proper suggestion or on its own initiative, may direct that the omission be corrected and a supplemental record transmitted to the district court.

H. **Conditions of release.** If the magistrate or municipal court has set an appeal bond pursuant to Rule 6-703 NMRA, upon filing of the notice of appeal, the bond shall be transferred to the district court pending disposition of the appeal. The district court shall dispose of all matters relating to the appeal bond until remand to the magistrate or municipal court.

I. **Review of terms of release.** If the magistrate or municipal court has refused release pending appeal or has imposed conditions of release which the defendant cannot meet, the defendant may file a petition for release with the clerk of the district court at any time after the filing of the notice of appeal. A copy of the petition for release which has been endorsed by the clerk of the district court shall be filed with the magistrate or municipal court. If the district court releases the defendant on appeal, a copy of the order of release shall be filed in the magistrate or municipal court.

J. **Trial de novo appeals.** Trials upon appeals from the magistrate or municipal court to the district court shall be de novo.

K. **Disposal of appeals.** The district court shall dispose of appeals by entry of a judgment and sentence or other final order. The court in its discretion may accompany the judgment or order with a formal or memorandum opinion. Opinions shall not be published and shall not be used as precedent in subsequent cases. A mandate shall be issued by the court upon expiration of whichever of the following events occurs latest:

(1) fifteen (15) days after entry of the order disposing of the case;

(2) fifteen (15) days after disposition of a motion for rehearing; or

(3) if a notice of appeal is filed, upon final disposition of the appeal.

L. **Remand.** Upon expiration of the time for appeal from the judgment or final order of the district court, if the relief granted is within the jurisdiction of the magistrate court, the district court shall remand the case to the magistrate or municipal court for enforcement of the district court's judgment.

M. **Appeal.** Any aggrieved person may appeal from a judgment of the district court to the New Mexico Supreme Court or Court of Appeals, as authorized by law in accordance with the Rules of Appellate Procedure [12-101 NMRA]. The conditions of release and bond approved or continued in effect by the district court during the pendency of the appeal to the district court shall continue in effect pending appeal to the Court of Appeals, unless modified pursuant to Rule 12-205 NMRA of the Rules of Appellate Procedure.

N. **Transmittal of the judgment and sentence or final order.** After final determination of the appeal, the clerk of the district court shall transmit a copy of the judgment and sentence or final order to the magistrate or municipal court clerk.

[Adopted by Supreme Court Order No. 12-8300-018, effective for all cases pending or filed on or after August 3, 2012.]

ANNOTATIONS

In an appeal from the magistrate court, the district court's review is not for legal error. — Where Defendant was charged in magistrate court with one misdemeanor traffic violation and three petty misdemeanor violations, and where, two days before trial, Defendant requested copies of jury questionnaires from the magistrate court clerk, who informed Defendant that the magistrate court required a copying fee for copies of the jury questionnaires, and where, the day before trial, Defendant filed a verified application for free process for indigency, along with a motion to continue his trial, and where, the next morning, with the jury panel already in the courtroom for jury selection, the magistrate court orally denied Defendant's motion to continue, and where, following a jury trial, Defendant was convicted on all four counts, and where Defendant appealed to the district court and filed a pretrial motion requesting appellate review of the magistrate court clerk's refusal to provide him free copies of the jury questionnaires and of the magistrate court's denial of his motion to continue, and where the district court denied Defendant's pretrial motion and held a de novo jury trial, after which, Defendant was again convicted on all four counts, and where, on appeal, Defendant claimed that the district court should have remanded his case to the magistrate court for a new trial, the district court did not err in providing Defendant with a trial de novo, because the district court's review in an appeal from the magistrate court is not for legal error. Defendant's claims of error can only be remedied by a trial de novo in the district court,

and no rule permits the district court to remand or otherwise transfer jurisdiction back to the magistrate court for a new trial. *State v. Lucero*, 2022-NMCA-020, *cert. denied*.

5-827. Appeals from metropolitan court.

A. **Right of appeal.** A party who is aggrieved by the judgment or final order in a criminal action may appeal, as permitted by law, to the district court of the county within which the metropolitan court is located. The notice of appeal shall be filed in the district court within fifteen (15) days after the judgment or final order appealed from is filed in the metropolitan court clerk's office. The three (3) day mailing period set forth in Rule 7-104 NMRA does not apply to the time limits set forth above. A notice of appeal filed after the announcement of a decision, or return of the verdict, but before the judgment or order is filed in the metropolitan court clerk's office, shall be treated as timely filed and shall become effective when the judgment or order appealed from is filed in the metropolitan court clerk’s office. Notwithstanding any other provision of this rule, no docket fee or other cost shall be imposed against the state or its political subdivisions or against a defendant who is represented by a public defender or court appointed counsel.

B. **Notice of appeal.** An appeal from the metropolitan court is taken by:

(1) filing with the clerk of the district court a notice of appeal with proof of service; and

(2) promptly filing with the metropolitan court:

(a) a copy of the notice of appeal which has been endorsed by the clerk of the district court; and

(b) unless the appeal has been filed by the state, a political subdivision of the state or by a defendant represented by a public defender or court appointed counsel, a copy of the receipt of payment of the docket fee.

C. **Content of the notice of appeal.** The notice of appeal shall be substantially in the form approved by the Supreme Court.

D. **Service of notice of appeal.** At the time the notice of appeal is filed in the district court, the appellant shall:

(1) serve each party or each party's attorney in the proceedings in the metropolitan court with a copy of the notice of appeal in accordance with Rule 5-103 NMRA of the Rules of Criminal Procedure for the District Courts; and

(2) file proof of service with the clerk of the district court that a copy of the notice of appeal has been served in accordance with Rule 5-103 NMRA.

E. **Docketing the appeal.** Upon the filing of the notice of appeal and proof of service and payment of the docket fee, if required, the clerk of the district court shall docket the appeal in the district court.

F. **Record on appeal.** Within fifteen (15) days after the appellant files a copy of the notice of appeal in the metropolitan court pursuant to Paragraph B of this rule, the metropolitan court shall file with the clerk of the district court a copy of the record on appeal taken in the action in the metropolitan court. For purposes of this rule, the record on appeal shall consist of:

(1) a title page containing the caption of the case in the metropolitan court and names and mailing addresses of each party or, if the party is represented by counsel, the name and address of the attorney;

(2) a copy of all papers and pleadings filed in the metropolitan court;

(3) a copy of the judgment or final order sought to be reviewed with date of filing;

(4) any exhibits; and

(5) if the appeal is from a trial on the record, any transcript of the proceedings made by the metropolitan court. The metropolitan court clerk shall prepare and file with the district court a duplicate of the audio record of the proceedings and that record's index log.

The metropolitan court clerk shall give prompt notice to all parties of the filing of the record on appeal with the district court. Any party desiring a copy of the record on appeal shall be responsible for paying the cost of preparing the copy.

G. **Correction or modification of the record.** If anything material to either party is omitted from the record on appeal by error or accident, the parties by stipulation, or the metropolitan court or the district court, on proper suggestion or on its own initiative, may direct that the omission be corrected and a supplemental record transmitted to the district court.

H. **Conditions of release.** If the metropolitan court sets an appeal bond pursuant to Rule 7-703 NMRA upon filing of the notice of appeal, the appeal bond shall be transferred to the district court pending disposition of the appeal. The district court shall dispose of all matters relating to the appeal bond until remand to the metropolitan court.

I. **Review of terms of release.** If the metropolitan court has refused release pending appeal or has imposed conditions of release which the defendant cannot meet, the defendant may file a petition for release with the clerk of the district court at any time after the filing of the notice of appeal. A copy of the petition for release which has been endorsed by the clerk of the district court shall be filed with the metropolitan court. If the

district court releases the defendant on appeal, a copy of the order of release shall be filed in the metropolitan court.

J. **Trial de novo appeals.** Except as otherwise provided by law for appeals involving driving while under the influence and domestic violence offenses, trials upon appeals from the metropolitan court to the district court shall be de novo.

K. **Rehearing; appeals on the record.** Within ten (10) days after entry of a judgment or order disposing of an appeal on the record, any party may file a motion for rehearing. The motion shall set forth with particularity the points of law or fact which the movant believes the court has overlooked or misapprehended but shall not contain argument. No response to a motion shall be permitted unless requested by the district court. The motion for rehearing shall be disposed of within fifteen (15) days after it is filed.

L. **Disposal of appeals.** The district court shall dispose of appeals by entry of a judgment and sentence or other final order. The court in its discretion may accompany the judgment or order with a formal or memorandum opinion. Opinions shall not be published and shall not be used as precedent in subsequent cases. A mandate shall be issued by the district court upon expiration of whichever of the following events occurs latest:

(1) fifteen (15) days after entry of the order disposing of the case;

(2) fifteen (15) days after disposition of a motion for rehearing; or

(3) if a notice of appeal is filed, upon final disposition of the appeal.

Upon remand of the case by the district court to the metropolitan court, the metropolitan court shall enforce the mandate of the district court.

M. **Remand.** Upon expiration of the time for appeal from the final order or judgment of the district court, the district court shall remand the case to the metropolitan court for enforcement of the district court's judgment.

N. **Appeal.** An aggrieved party may appeal from a judgment of the district court to the New Mexico Supreme Court or New Mexico Court of Appeals, as authorized by law, in accordance with the Rules of Appellate Procedure. The conditions of release and bond approved or continued in effect by the district court during the pendency of the appeal to the district court shall continue in effect pending appeal to the Court of Appeals, unless modified pursuant to Rule 12-205 NMRA of the Rules of Appellate Procedure.

O. **Transmittal of the judgment and sentence or final order.** After final determination of the appeal, the clerk of the district court shall transmit a copy of the judgment and sentence or final order to the metropolitan court clerk.

[Adopted by Supreme Court Order No. 12-8300-018, effective for all cases pending or filed on or after August 3, 2012.]

Committee commentary. — Section 34-8A-6C NMSA 1978 (as amended by Laws 1980, Chapter 142, Section 4), is so broad as to be in violation of the constitutional prohibition against double jeopardy. The rule as drafted limits appeals by the prosecution to a determination of the validity of the statute or ordinance under which the defendant was prosecuted, thus avoiding the statutory violation mentioned above.

[Adopted by Supreme Court Order No. 12-8300-018, effective for all cases pending or filed on or after August 3, 2012.]

5-828. Appeals from magistrate, metropolitan or municipal court; dismissals for failure to comply with rules or failure to appear.

A. **By the court.** When an appellant fails to comply with these rules, the district court shall notify the appellant that upon the expiration of ten (10) days from the date of the notice the appeal will be dismissed unless prior to that date appellant shows cause why the appeal should not be dismissed.

B. **Failure to appear; trial *de novo* appeals.** If the defendant fails to appear at the trial *de novo*, the district court shall set a hearing within thirty (30) days for the defendant to show good cause why the defendant's appeal should not be dismissed. The clerk of the district court shall mail notice of the hearing to the defendant and to the defendant's counsel at least ten (10) days prior to the hearing. If the defendant fails to show good cause for the failure to appear for trial, the district court may dismiss the appeal and remand the case to the lower court for enforcement of the judgment and sentence. If the district court finds good cause for the defendant's failure to appear, the district court shall reschedule the trial.

C. **By motion of the appellee.** If the appellant fails to comply with these rules, the appellee may file a motion in the district court to dismiss the appeal. The motion shall identify the rule violated. The appellant shall have ten (10) days from the date of service to respond to the motion.

[Adopted by Supreme Court Order No. 12-8300-018, effective for all cases pending or filed on or after August 3, 2012.]

ANNOTATIONS

District court erred in dismissing defendant's de novo appeal for lack of prosecution. — Where defendant was charged with criminal damage to property of a household member, and where, at arraignment in magistrate court, defendant asked to be represented by a public defender, and where the magistrate court judge entered an order conditionally appointing the Law Offices of the Public Defender (LOPD), finding that "the defendant was unable to obtain counsel and desires representation by the

LOPD", and where, in that same proceeding while defendant stood accused of a crime and had requested but had not yet received legal representation, the magistrate court judge accepted defendant's plea of no contest and adjudicated defendant's guilt, and where on de novo appeal to the district court, the district court judge dismissed the appeal for lack of prosecution, finding that defendant had not taken action on the case in more than 180 days, the district court erred in dismissing defendant's de novo appeal, because the Rules of Criminal Procedure do not require a district court to dismiss a criminal appeal from the magistrate court if the case is not brought to trial within six months. *State v. Cruz*, 2021-NMSC-015, *rev'g* A-1-CA-37581, mem. op. (May 24, 2019) (non-precedential).

5-829. Withdrawn.

ANNOTATIONS

Withdrawals. — Pursuant to Supreme Court Order No. 19-8300-004, former 5-829 NMRA, relating to audio recordings of proceedings, appeals on the record, was withdrawn effective June 14, 2019. For provisions of former rule, *see* the 2018 NMRA on *NMOneSource.com*.

5-830. Withdrawn.

ANNOTATIONS

Withdrawals. — Pursuant to Supreme Court Order No. 19-8300-004, former 5-830 NMRA, relating to statement of appellate issues, appeals on the record, was withdrawn effective June 14, 2019. For provisions of former rule, *see* the 2018 NMRA on *NMOneSource.com*.

5-831. Withdrawn.

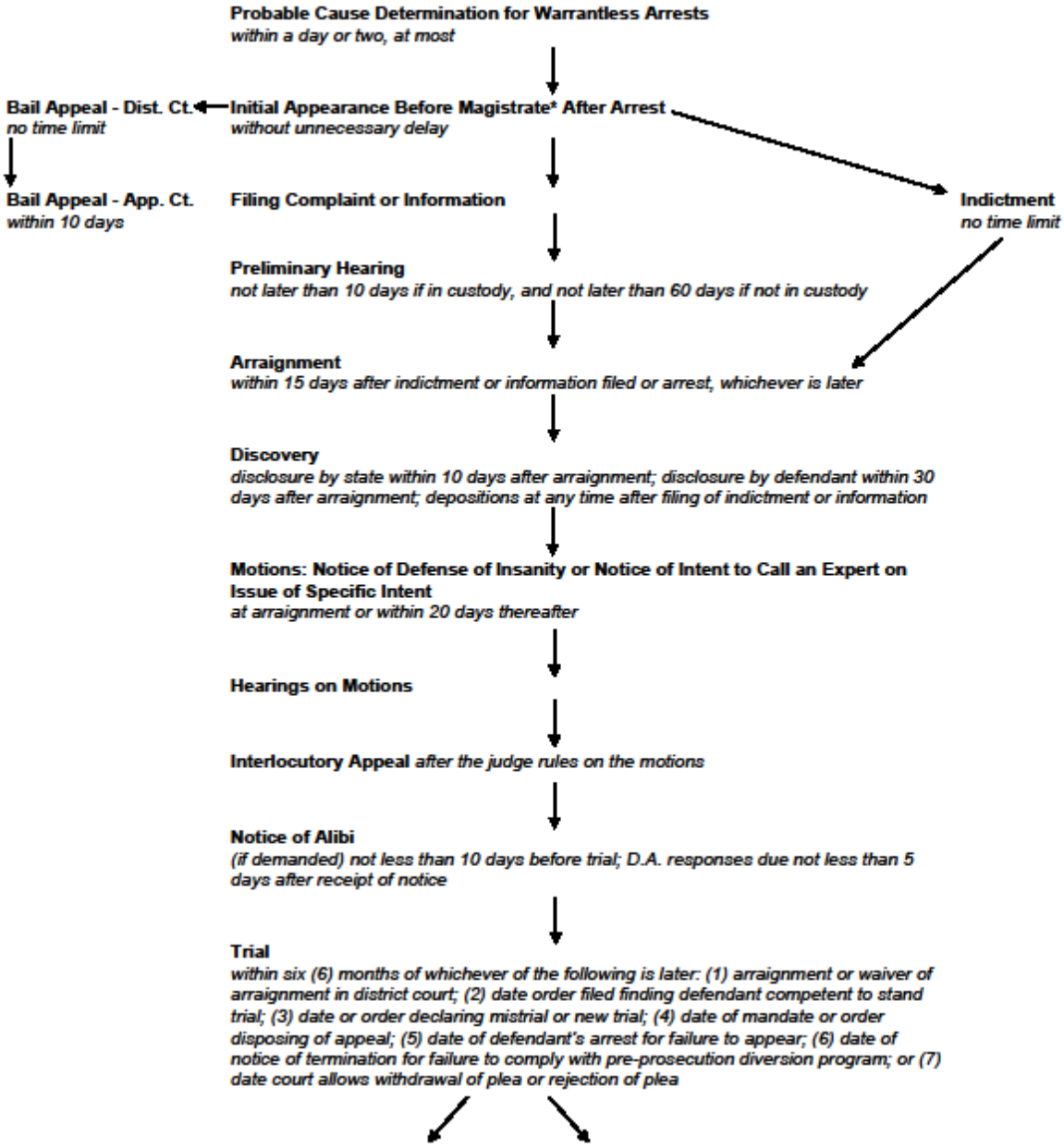
ANNOTATIONS

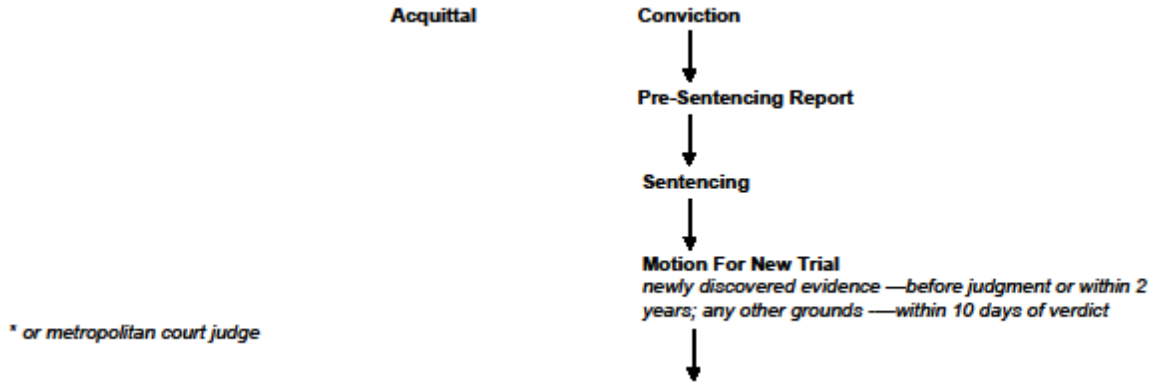
Withdrawals. — Pursuant to Supreme Court Order No. 19-8300-004, former 5-831 NMRA, relating to scope of review by district court, appeals on the record, was withdrawn effective June 14, 2019. For provisions of former rule, *see* the 2018 NMRA on *NMOneSource.com*.

ARTICLE 9
Appendices

5-901. Time sequence for typical felony case.

Time Sequence for Typical Felony Case





5-902. Withdrawn.

Withdrawals. — Pursuant to Supreme Court Order No. 15-8300-020, 5-902 NMRA, relating to contempt of court, was withdrawn effective for all cases pending or filed on or after December 31, 2015. For provisions of former rule, *see* the 2015 NMRA on *NMOneSource.com*.

5-903. Juror handbook (Transferred).

ANNOTATIONS

Compiler's notes. — The juror handbook has been moved to appear at the end of Rule Set 14, Uniform Jury Instructions - Criminal.