CHAPTER 31
Criminal Procedure

ARTICLE 1
Issuance of Process and Warrants

31-1-1. Short title.

Sections 31-1-1 through 31-3-9 NMSA 1978 may be referred to as the "Criminal Procedure Act."

History: 1953 Comp., § 41-1-1, enacted by Laws 1972, ch. 71, § 4; 1973, ch. 73, § 1.

ANNOTATIONS

Repeals and reenactments. — Laws 1972, ch. 71, § 4, repealed 41-1-1, 1953 Comp., relating to complaints, examination of complainants and witnesses, warrants and enacted a new 31-1-1 NMSA 1978.

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

For comment, "Survey of New Mexico Law: Criminal Procedure," see 15 N.M.L. Rev. 263 (1985).

31-1-2. Definitions.

Unless a specific meaning is given, as used in the Criminal Procedure Act [31-1-1 to 31-3-9 NMSA 1978]:

A. "accused" means any person charged with the violation of any law of this state imposing a criminal penalty;

B. "bail bond" is a contract between surety and the state to the effect that the accused and the surety will appear in court when required and will comply with all conditions of the bond;

C. "defendant" means any person accused of a violation of any law of this state imposing a criminal penalty;

D. "felony" means any crime so designated by law or if upon conviction thereof a sentence of death or of imprisonment for a term of one year or more is authorized;

E. "person," unless a contrary intention appears, means any individual, estate, trust, receiver, cooperative association, club, corporation, company, firm, partnership, joint venture, syndicate or other entity;

F. "police officer," "law enforcement officer," "peace officer" or "officer" means any full-time salaried officer who by virtue of his office or public employment is vested by law with the duty to maintain the public peace;

G. "recognizance" means any obligation of record entered into before a court requiring the accused to appear at all appropriate times or forfeit any bail and subject himself to criminal penalty for failure to appear;

H. "release on personal recognizance" or "release on own recognizance" means the release of a defendant without bail, bail bond or sureties upon his promise to appear at all appropriate times;

I. "Rules of Civil Procedure" means Rules of Civil Procedure for the District Courts of the state of New Mexico, as may be amended from time to time;

J. "rules of criminal procedure" means rules of criminal procedure for the district courts, magistrate courts and municipal courts adopted by the New Mexico supreme court, as may be amended from time to time;

K. "misdemeanor" means any offense for which the authorized penalty upon conviction is imprisonment in excess of six months but less than one year; and

L. "petty misdemeanor" means any offense so designated by law or if upon conviction a sentence of imprisonment for six months or less is authorized.

History: 1953 Comp., § 41-1-2, enacted by Laws 1972, ch. 71, § 5; 1973, ch. 73, § 2; 1979, ch. 123, § 1.

ANNOTATIONS

Repeals and reenactments. — Laws 1972, ch. 71, § 5, repealed 41-1-2, 1953 Comp., relating to warrants and affidavits of information and belief, and enacted a new 31-1-2 NMSA 1978.

No "accused" prior to commencement of criminal proceedings. — Where no complaint, information or indictment has been filed which names the accused, and no criminal prosecution has been commenced, the defendant is not an "accused" nor a "defendant." Sanchez v. Attorney Gen., 93 N.M. 210, 598 P.2d 1170 (Ct. App. 1979).

Petty misdemeanor does not include violations of city ordinances in this penalty range, since such a violation is not a misdemeanor. 1973 Op. Att'y Gen. No. 73-46.

31-1-3. Method of prosecution.

A criminal prosecution shall be commenced, conducted and terminated in accordance with Rules of Criminal Procedure. All pleadings, practice and procedure shall be governed by such rules.

History: 1953 Comp., § 41-1-3, enacted by Laws 1972, ch. 71, § 6.

ANNOTATIONS

Cross references. — For Rules of Criminal Procedure, see Rules 5-101 et seq.

Repeals and reenactments. — Laws 1972, ch. 71, § 6, repeals 41-1-3, 1953 Comp., relating to unlawful arrests and enacts the above section.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Limitations on state prosecuting attorney's discretion to initiate prosecution by indictment or by information, 44 A.L.R.4th 401.

31-1-4. Criminal actions; docketing action; service; return.

A. Upon filing of the complaint of a law enforcement officer, the court shall docket the action. Upon the filing of the complaint of any other person, the court shall collect the docket fee from the person before docketing the action.

B. Upon the docketing of any criminal action, the court may issue a summons directing the defendant to appear before the court at a time stated in the summons.

C. When a warrant is issued in a criminal action, it shall be directed to a law enforcement officer, and the defendant named in the warrant shall, upon arrest, be brought by the officer before the court without unnecessary delay.

D. It shall be the duty of the clerk of the district court to issue process in criminal cases filed in the district court. It shall be the duty of the clerk of the magistrate court or the magistrate, if there is no clerk, to issue process in criminal cases filed in the magistrate court. It shall be the duty of the law enforcement officer to whom process is directed to execute process and return the same to the clerk of the court from which process is issued or, if there is no clerk of the court, to the judge thereof.

E. Except for criminal actions filed in municipal court, all police officers authorized to serve process issued in any criminal action have jurisdiction to serve such process in any county of this state.

History: 1953 Comp., § 41-1-4, enacted by Laws 1972, ch. 71, § 7; 1975, ch. 242, § 11.

ANNOTATIONS

Cross references. — For method of arrest for gambling, see 30-19-12 NMSA 1978.

For arrest under forest-fire laws, see 30-32-3 NMSA 1978.

As to arrests for traffic offenses, see 66-8-122 NMSA 1978 et seq.

For docketing of action, issuance of summons or warrant, see 5-207 and 5-208 NMRA.

Repeals and reenactments. — Laws 1972, ch. 71, § 7, repealed 41-1-4, 1953 Comp., relating to officers empowered to issue warrants, and enacted a new 31-1-4 NMSA 1978.

Compiler's notes. — Some of the following annotations are from cases and opinions which were decided under former law.

Constitutional provision and statute in pari materia. — Constitutional provisions relative to arrests, searches and seizures (art. II, § 10) and former statute were to be considered in pari materia, their general purpose being preservation of personal security and liberty of individual, by forbidding issuance of a warrant except upon probable cause shown under oath, and by preventing as far as possible the institution of baseless and unfounded prosecution. State v. Trujillo, 33 N.M. 370, 266 P. 922 (1928).

Complaint subscribed by sheriff was insufficient to invoke jurisdiction of district court where crimes charged therein, burglary and grand larceny, purported in each case to be a felony. State v. Chacon, 62 N.M. 291, 309 P.2d 230 (1957).

Validity of complaint insignificant. — Where appellant was arrested by drugstore owner who apprehended appellant outside his store in early morning, then appellant was properly arrested without warrant on probable cause, and appellant was properly before the justice of the peace (now magistrate court) regardless of validity of final complaint of the store owner. State v. Hudson, 78 N.M. 228, 430 P.2d 386 (1967).

Purpose of warrant is to acquire jurisdiction over the person of the accused - to bring him before the court. State v. Barreras, 64 N.M. 300, 328 P.2d 74 (1958).

Section read with common-law rule. — This section (former 41-3-1, 1953 Comp.) was to be read in connection with the common-law rule that an officer may arrest, without a warrant, a person whom he has probable cause to believe guilty of a felony. State v. Barreras, 64 N.M. 300, 328 P.2d 74 (1958).

Definition of warrant. — 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 court, to answer, or be examined, touching some offense which he is charged with having committed. State v. Barreras, 64 N.M. 300, 328 P.2d 74 (1958).

Warrants in criminal cases may issue on Sunday, and that setting and accepting appearance bonds are ministerial acts that may be performed on Sunday, in felony cases as well as misdemeanor cases. 1961-62 Op. Att'y Gen. No. 61-56.

Warrant valid. — A warrant based upon a detective's information and belief affidavit and approved in writing by the assistant district attorney was valid. State v. Slicker, 79 N.M. 677, 448 P.2d 478 (Ct. App. 1968).

When no warrant required. — Under former 41-3-8, the issuance of a warrant was not necessary to confer jurisdiction over the person of an accused who had already been arrested with probable cause and who was under confinement. State v. Barreras, 64 N.M. 300, 328 P.2d 74 (1958).

Arrest of both defendant and party named in warrant upheld. — Arrest was proper where defendant was in company of party for whom arresting officer had warrant and officer had been advised that party for whom he had warrant was accompanied by man answering defendant's description when alleged acts were committed. State v. Gibby, 78 N.M. 414, 432 P.2d 258 (1967).

"Process" defined. — The term "process," as used in Subsections D and E, is meant to be generic, including, summons, writs, warrants, and orders. State v. Gutierrez, 102 N.M. 726, 699 P.2d 1078 (Ct. App. 1985).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 5 Am. Jur. 2d Arrest § 10 et seq.; 21 Am. Jur. 2d Criminal Law §§ 408, 409.

Constitutionality of statute or ordinance authorizing arrest, 1 A.L.R. 585.

Advice or order from superior officers as defense to a police officer for making an unlawful arrest, 3 A.L.R. 647.

Liability for loss of property left unprotected when owner was wrongfully arrested, 5 A.L.R. 362.

Effect of defects or informalities as to appearance or return day in summons or notice of commencement of action, 6 A.L.R. 841, 97 A.L.R. 746.

Time at which an arrest is made as affecting its legality or liability for making it, 9 A.L.R. 1350.

Who may take affidavit as basis for warrant of arrest, 16 A.L.R. 923.

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.

Unlawfulness of arrest as affecting jurisdiction or power of court to proceed in criminal case, 96 A.L.R. 982.

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.

Prohibition as remedy in case of defective indictment, information or complaint, 102 A.L.R. 298.

Error in naming the offense covered by allegations of specific facts in complaint, indictment or information, 121 A.L.R. 1088.

Summons as amendable to cure error or omission in naming or describing court or judge, or place of court's convening, 154 A.L.R. 1019.

Immunity of nonresident defendant in criminal case from service of process, 20 A.L.R.2d 163.

Omission of signature of issuing officer on civil process or summons as affecting jurisdiction of the person, 37 A.L.R.2d 928.

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.

Privilege of party, witness or attorney, while going to, attending or returning from court as extending to privilege from arrest for crime, 74 A.L.R.2d 592.

Delay between filing of complaint or other charge and arrest of accused as violation of right to speedy trial, 85 A.L.R.2d 980.

Mistake or error in middle initial or middle name of party as vitiating or invalidating civil process, summons, or the like, 6 A.L.R.3d 1179.

Criminal liability for obstructing process as affected by invalidity or irregularity of the process, 10 A.L.R.3d 1146.

Civil liability of one making false or fraudulent return of process, 31 A.L.R.3d 1393.

Modern status of rules as to right to forcefully resist illegal arrest, 44 A.L.R.3d 1078.

Right to resist excessive force used in accomplishing lawful arrest, 77 A.L.R.3d 281.

Individual's right to present complaint or evidence of criminal offense to grand jury, 24 A.L.R.4th 316.

Liability for false arrest or imprisonment under warrant as affected by mistake as to identity of person arrested, 39 A.L.R.4th 705.

Validity of arrest made in reliance upon uncorrected or outdated warrant list or similar police records, 45 A.L.R.4th 550.

Media's dissemination of material in violation of injunction or restraining order as contempt - federal cases, 91 A.L.R. Fed. 270.

6A C.J.S. Arrest §§ 43 to 60; 22 C.J.S. Criminal Law §§ 324 to 338.

31-1-5. Procedures on arrest; reports.

A. Following arrest, any person accused of a crime is entitled to have reasonable opportunity to make three telephone calls beginning not later than twenty minutes after the time of arrival at a police station, sheriff's office or other place of detention. Nothing in this subsection limits any right to make telephone calls at any time later than twenty minutes after the time of arrival at the police station.

B. Every accused shall be brought before a court having jurisdiction to release the accused without unnecessary delay.

C. Within eighteen hours after the arrest of any person accused with having committed a misdemeanor or a felony, the arresting law enforcement agency shall notify the district attorney of:

(1) the name of the accused; and

(2) the offense charged.

History: 1953 Comp., § 41-1-5, enacted by Laws 1973, ch. 73, § 3.

ANNOTATIONS

Repeals. — Laws 1972, ch. 71, § 18, repeals former 41-1-5, 1953 Comp., relating to issuance of warrants for fugitives.

Effect of denial to accused to make calls. — Absent prejudice, no basis for release is established by denial of use of a telephone after arrest. State v. Gibby, 78 N.M. 414, 432 P.2d 258 (1967)(decided under former law).

Burden of proof. — Once a defendant proves that he has been denied access to a telephone for an extended period of time, the state bears the burden of proving a reasonable basis for the denial. State v. Bearly, 112 N.M. 50, 811 P.2d 83 (1991).

31-1-6. Citation in lieu of arrest without a warrant.

A. A law enforcement officer who arrests a person without a warrant for a petty misdemeanor or any offense under Chapter 17 NMSA 1978, may offer the person arrested the option of accepting a citation to appear in lieu of taking him to jail.

B. A citation issued pursuant to this section shall contain the name and address of the cited person, the offense charged and the time and place to appear. Unless the person requests an earlier date, the time specified in the citation shall be at least three days after issuance of the citation. The law enforcement officer shall explain the person's rights not to sign a citation, the effect of not signing the citation, the effect of signing the citation and the effect of failing to appear at the time and place stated on the citation.

C. The person's signature on the citation constitutes a promise to appear at the time and place stated in the citation. One copy of the citation to appear shall be delivered to the person cited, and the law enforcement officer shall keep a duplicate copy which he shall file with the court as soon as practicable.

D. A citation issued pursuant to this section is a valid complaint if the person receiving it appears in court.

E. It is a petty misdemeanor for a person signing a citation not to appear at the time and place stated in the citation regardless of the disposition of the offense for which the citation was issued. A written promise to appear may be complied with by appearance of counsel.

History: 1953 Comp., § 41-1-6, enacted by Laws 1973, ch. 73, § 4; 1987, ch. 114, § 1.

ANNOTATIONS

The 1987 amendment, effective June 19, 1987, in Subsection A, inserted "or any offense under Chapter 17 NMSA 1978" following "without a warrant a petty misdemeanor."

Repeals. — Laws 1972, ch. 71, § 18, repeals former 41-1-6, 1953 Comp., relating to process issued to the sheriff.

Legislative intent. — This statute is not mandatory, but the apparent legislative intent is that citations should be issued in most petty misdemeanor cases. 1973 Op. Att'y Gen. No. 73-46.

No right to counsel upon issuance of citation. — A person issued a citation and placed under custodial arrest for driving while under the influence of intoxicating liquor does not have a constitutional right to counsel immediately following a breath alcohol test since it did not amount to initiation of judicial criminal proceedings or prosecutorial commitment, nor was the period following administration of the test a critical stage. State v. Sandoval, 101 N.M. 399, 683 P.2d 516 (Ct. App. 1984).

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. — 5 Am. Jur. 2d Arrest § 37 et seq.

22 C.J.S. Criminal Law § 334.

31-1-7. Arrest without warrant; liability.

A. Notwithstanding the provisions of any other law to the contrary, a peace officer may arrest a person and take that person into custody without a warrant when the officer is at the scene of a domestic disturbance and has probable cause to believe that the person has committed an assault or a battery upon a household member. As used in this section, "household member" means a spouse, former spouse, family member, including a relative, parent, present or former step-parent, present or former in-law, child or co-parent of a child, or a person with whom the victim has had a continuing personal relationship. Cohabitation is not necessary to be deemed a household member for purposes of this section.

B. No peace officer shall be held criminally or civilly liable for making an arrest pursuant to this section, provided he acts in good faith and without malice.

C. Whether or not an arrest is made pursuant to this section, a peace officer may remain with the victim and assist the victim in getting to a shelter or receiving proper medical attention.

History: Laws 1979, ch. 178, § 1; 1995, ch. 23, § 2.

ANNOTATIONS

Cross references. — For Tort Claims Act, see 41-4-1 to 41-4-27 NMSA 1978.

The 1995 amendment, effective June 16, 1995, in Subsection A, deleted "family or" preceding "household member" at the end of the first sentence, rewrote the second sentence which read "As used in this section, 'family or household members' means spouses, former spouses or persons residing with each other", and added the third sentence.

Law reviews. — For article, "Survey of New Mexico Law, 1979-80: Domestic Relations and Juvenile Law," see 11 N.M.L. Rev. 134 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Validity, in state criminal trial, of arrest without warrant by identified peace officer outside of jurisdiction, when not in fresh pursuit, 34 A.L.R.4th 328.

Validity of arrest made in reliance upon uncorrected or outdated warrant list or similar police records, 45 A.L.R.4th 550.

Burden of proof in civil action for using unreasonable force in making arrest as to reasonableness of force used, 82 A.L.R.4th 598.

ARTICLE 1A
DNA Evidence

31-1A-1. Repealed.

ANNOTATIONS

Repeals. — Laws 2003 ch. 27, § 2 repeals 31-1A-1 NMSA 1978, effective July 1, 2003. For provisions of former section, see 2002 Cumulative Supplement. For post-conviction consideration of DNA evidence, see 31-1A-2 NMSA 1978.

31-1A-2. Procedures for post-conviction consideration of DNA evidence; requirements.

A. A person convicted of a felony, who claims that DNA evidence will establish his innocence, may petition the district court of the judicial district in which he was convicted to order the disclosure, preservation, production and testing of evidence that can be subjected to DNA testing. A copy of the petition shall be served on the district attorney for the judicial district in which the district court is located.

B. As a condition to the district court's acceptance of his petition, the petitioner shall:

(1) submit to DNA testing ordered by the district court; and

(2) authorize the district attorney's use of the DNA test results to investigate all aspects of the case that the petitioner is seeking to reopen.

C. The petitioner shall show, by a preponderance of the evidence, that:

(1) he was convicted of a felony;

(2) evidence exists that can be subjected to DNA testing;

(3) the evidence to be subjected to DNA testing:

(a) has not previously been subjected to DNA testing;

(b) has not previously been subjected to the type of DNA testing that is now being requested; or

(c) was previously subjected to DNA testing, but was tested incorrectly or interpreted incorrectly;

(4) the DNA testing he is requesting will be likely to produce admissible evidence; and

(5) identity was an issue in his case or that if the DNA testing he is requesting had been performed prior to his conviction and the results had been exculpatory, there is a reasonable probability that the petitioner would not have pled guilty or been found guilty.

D. If the petitioner satisfies the requirements set forth in Subsection C of this section, the district court shall appoint counsel for the petitioner, unless the petitioner waives counsel or retains his own counsel.

E. After reviewing a petition, the district court may dismiss the petition, order a response by the district attorney or issue an order for DNA testing.

F. The district court shall order all evidence secured that is related to the petitioner's case and that could be subjected to DNA testing. The evidence shall be preserved during the pendency of the proceeding. The district court may impose appropriate sanctions, including dismissal of the petitioner's conviction or criminal contempt, if the court determines that evidence was intentionally destroyed after issuance of the court's order to secure evidence.

G. The district court shall order DNA testing if the petitioner satisfies the requirements set forth in Subsections B and C of this section.

H. If the results of the DNA testing are exculpatory, the district court may set aside the petitioner's judgment and sentence, may dismiss the charges against the petitioner with prejudice, may grant the petitioner a new trial or may order other appropriate relief.

I. The cost of DNA testing ordered pursuant to this section shall be borne by the state or the petitioner, as the district court may order in the interest of justice. Provided, that a petitioner shall not be denied DNA testing because of his inability to pay for the cost of DNA testing. Testing under this provision shall only be performed by a laboratory that meets the minimum standards of the national DNA index system.

J. The provisions of this section shall not be interpreted to limit:

(1) other circumstances under which a person may obtain DNA testing; or

(2) post-conviction relief a petitioner may seek pursuant to other provisions of law.

K. The petitioner shall have the right to appeal a district court's denial of the requested DNA testing, a district court's final order on a petition or a district court's decision regarding relief for the petitioner. The state shall have the right to appeal any final order issued by the district court. An appeal shall be filed by a party within thirty days to the court of appeals.

L. The state 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.

M. The state may dispose of evidence before the expiration of the time period set forth in Subsection K of this section 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.

N. As used in this section, "DNA" means deoxyribonucleic acid.

History: Laws 2003, ch. 27, § 1; 2005, ch. 28, § 1.

ANNOTATIONS

Delayed repeals. — Laws 2003, ch. 27, § 3, repeals 31-1A-2, as enacted by Laws 2003, ch. 27, § 1, effective July 1, 2006.

Effective dates. — Laws 2003, ch. 27, § 4 makes the act effective July 1, 2003.

Compiler's notes. — Laws 2005, ch. 28, § 1 repeals Laws 2003, ch. 27, § 3, which would have repealed this section, effective July 1, 2006.

ARTICLE 2
Fresh Pursuit

31-2-1. [Officer of another state entering this state in fresh pursuit; power to arrest and hold fugitive.]

Any member of a duly organized state, county or municipal peace unit of another state of the United States who enters this state in fresh pursuit, and continues within this state in such fresh pursuit, of a person in order to arrest him on the ground that he is believed to have committed a felony in such other state, shall have the same authority to arrest and hold such person in custody, as has any member of any duly organized state, county or municipal peace unit of this state, to arrest and hold in custody a person on the ground that he is believed to have committed a felony in this state.

History: Laws 1937, ch. 12, § 1; 1941 Comp., § 42-201; 1953 Comp., § 41-2-1.

ANNOTATIONS

Compiler's notes. — A few states have adopted a Uniform Law on Close Pursuit. Others have adopted a Uniform Law on Fresh Pursuit. However, the Commissioners on Uniform State Laws have not as yet promulgated or approved uniform laws on the subject.

Section grants same right to New Mexico officer. — An officer of the New Mexico state police, while in hot pursuit of a person who has committed a felony in New Mexico, may enter the state of Colorado, arrest such a person there and return him to New Mexico without obtaining extradition. 1959-60 Op. Att'y Gen. No. 60-66.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 5 Am. Jur. 2d Arrest § 72.

Validity, in state criminal trial, of arrest without warrant by identified peace officer outside of jurisdiction, when not in fresh pursuit, 34 A.L.R.4th 328.

6A C.J.S. Arrest § 18.

31-2-2. [Arrested person taken before magistrate; hearing; commitment or discharge.]

If an arrest is made in this state by an officer of another state in accordance with the provisions of Section 1 [31-2-1 NMSA 1978] of this act he shall without unnecessary delay take the person arrested before a magistrate of the county in which the arrest was made, who shall conduct a hearing for the purpose of determining the lawfulness of the arrest. If the magistrate determines the arrest was lawful he shall commit the person arrested to await for a reasonable time the issuance of an extradition warrant by the

governor of this state. If the magistrate determines that the arrest was unlawful he shall discharge the person arrested.

History: Laws 1937, ch. 12, § 2; 1941 Comp., § 42-202; 1953 Comp., § 41-2-2.

ANNOTATIONS

Cross references. — For extradition, see 31-4-1 NMSA 1978 et seq.

31-2-3. [Construction of act; power to arrest not limited.]

Section 1 [31-2-1 NMSA 1978] of this act shall not be construed so as to make unlawful any arrest in this state which would otherwise be lawful.

History: Laws 1937, ch. 12, § 3; 1941 Comp., § 42-203; 1953 Comp., § 41-2-3.

31-2-4. ["State" includes District of Columbia.]

For the purpose of this act [31-2-1 to 31-2-7 NMSA 1978] the word "state" shall include the District of Columbia.

History: Laws 1937, ch. 12, § 4; 1941 Comp., § 42-204; 1953 Comp., § 41-2-4.

31-2-5. ["Fresh pursuit" defined.]

The term "fresh pursuit" as used in this act [31-2-1 to 31-2-7 NMSA 1978] shall include fresh pursuit as defined by the common law, and also the pursuit of a person who has committed a felony or who is reasonably suspected of having committed a felony. It shall also include the pursuit of a person suspected of having committed a supposed felony, though no felony has actually been committed, if there is reasonable ground for believing that a felony has been committed. Fresh pursuit as used herein shall not necessarily imply instant pursuit, but pursuit without unreasonable delay.

History: Laws 1937, ch. 12, § 5; 1941 Comp., § 42-205; 1953 Comp., § 41-2-5.

31-2-6. [Certified copies of law to be distributed.]

Upon the passage and approval by the governor of this act [31-2-1 to 31-2-7 NMSA 1978] it shall be the duty of the secretary of state (or other officer) to certify a copy of this act to the executive department of each of the states of the United States.

History: Laws 1937, ch. 12, § 6; 1941 Comp., § 42-206; 1953 Comp., § 41-2-6.

31-2-7. [Citation of act.]

This act [31-2-1 to 31-2-7 NMSA 1978] may be cited as the Uniform Act on Fresh Pursuit.

History: Laws 1937, ch. 12, § 8; 1941 Comp., § 42-207; 1953 Comp., § 41-2-7.

ANNOTATIONS

Compiler's notes. — See same catchline in notes following 31-2-1 NMSA 1978.

31-2-8. Authority to arrest misdemeanant; fresh pursuit.

A. Any county sheriff or municipal police officer who leaves his jurisdictional boundary while in fresh pursuit of a misdemeanant whom he would otherwise have authority to arrest shall have the authority to arrest that misdemeanant anywhere within this state and return him to the jurisdiction in which the fresh pursuit began without further judicial process.

B. For purposes of this section, "fresh pursuit of a misdemeanant" means the pursuit of a person who has committed a misdemeanor in the presence of the pursuing officer. Fresh pursuit shall not necessarily imply instant pursuit, but pursuit without unreasonable delay.

History: Laws 1981, ch. 102, § 1.

ANNOTATIONS

Commission of petty misdemeanor. — This section authorizes pursuit of a suspect into another county, whether the pursuing officer has reasonable cause to believe the suspect guilty of a misdemeanor or only of a petty misdemeanor. County of Los Alamos v. Tapia, 109 N.M. 736, 790 P.2d 1017 (1990).

Extraterritorial arrest for D.W.I. — This section authorizes a municipal police officer to make an extraterritorial arrest for D.W.I. Incorporated County v. Johnson, 108 N.M. 633, 776 P.2d 1252 (1989).

Arrest on Indian reservation. — An arrest of a Navajo citizen on the Navajo Reservation by a city police officer following a car chase that started off the reservation was illegal since the officer failed to follow tribal extradition procedures; the misdemeanor fresh pursuit law did not affect the legality of the arrest. City of Farmington v. Benally, 119 N.M. 496, 892 P.2d 629 (Ct. App. 1995).

ARTICLE 3
Bail

31-3-1. Designee to accept bail.

Any statutory provision or rule of court governing the release of an accused may be carried out by a responsible person designated by the court.

History: 1953 Comp., § 41-3-1, enacted by Laws 1972, ch. 71, § 8.

ANNOTATIONS

Cross references. — For right to bail, prevention of infliction of cruel and unusual punishment, see N.M. Const., art. II, § 13.

For bail proceedings, authorization of habeas corpus, see 44-1-23 NMSA 1978.

As to certiorari to committing magistrate, see 44-1-24 NMSA 1978.

As to Bail Bondsmen Licensing Law, see Chapter 59A, Article 51 NMSA 1978.

For right to bail, under the Rules of Criminal Procedure, see Rule 5-401 NMRA.

As to justification of compensated sureties, see Rule 5-401B NMRA.

For bail, release provisions in magistrate court, see Rule 6-401 NMRA.

As to appearance of defendant, see Rule 6-501 NMRA.

Repeals and reenactments. — Laws 1972, ch. 71, § 8, repeals 41-3-1, 1953 Comp., relating to the magistrate informing the defendant of the charge and his rights, and enacts the above section.

Generally. — Provisions with regard to admitting to bail in criminal cases are based upon the idea that a person accused of a crime shall be admitted to bail until adjudged guilty by the court of last resort to him; however, this right is not absolute under all circumstances. Tijerina v. Baker, 78 N.M. 770, 438 P.2d 514 (1968)(decided under former law).

Bail within judge's discretion. — Former section did not make it compulsory for judge to grant bail, but vested in such judge a discretion. Ex parte Towndrow, 20 N.M. 631, 151 P. 761 (1915).

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).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 8A Am. Jur. 2d Bail and Recognizance § 1 et seq.

Constitutional right to bail pending appeal from conviction, 19 A.L.R. 807, 77 A.L.R. 1235.

Acknowledgment of bail bond in open court, necessity of, 38 A.L.R. 1108.

Bail pending appeal from conviction, 45 A.L.R. 458.

Amount of bail required in criminal action, 53 A.L.R. 399.

Lien or encumbrance on his real property as affecting qualifications of surety on bail bond, 56 A.L.R. 1097.

Arresting one who has been released on bail, 62 A.L.R. 462.

Factors in fixing amount of bail in criminal cases, 72 A.L.R. 801.

Delay in taking before magistrate or denial of opportunity to give bail as supporting action for false imprisonment, 79 A.L.R. 13.

Disciplinary power of court in respect of suretyship in judicial proceedings, 91 A.L.R. 889.

Specific crime, necessity of reference to, in bail bond, 103 A.L.R. 535.

Rape as bailable offense, 118 A.L.R. 1115.

Mandamus to compel judge or other officer to grant accused bail or to accept proffered sureties, 23 A.L.R.2d 803.

Statutes relating to sexual psychopaths, 24 A.L.R.2d 350.

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.

Funds deposited in court in lieu of bail as subject of garnishment, 1 A.L.R.3d 936.

Insanity of accused as affecting right to bail in criminal case, 11 A.L.R.3d 1385.

Validity, construction, and application of statutes regulating bail bond business, 13 A.L.R.3d 618.

Pretrial preventive detention by state court, 75 A.L.R.3d 956.

Application of state statutes establishing pretrial release of accused on personal recognizance as presumptive form of release, 78 A.L.R.3d 780.

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.

Liability of surety on bail bond taken without authority, 27 A.L.R.4th 246.

8 C.J.S. Bail; Release and Detention Pending Proceedings §§ 4 to 9, 14, 15, 17 to 30, 33 to 41, 43 to 58, 62, 64, 66, 67, 69 to 75, 81.

31-3-2. Failure to appear; forfeiture of bail bonds.

A. Whenever any person fails to appear at the time and place fixed by the terms of recognizance, the court may issue a warrant for his arrest.

B. Whenever a person fails to appear at the time and place fixed by the terms of his bail bond, the court:

(1) may issue a warrant for his arrest; and

(2) may declare a forfeiture of the bail. If the court declares a forfeiture, it shall:

(a) declare such forfeiture at the time of nonappearance;

(b) give written notice thereof to the surety within four working days of declaration; and

(c) issue a bench warrant for the person's arrest.

C. The court may direct that a forfeiture be set aside, upon such conditions as the court may impose, if it appears that justice does not require the enforcement of the forfeiture.

D. When a forfeiture has not been set aside, the court shall on motion enter a judgment of default, and execution may issue thereon. By entering into a bail bond, the obligors submit to the jurisdiction of the court and irrevocably appoint the clerk of the court as their agent upon whom papers affecting their liability may be served. Liability of the surety may be enforced on motion without the necessity of an independent action.

E. Notice of the motion to enter a judgment of default may be served pursuant to the rules of criminal procedure or may be served on the clerk of the court, who shall forthwith mail copies to the obligors at their last known address. The notice shall require the sureties to appear on or before a given date and show cause why judgment shall not be entered against them for the amount of the bail bond or recognizance. If good cause is not shown, the court may then enter judgment against the obligors on the recognizance, for such sum as it sees fit, not exceeding the penalty fixed by the bail bond or recognizance.

F. When a judgment has been rendered against the defendant or surety for the whole or part of the penalty of a forfeited recognizance, the court rendering such judgment shall remit the amount thereof when, after such rendition, the accused has been arrested and surrendered to the proper court to be tried on such charge or to answer the judgment of the court, provided that the apprehension of the accused in some way was aided by the surety's efforts or by information supplied by the surety.

G. If any amount remains unpaid ten days after entry of judgment, the court may issue execution for satisfaction of judgment.

H. In the event that an obligor does not possess property in this state sufficient to satisfy a judgment against it for the whole or part of the penalty of a forfeited recognizance, the court entering judgment against the obligor on the recognizance shall send written notification to the superintendent of insurance. Immediately upon receipt of such written notification and pursuant to Section 46-6-4 NMSA 1978, the superintendent of insurance shall inform the obligor that unless the judgment is paid or an appeal, writ of error or supersedeas is taken within thirty days of the rendition of the judgment or decree, such obligor shall forfeit all right to do business in this state. If timely appeal, writ of error or supersedeas is not taken, the superintendent of insurance shall immediately take whatever steps necessary to revoke the right of the obligor to do business in this state.

History: 1953 Comp., § 41-3-2, enacted by Laws 1972, ch. 71, § 9; 1973, ch. 215, § 1; 1987, ch. 228, § 1; 1993, ch. 159, § 1.

ANNOTATIONS

Repeals and reenactments. — Laws 1972, ch. 71, § 9, repealed 41-3-2, 1953 Comp., relating to defendant being permitted to send for counsel, and enacted a new 31-3-2 NMSA 1978.

The 1987 amendment, effective June 19, 1987, added all of the language following "bail" in Subsection A(2), made minor stylistic changes in Subsection D, and substituted "shall remit" for "may in its discretion remit or reduce" in Subsection E while adding the proviso at the end of that subsection.

The 1993 amendment, effective June 18, 1993, rewrote former Subsection A as present Subsections A and B and redesignated former Subsections B through G accordingly.

Compiler's notes. — Many of the following annotations are from cases which were decided under former law.

Purpose of bail is to secure defendant's attendance to submit to the punishment to be imposed by the court. State v. Cotton Belt Ins. Co., 97 N.M. 152, 637 P.2d 834 (1981).

Bail is subject to forfeiture until such time as the defendant surrenders himself to the authorities to serve his sentence. State v. Cotton Belt Ins. Co., 97 N.M. 152, 637 P.2d 834 (1981).

Court's discretion in ordering forfeiture. — The court must exercise its discretion in determining whether to order forfeiture of the entire amount of the bond. State v. Amador, 98 N.M. 270, 648 P.2d 309 (1982).

Refund of forfeited bond. — Despite the conflict between Rule 7-406 NMRA and Subsection F of this section, a metropolitan court judge may refund a forfeited bond to a bondsman who is able to apprehend a defendant and bring her back to court, as the conflict concerns substantive law over which the statute controls. 1989 Op. Att'y Gen. No. 89-12.

Order forfeiting bond must include finding that defendant failed to appear. — The order forfeiting bond was fatally defective because of the failure to include therein a finding that the defendant (principal on the bond) failed to appear. State v. Barboa, 64 N.M. 5, 322 P.2d 337 (1958).

And no bail discharge because principal imprisoned in another state. — If the performance of a recognizance is rendered impossible by the imprisonment of the principal in another state, it is not such an act of law as will discharge bail. State v. United Bonding Ins. Co., 81 N.M. 154, 464 P.2d 884 (1970).

Surety's responsibilities begin upon prisoner's release. — A prisoner released on bail is regarded as being transferred from the custody of the public officials charged with his confinement to that of the sureties on his bail bond or recognizance. The sureties are then charged with the duty of producing him to answer the charges against him at the proper time and are liable for a failure to do so, unless the failure is excused for reasons which the courts regard as adequate. State v. United Bonding Ins. Co., 81 N.M. 154, 464 P.2d 884 (1970).

Principal must fail to respond before surety found in default. — There must be a finding of a failure of the principal to answer or appear upon the calling of his case for trial or other court action, or otherwise to fail to respond to the court before any default on the undertaking of the surety can be ordered by the court. State v. United Bonding Ins. Co., 81 N.M. 154, 464 P.2d 884 (1970).

Ceremonial calling dispensed with in principal's absence. — Notice to the surety on a bail bond is sufficient notice to the principal and to require a ceremonial calling out of the principal's name when his absence is obvious and that fact acknowledged in open court by the bail would be useless. Thus the court's order to forfeit the bond was valid. State v. Hathaway, 81 N.M. 159, 464 P.2d 889 (1970).

Obligation of surety is to suffer forfeiture if the principal does not, after notice to him or the surety, respond to the judgment and sentence and final commitment of the court. State v. United Bonding Ins. Co., 81 N.M. 154, 464 P.2d 884 (1970).

Authority of magistrate court to set aside forfeiture judgment. — Subsection F is an exception to the "continuing jurisdiction" rule. The language of the subsection clearly indicates that the legislature intended to affirmatively grant magistrate courts the discretion to set aside a forfeiture judgment, and remit all or part of the penalty. State v. Ramirez, 97 N.M. 125, 637 P.2d 556 (1981).

No mitigation of judgment until principal surrenders. — Once judgment of forfeiture is entered and the amount fixed, the court has no occasion to mitigate the amount of the judgment it has previously entered, unless the principal is "surrendered to proper court to be tried on such charges, or to answer the judgment of said court." State v. United Bonding Ins. Co., 81 N.M. 154, 464 P.2d 884 (1970).

Relief in the form of remittitur is discretionary and will be reviewed only for abuse of discretion. State v. Cotton Belt Ins. Co., 97 N.M. 152, 637 P.2d 834 (1981).

Action on recognizance civil in nature. — Actions on recognizances, though normally pursued in the criminal causes of action, are actually independent civil proceedings brought by the state against appellants pursuant to statute. State v. United Bonding Ins. Co., 81 N.M. 154, 464 P.2d 884 (1970).

Effect of prosecution of bond liability. — Where a bond has been declared forfeited on nonappearance of the principal in a criminal case, and the enforcement of the bond liability is prosecuted in a civil action, transfer of the criminal case to another court will not affect the jurisdiction of the first court to determine the enforcement of the forfeiture. State v. United Bonding Ins. Co., 81 N.M. 154, 464 P.2d 884 (1970).

Security for restitution disallowed. — There is no authorization under this section for requiring security for restitution as a condition of bail pending appeal. State v. Montoya, 116 N.M. 297, 861 P.2d 978 (Ct. App. 1993).

Bondsman thwarted by actions of another jurisdiction. — Considering the purposes of bail and the policy to encourage bondsmen to enter into bail contracts, it is unjust to enrich the state treasury when a bondsman has been diligent in his efforts to apprehend and bring back for trial a defendant but has been thwarted by the actions of another sovereign jurisdiction. State v. Amador, 98 N.M. 270, 648 P.2d 309 (1982).

Law reviews. — For annual survey of New Mexico law relating to civil procedure, see 13 N.M.L. Rev. 251 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 8 Am. Jur. 2d Bail and Recognizance § 109 et seq.

Insanity of principal as relieving bail for his nonappearance, 7 A.L.R. 394.

Induction of principal into military or naval service as exonerating his bail for his nonappearance, 8 A.L.R. 371, 147 A.L.R. 1428, 151 A.L.R. 1462, 153 A.L.R. 1431.

Variance between name in bail bond and in judgment of forfeiture, 20 A.L.R. 411.

Constitutionality of statute relieving against forfeiture of bail or recognizance, 43 A.L.R. 1233.

Escape of principal during his detention on separate charge as affecting liability of bail, 45 A.L.R. 1037.

Right of bail to relief from forfeiture of bond or recognizance in event of subsequent surrender or production of principal, 84 A.L.R. 420.

Relief from forfeiture, excuse for failure of accused to appear which will entitle surety to, 84 A.L.R. 440.

Arraignment and plea, failure of judgment or order forfeiting bail, or deposit in lieu thereof, to recite, 90 A.L.R. 298.

Failure to appear, and the like, resulting in forfeiture or conditional forfeiture of bail, as affecting right to second admission to bail in same noncapital criminal case, 29 A.L.R.2d 945.

Bail jumping after conviction, failure to surrender or appear for sentencing and the like, as contempt, 34 A.L.R.2d 1100.

Death of principal as exoneration of sureties on bail or appearance bond, 63 A.L.R.2d 830.

Limitation of actions, enforceability of bail bond or recognizance against surety where, at time it was filed, prosecution of principal was barred by, 75 A.L.R.2d 1431.

Governor's authority to remit forfeited bail bond, 77 A.L.R.2d 988.

Appealability of order relating to forfeiture of bail, 78 A.L.R.2d 1180.

Funds deposited in court in lieu of bail as subject of garnishment, 1 A.L.R.3d 936.

Dismissal or vacation of indictment as terminating liability or obligation of surety on bail bond, 18 A.L.R.3d 1354.

Liability of surety on bail bond taken without authority, 27 A.L.R.4th 246.

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 surety's liability under bail bond of principal's incarceration in other jurisdiction, 33 A.L.R.4th 663.

Bail: effect on surety's liability under bail bond of principal's subsequent incarceration in same jurisdiction, 35 A.L.R.4th 1192.

State statutes making default on bail a separate criminal offense, 63 A.L.R.4th 1064.

Forfeiture of bail for breach of conditions of release other than that of appearance, 68 A.L.R.4th 1082.

8 C.J.S. Bail; Release and Detention Pending Proceedings §§ 118 to 190.

31-3-3. Surrender of principal by surety.

A. When a surety desires to be discharged from the obligation of its bail bond, the surety may arrest the accused and deliver him to the sheriff of the county in which the action against the accused is pending.

B. The surety shall, at the time of surrendering the accused, deliver to the sheriff a certified copy of the order admitting the accused to bail and a certified copy of the bail bond. Delivery of these documents shall be sufficient authority for the sheriff to receive and retain the accused until he is otherwise bailed or discharged.

C. Upon the delivery of the accused as provided in this section, the surety may apply to the court for an order discharging him from liability as surety; and upon satisfactory proof being made that this section has been complied with, the court shall enter an order discharging the surety from liability.

D. This section shall not apply to a paid surety as defined by Section 31-3-4 NMSA 1978.

History: 1953 Comp., § 41-3-3, enacted by Laws 1972, ch. 71, § 10.

ANNOTATIONS

Repeals and reenactments. — Laws 1972, ch. 71, § 10, repeals 41-3-3, 1953 Comp., relating to examination of case by magistrate, and enacts the above section.

Obligation terminates upon delivery to sheriff. — By statute, the bail has power to take and deliver the principal at any time to the sheriff and thus be relieved of its

obligation. State v. United Bonding Ins. Co., 81 N.M. 154, 464 P.2d 884 (1970)(decided under former law).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 8 Am. Jur. 2d Bail and Recognizance § 80 et seq.

Surrender of principal by sureties on bail bond, 3 A.L.R. 180, 73 A.L.R. 1369.

Right of bail to relief from forfeiture of bond or recognizance in event of subsequent surrender or production of principal, 84 A.L.R. 420.

Dismissal or vacation of indictment as terminating liability or obligation of surety on bail bond, 18 A.L.R.3d 1354.

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 subsequent incarceration in same jurisdiction, 35 A.L.R.4th 1192.

8 C.J.S. Bail; Release and Detention Pending Proceedings §§ 136 to 139.

31-3-4. Paid sureties.

A. A "paid surety" is a surety that has taken money, property or other consideration to act as a surety for the accused.

B. When a paid surety desires to be discharged from the obligation of its bond, it may arrest the accused and deliver him to the sheriff of the county in which the action against the accused is pending.

C. The paid surety shall, at the time of surrendering the accused, deliver to the sheriff a certified copy of the order admitting the accused to bail and a certified copy of the bail bond. Delivery of these documents shall be sufficient authority for the sheriff to receive and retain the accused until he may be brought before the court.

D. A paid surety may be released from the obligation of its bond only by an order of the court.

E. The court shall order the discharge of a paid surety if:

(1) there has been a final disposition of all charges against the accused;

(2) the accused is dead;

(3) circumstances have arisen which the surety could not have foreseen at the time it became a paid surety for the accused; or

(4) the contractual agreement between the surety, the principal and the state has terminated.

History: 1953 Comp., § 41-3-4, enacted by Laws 1972, ch. 71, § 11.

ANNOTATIONS

Repeals and reenactments. — Laws 1972, ch. 71, § 11, repeals 41-3-4, 1953 Comp., relating to adjournment of the magistrate's examination of the defendant, and enacts the above section.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 8 Am. Jur. 2d Bail and Recognizance § 80 et seq.

8 C.J.S. Bail; Release and Detention Pending Proceedings §§ 136 to 139.

31-3-5. Approval of bond.

No bond shall be accepted from a paid surety, as defined in Section 31-3-4 NMSA 1978, by a magistrate court or a district court unless executed on a form which has been approved by the supreme court.

History: 1953 Comp., § 41-3-4.1, enacted by Laws 1973, ch. 73, § 5.

31-3-6. Change of venue.

If the defendant is released pending trial and thereafter a change of venue is granted, the defendant shall be bound to appear according to the change of venue and otherwise in accordance with the terms of his recognizance. The sureties on a bail bond shall be bound to deliver the defendant in accordance with the change of venue without the necessity of giving a new bail bond.

History: 1953 Comp., § 41-3-5, enacted by Laws 1972, ch. 71, § 12.

ANNOTATIONS

Repeals and reenactments. — Laws 1972, ch. 71, § 12, repeals 41-3-5, 1953 Comp., relating to disposition of defendant, by the magistrate, in case of an adjournment, and enacts the above section.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 8 Am. Jur. 2d Bail and Recognizance § 117.

8 C.J.S. Bail; Release and Detention Pending Proceedings §§ 40, 41, 43 to 49, 140, 141, 143 to 155, 183.

31-3-7. Bail for witness.

If it appears by affidavit that the testimony of a person is material in any felony criminal proceeding and that it may become impracticable to secure his presence by subpoena, the judge may require such person to give bail pursuant to Rules of Criminal Procedure for his appearance as a witness. If the witness fails to give bail pursuant to Rules of Criminal Procedure, the witness may be committed to the custody of the sheriff for a period not to exceed five days within which time his deposition shall be taken as provided by Rules of Criminal Procedure. The court upon good cause shown may extend the time for taking such depositions for a period not exceeding five days. In no case except a first or second degree felony shall any surety be required for the bail of such witness.

History: 1953 Comp., § 41-3-6, enacted by Laws 1972, ch. 71, § 13.

ANNOTATIONS

Repeals and reenactments. — Laws 1972, ch. 71, § 13, repeals 41-3-6, 1953 Comp., relating to commitment forms to be used by the magistrate, and enacts the above section.

Arrest of material witness. — This section does not authorize an arrest of a material witness at the scene of a crime, where there is no evidence that the witness would avoid a subpoena or be unwilling to testify in a subsequent trial. Perkins v. Click, 148 F. Supp. 2d 1177 (D.N.M. 2001).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 81 Am. Jur. 2d Witnesses § 4.

8 C.J.S. Bail; Release and Detention Pending Proceedings §§ 56 to 58, 170 to 174.

31-3-8. Defects in bail or bail bond; effect.

No recognizance, undertaking or bond taken in any criminal proceeding shall be void, nor shall the principal or surety be discharged, from liability thereon for want of form or substance or for omission of any recital or condition or because the same was entered into on Sunday.

History: 1953 Comp., § 41-3-7, enacted by Laws 1972, ch. 71, § 14.

ANNOTATIONS

Repeals and reenactments. — Laws 1972, ch. 71, § 14, repeals 41-3-7, 1953 Comp., relating to the magistrate reading the complaint to the defendant and issuing subpoenas for any required witnesses, and enacts the above section.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 8 Am. Jur. 2d Bail and Recognizance § 51 et seq; §§ 153, 160 to 162.

Variance between name in bail bond and in judgment of forfeiture, 20 A.L.R. 411.

Necessity of reference in bail bond to specific crime, 103 A.L.R. 535.

8 C.J.S. Bail; Release and Detention Pending Proceedings §§ 93 to 106.

31-3-9. Failure to appear; penalty.

A person released pending any proceeding related to the prosecution or appeal of a criminal offense or a probation revocation proceeding who willfully fails to appear before any court or judicial officer as required:

A. is guilty of a fourth degree felony, if he was released in connection with a felony proceeding; or

B. is guilty of a petty misdemeanor, if he was released in connection with a misdemeanor or a petty misdemeanor proceeding.

History: 1953 Comp., § 41-3-8, enacted by Laws 1973, ch. 73, § 6; 1999, ch. 150, § 1.

ANNOTATIONS

The 1999 amendment, effective July 1, 1999, substituted "A" for "Any" and "any proceeding related to the prosecution or appeal of a criminal offense or a probation revocation proceeding" for "trial or appeal in any criminal action" in the first paragraph, substituted "proceeding" for "charge" in Subsection A, and deleted "charge of a" following "in connection with" and added "proceeding" in Subsection B.

Repeals. — Laws 1972, ch. 71, § 18, repeals former 41-3-8, 1953 Comp., relating to procedures in the magistrate court after defendant's arrest.

This section is not unconstitutionally vague. State v. Aranda, 94 N.M. 784, 617 P.2d 173 (Ct. App. 1980).

Only general intent required. — Failure to appear is not a specific intent crime; therefore, rejection of defendant's tendered instruction defining "willfulness" as requiring specific intent to abscond or thwart legal process was not erroneous. State v. Elliott, 2001-NMCA-108, 131 N.M. 390, 37 P.3d 107, cert. quashed, 132 N.M. 288, 47 P.3d 447 (2002).

Sentencing proceedings included. — Failure to appear at sentencing is encompassed by this section, since the word "trial", which formerly appeared in this section, could be construed as including all those proceedings within the district court's jurisdiction, at least through sentencing. State v. Peppers, 110 N.M. 393, 796 P.2d 614 (Ct. App. 1990).

Attorneys lack authority to compel appearance of individuals. — Although attorneys are officers of the court, there is no authority under which attorneys can require the appearance of an individual before a court unless authorized to do so by court process, court rule or enabling legislation. Where no such authorization appeared in the record, defendant who willfully failed to appear in district court after making oral promise to assistant district attorney that he would do so to complete plea bargaining agreement on drug charge was not required to appear for purposes of this section, and could not be convicted under Subsection A. State v. Easterling, 89 N.M. 486, 553 P.2d 1293 (Ct. App. 1976).

No requirement of proving express notice to defendant. — The presence or absence of notice to the defendant may have a bearing at trial on the question of willfulness, depending upon the other facts of the case, but express notice to the defendant is not an independent element, apart from the determination of willfulness, which the state must prove at either the preliminary hearing or at trial. State v. Masters, 99 N.M. 58, 653 P.2d 889 (Ct. App. 1982).

Willful failure to appear is question of fact. — the word "willfully," as used in this section, concerns the defendant's state of mind and is a factual question. State v. Masters, 99 N.M. 58, 653 P.2d 889 (Ct. App. 1982).

Court order failed to compel appearance. — Facts as charged and as elicited at trial simply did not constitute a violation of this section when "strictly construed" against the State because: (1) the trial court's order violated due process in that it was unclear whether or not the defendant was required to appear on the date in question; and (2) courts would not extend punishment to cases that were not plainly within the statutory language used. State v. Hicks, 2002-NMCA-038, 132 N.M. 68, 43 P.3d 1078.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Failure to appear, and the like, resulting in forfeiture or conditional forfeiture of bail, as affecting right to second admission to bail in same noncapital criminal case, 29 A.L.R.2d 945.

State statutes making default on bail a separate criminal offense, 63 A.L.R.4th 1064.

8 C.J.S. Bail; Release and Detention Pending Proceedings §§ 70 to 75.

31-3-10. Termination of liability.

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.

History: 1978 Comp., § 31-3-10, enacted by Laws 1987, ch. 228, § 2.

ANNOTATIONS

Purpose of bail bond. — A bail bond is a type of bond to obtain the release of a person from imprisonment and to secure his appearance before the court. State v. Valles, 2004-NMCA-118, 136 N.M. 429, 99 P.3d 1164.

Statute governs. — Because the bail bond form which the Supreme Court requires sureties to sign when posting bail for a criminal defendant and a statute conflict on when the surety's obligation under the bond terminates, the statute governs. State v. Valles, 2004-NMCA-118, 136 N.M. 429, 99 P.3d 1164.

Surety discharged when defendant found guilty. — With the 1987 enactment of this section, the legislature established that the contractual agreement between surety, the principal and the state was terminated when defendant was found guilty, and the court is therefore required to order the discharge of the surety under 31-3-4 E(4) NMSA 1978. State v. Valles, 2004-NMCA-118, 136 N.M. 429, 99 P.3d 1164.

ARTICLE 3A
Witness Immunity

31-3A-1. Recompiled.

ANNOTATIONS

Recompilations. — Section 31-3A-1 NMSA 1978 is recompiled as 31-6-15 NMSA 1978 by direction of the compilation commission.

ARTICLE 4
Extradition

31-4-1. Definitions.

Where appearing in this act [31-4-1 to 31-4-30 NMSA 1978], the term "governor" includes any person performing the functions of governor by authority of the law of this state. The term "executive authority" includes the governor, and any person performing the functions of governor in a state other than this state. The term "state," referring to a state other than this state, includes any other state or territory, organized or unorganized, of the United States of America. The term "prosecuting attorney" includes

the various district attorneys of this state and their duly appointed, qualified and acting assistants, the attorney general and his duly appointed, qualified and acting assistants.

History: Laws 1937, ch. 65, § 1; 1941 Comp., § 42-1901; 1953 Comp., § 41-19-1.

ANNOTATIONS

Uniform Criminal Extradition Act is constitutional. Ex parte Dalton, 56 N.M. 407, 244 P.2d 790 (1952).

Extradition not required. — The state was not required to extradite defendant from Arizona so as to prevent his classification as a fugitive under 31-21-15 NMSA 1978 and the consequent revocation of probation. State v. McDonald, 113 N.M. 305, 825 P.2d 238 (Ct. App. 1991).

Law reviews. — For comment, "Tribal Control of Extradition from Reservations," see 10 Nat. Resources J. 626 (1970).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 31A Am. Jur. 2d Extradition § 1 et seq.

Right to delay of one arrested on extradition warrant to enable him to present evidence that he is not subject to extradition, 11 A.L.R. 1410.

Meaning of word "similar" in statute as to evidence in extradition proceeding, 17 A.L.R. 102.

Right to try one for an offense other than that named in extradition proceedings, 21 A.L.R. 1405.

One charged with desertion or failure to support wife or child as fugitive from justice, subject to extradition, 32 A.L.R. 1167, 54 A.L.R. 281.

Right to prove alibi or absence from demanding state, 51 A.L.R. 797, 61 A.L.R. 715.

Extradition of juveniles, 73 A.L.R.3d 700.

Application of doctrine of specialty to federal criminal prosecution of accused extradited from foreign country, 112 A.L.R. Fed. 473.

Test of "dual criminality" where extradition to or from foreign nation is sought, 132 A.L.R. Fed. 525.

35 C.J.S. Extradition § 2 et seq.

31-4-2. Fugitives from justice; duty of governor.

Subject to the provisions of this act [31-4-1 to 31-4-30 NMSA 1978], the provisions of the constitution of the United States controlling and any and all acts of congress enacted in pursuance thereof, it is the duty of the governor of this state to have arrested and delivered up to the executive authority of any other state of the United States any person charged in that state with treason, felony or other crime, who has fled from justice and is found in this state.

History: Laws 1937, ch. 65, § 2; 1941 Comp., § 42-1902; 1953 Comp., § 41-19-2.

ANNOTATIONS

Purpose of extradition clause of federal constitution, U.S. Const., art. IV, § 2, is to preclude any state from becoming a sanctuary for fugitives from the justice of another state and thus "balkanize" the administration of criminal justice among the several states. Bazaldua v. Hanrahan, 92 N.M. 596, 592 P.2d 512 (1979).

The intent of the extradition clause to the United States constitution is to enable each state to bring offenders to trial as swiftly as possible in the state where the alleged offense occurred. The purpose of the clause is to prevent any state from becoming a sanctuary for fugitives from justice of another state. State ex rel. Schiff v. Brennan, 99 N.M. 641, 662 P.2d 642 (1983).

Governor's grant of extradition prima facie evidence that constitutional and statutory requirements have been met. Thereafter, the burden shifts to the accused to prove beyond a reasonable doubt in the asylum state that he is not a fugitive from the demanding state. Bazaldua v. Hanrahan, 92 N.M. 596, 592 P.2d 512 (1979).

Courts of asylum state bound by demanding state's judicial determination. — Under U.S. Const., art. IV, § 2, the courts of the asylum state are bound to accept the demanding state's judicial determination of probable cause for arrest since the proceedings of the demanding state are clothed with the traditional presumption of regularity. Bazaldua v. Hanrahan, 92 N.M. 596, 592 P.2d 512 (1979).

Court may not discharge accused arrested under governor's warrant where there is merely contradictory evidence on the subject of his presence in or absence from the demanding state at the time of the alleged crime, as habeas corpus is not the proper proceeding to try the question of alibi or any question as to the guilt or innocence of the accused. Bazaldua v. Hanrahan, 92 N.M. 596, 592 P.2d 512 (1979).

However, no further judicial inquiries, once governor acts on extradition. — Once the governor of an asylum state has acted on a requisition for extradition based on the demanding state's judicial determination that probable cause existed, no further judicial inquiry may be had on that issue in the asylum state. Bazaldua v. Hanrahan, 92 N.M. 596, 592 P.2d 512 (1979).

Review of requisition for extradition. — Once a governor has granted extradition, a court in the asylum state considering release on habeas corpus can do no more than decide: (1) whether the extradition documents on their face are in order; (2) whether the petitioner has been charged with a crime in the demanding state; (3) whether the petitioner is the person named in the request for extradition; and (4) whether the petitioner is a fugitive. Bazaldua v. Hanrahan, 92 N.M. 596, 592 P.2d 512 (1979).

Extradition of juveniles. — See 1973 Op. Att'y Gen. No. 73-14.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 31A Am. Jur. 2d Extradition §§ 22 to 26, 30, 95.

One charged with desertion or failure to support wife or child as fugitive from justice, subject to extradition, 32 A.L.R. 1167, 54 A.L.R. 281.

Extradition of fugitive in custody under charge in asylum state, 42 A.L.R. 585.

One who left demanding state by official permission as a fugitive from justice for purposes of extradition, 67 A.L.R. 1480.

Extradition of escaped or paroled convict, or one at liberty on bail, 78 A.L.R. 419.

Once removed from demanding state or country as a fugitive from justice within contemplation of extradition laws, 85 A.L.R. 118.

One not in demanding state at time of offense, but who afterward entered and left state, as fugitive from justice within extradition law, 91 A.L.R. 1262.

35 C.J.S. Extradition § 7 et seq.

31-4-3. Form of demand.

No demand for the extradition of a person charged with crime in another state shall be recognized by the governor unless in writing, alleging, except in cases arising under Section 6 [31-4-6 NMSA 1978], that the accused was present in the demanding state at the time of the commission of the alleged crime, and that thereafter he fled from the state, and accompanied by a copy of an indictment found or by information supported by affidavit in the state having jurisdiction of the crime, or by a copy of an affidavit made before a magistrate there, together with a copy of any warrant which was issued thereupon; or by a copy of a judgment of conviction or of a sentence imposed in execution thereof, together with a statement by the executive authority of the demanding state that the person claimed has escaped from confinement or has broken the terms of his bail, probation or parole. The indictment, information or affidavit made before the magistrate must substantially charge the person demanded with having committed a crime under the law of that state; and the cpoy [copy] of indictment,

information, affidavit, judgment of conviction or sentence must be authenticated by the executive authority making the demand.

History: Laws 1937, ch. 65, § 3; 1941 Comp., § 42-1903; 1953 Comp., § 41-19-3.

ANNOTATIONS

District court not authorized to review issues beyond scope of demanding documents. — Language in this section requiring the indictment, information or affidavit to "substantially charge the person demanded with having committed a crime" does not authorize the district court to go beyond the charging documents and review issues that should be litigated in the state demanding extradition. Hopper v. State ex rel. Schiff, 101 N.M. 71, 678 P.2d 699 (1984).

Error held harmless where documentation eventually provided. — In a proceeding for a writ of habeas corpus challenging the petitioner's extradition to Ohio, there was no harm in the fact that the parties may have been served with incomplete documentation since the missing documents were eventually provided. Reed v. State ex rel. Ortiz, 1997-NMSC-055, 124 N.M. 129, 947 P.2d 86, rev'd on other grounds, 524 U.S. 151, 118 S. Ct. 1860, 141 L. Ed. 2d 131 (1998).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 31A Am. Jur. 2d Extradition §§ 67 to 89.

Extradition of one who violates parole, 78 A.L.R. 419.

Recitals in rendition warrant as to copy of indictment or affidavit, sufficiency of, 89 A.L.R. 595.

Allegation or proof of presence of accused in demanding state at time of commission of alleged crime or that accused is a fugitive, sufficiency of statements in demanding papers as to, 135 A.L.R. 973.

Statute authorizing extradition of one who commits an act within the state or a third state resulting in a crime in the demanding state, constitutionality, construction and application of, 151 A.L.R. 239.

Modern status of rule relating to jurisdiction of state court to try criminal defendant brought within jurisdiction illegal or as result of fraud or mistake, 25 A.L.R.4th 157.

35 C.J.S. Extradition § 16 et seq.

31-4-4. Governor may investigate case.

When a demand shall be made upon the governor of this state by the executive authority of another state for the surrender of a person so charged with crime, the governor may call upon the attorney general or any prosecuting officer in this state to

investigate or assist in investigating the demand, and to report to him the situation and circumstances of the person so demanded, and whether he ought to be surrendered.

History: Laws 1937, ch. 65, § 4; 1941 Comp., § 42-1904; 1953 Comp., § 41-19-4.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 31A Am. Jur. 2d Extradition § 96.

Mission or motive of defendant in going to asylum state as affecting right to extradite him, 13 A.L.R. 415.

Bar of limitations as proper subject of investigation in extradition proceedings, 77 A.L.R. 902.

Determination in extradition proceedings, or on habeas corpus in such proceedings, whether a crime is charged, 81 A.L.R. 552, 40 A.L.R.2d 1151.

Motive or ulterior purpose of officials demanding or granting extradition as proper subject of inquiry, 94 A.L.R. 1493.

Sanity or insanity or pendency of lunacy proceedings as matters for consideration in extradition proceedings, 114 A.L.R. 693.

35 C.J.S. Extradition §§ 30 to 33.

31-4-5. Extradition of persons imprisoned or awaiting trial in another state or who have left the demanding state under compulsion.

When it is desired to have returned to this state a person charged in this state with a crime, and such person is imprisoned or is held under criminal proceedings then pending against him in another state, the governor of this state may agree with the executive authority of such other state for the extradition of such person before the conclusion of such proceedings or his term of sentence in such other state, upon condition that such person be returned to such other state at the expense of this state as soon as the prosecution in this state is terminated.

The governor of this state may also surrender on demand of the executive authority of any other state any person in this state who is charged in the manner provided in Section 23 [31-4-25 NMSA 1978] of this act with having violated the laws of the state whose executive authority is making the demand, even though such person left the demanding state involuntarily.

History: Laws 1937, ch. 65, § 5; 1941 Comp., § 42-1905; 1953 Comp., § 41-19-5.

ANNOTATIONS

Cross references. — For surrendering to another state a person detained in this state under prosecution or conviction in this state, see 31-4-19 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 31A Am. Jur. 2d Extradition § 152.

Extradition of fugitive in custody under charge in asylum state, 42 A.L.R. 585.

Extradition, as a fugitive from justice, of one who left the demanding state by official permission, 67 A.L.R. 1480.

Determination whether crime is charged, 40 A.L.R.2d 1151.

35 C.J.S. Extradition § 15.

31-4-6. Extradition of persons not present in demanding state at time of commission of crime.

The governor of this state may also surrender, on demand of the executive authority of any other state, any person in this state charged in such other state in the manner provided in Section 3 [31-4-3 NMSA 1978] with committing an act in this state, or in a third state, intentionally resulting in a crime in the state whose executive authority is making the demand, and the provisions of this act [31-4-1 to 31-4-30 NMSA 1978] not otherwise inconsistent, shall apply to such cases, even though the accused was not in that state at the time of the commission of the crime, and has not fled therefrom.

History: Laws 1937, ch. 65, § 6; 1941 Comp., § 42-1906; 1953 Comp., § 41-19-6.

ANNOTATIONS

Proper request by demanding state must be honored. — Extradition demanded by another state for the crime of non-support, properly requested under this section, should be honored by New Mexico if the demanding state has a law making it a crime to fail to support a wife or child when the accused is outside the demanding state at the time of failure to support occurs. 1953-54 Op. Att'y Gen. No. 53-5713.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 31A Am. Jur. 2d Extradition § 28, 29.

One not in demanding state at time of offense, but who afterward entered and left state, as fugitive from justice within extradition law, 91 A.L.R. 1262.

Constitutionality, construction and application of statute authorizing extradition of one who commits an act within the state or a third state resulting in a crime in the demanding state, 151 A.L.R. 239.

35 C.J.S. Extradition § 11.

31-4-7. Issue of governor's warrant of arrest; its recitals.

If the governor decides that the demand should be complied with, he shall sign a warrant of arrest, which shall be sealed with the state seal, and be directed to any peace officer or other person whom he may think fit to entrust with the execution thereof. The warrant must substantially recite the facts necessary to the validity of its issuance.

History: Laws 1937, ch. 65, § 7; 1941 Comp., § 42-1907; 1953 Comp., § 41-19-7.

ANNOTATIONS

Prisoner is not entitled to bail after governor's extradition warrant has been served. State ex rel. Schiff v. Brennan, 99 N.M. 641, 662 P.2d 642 (1983).

Enumeration of rights not required. — A warrant issued in accordance with this section is not required to enumerate the rights contained in Section 31-4-10 NMSA 1978. Johnson v. Shuler, 2001-NMSC-009, 130 N.M. 144, 20 P.3d 126.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 31A Am. Jur. 2d Extradition § 117 to 119.

Sufficiency of recitals in rendition warrant in extradition as regards copy of indictment or affidavit, 89 A.L.R. 595.

35 C.J.S. Extradition §§ 35, 36.

31-4-8. Manner and place of execution.

Such warrant shall authorize the peace officer or other person to whom directed to arrest the accused at any time and any place where he may be found within the state and to command the aid of all peace officers or other persons in the execution of the warrant, and to deliver the accused, subject to the provisions of this act [31-4-1 to 31-4-30 NMSA 1978], to the duly authorized agent of the demanding state.

History: Laws 1937, ch. 65, § 8; 1941 Comp., § 42-1908; 1953 Comp., § 41-19-8.

31-4-9. Authority of arresting officer.

Every such peace officer or other person empowered to make the arrest shall have the same authority, in arresting the accused, to command assistance therein, as peace officers have by law in the execution of any criminal process directed to them, with like penalties against those who refuse their assistance.

History: Laws 1937, ch. 65, § 9; 1941 Comp., § 42-1909; 1953 Comp., § 41-19-9.

31-4-10. Rights of accused person; application for writ of habeas corpus.

No person arrested upon such warrant shall be delivered over to the agent whom the executive authority demanding him shall have appointed to receive him unless he shall first be taken forthwith before a judge of a court of record in this state, who shall inform him of the demand made for his surrender and of the crime with which he is charged, and that he has the right to demand and procure legal counsel; and if the prisoner or his counsel shall state that he or they desire to test the legality of his arrest, the judge of such court of record shall fix a reasonable time to be allowed him within which to apply for a writ of habeas corpus. When such writ is applied for, notice thereof, and of the time and place of hearing thereon, shall be given to the prosecuting officer of the county in which the arrest is made and in which the accused is in custody, and to the said agent of the demanding state.

History: Laws 1937, ch. 65, § 10; 1941 Comp., § 42-1910; 1953 Comp., § 41-19-10.

ANNOTATIONS

Cross references. — For habeas corpus, see 44-1-1 to 44-1-37 NMSA 1978.

Jurisdiction occurs upon arrest on out-of-state charges. — Under this section, the district court does not obtain jurisdiction over the person until after an arrest on the out-of-state charge has been made, so, where there was never an arrest, and the defendant has not suffered any damage, subsequent statutory proceedings for extradition are not precluded by a court's earlier actions without jurisdiction. State v. Nicolini, 91 N.M. 484, 576 P.2d 290 (1978).

Application for writ. — If a fugitive desires to test the legality of his arrest, the judge of the court of record determines a reasonable time within which he is to apply for the writ of habeas corpus. This provision of the extradition act helps assure that a fugitive will not remain incarcerated in the asylum state for an unduly long period of time after arrest under a governor's warrant. 1974 Op. Att'y Gen. No. 74-38.

Law reviews. — For article, "Habeas Corpus in New Mexico," see 11 N.M.L. Rev. 291 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 31A Am. Jur. 2d Extradition §§ 123 to 143.

Right to appeal from order releasing one in extradition proceedings, 5 A.L.R. 1156.

Right of one arrested on extradition warrant to delay to enable him to present evidence that he is not subject to extradition, 11 A.L.R. 1410.

Motive or mission of defendant in going to asylum state as affecting right to extradite him, 13 A.L.R. 415.

Right to try one for offense other than that named in extradition proceedings, 21 A.L.R. 1405.

Right to prove absence from demanding state or alibi on habeas corpus in extradition proceedings, 51 A.L.R. 797, 61 A.L.R. 715.

Bar of limitations as proper subject of investigation in extradition proceedings or in habeas corpus proceedings for release of one sought to be extradited, 77 A.L.R. 902.

Determination in extradition proceedings, or on habeas corpus in such proceedings, whether a crime is charged, 81 A.L.R. 552, 40 A.L.R.2d 1151.

Bond to indemnify public against expense of extradition or other criminal proceedings in event they are unsuccessful as contrary to public policy, 94 A.L.R. 355.

Motive or ulterior purpose of officials demanding or granting extradition as proper subject of inquiry, 94 A.L.R. 1493.

Sanity or insanity or pendency of lunacy proceedings as matters for consideration in extradition proceedings, 114 A.L.R. 693.

Discharge on habeas corpus of one held in extradition proceedings as precluding subsequent extradition proceedings, 33 A.L.R.3d 1443.

35 C.J.S. Extradition § 34.

31-4-11. Penalty for noncompliance with preceding section.

Any officer who shall deliver to the agent for extradition of the demanding state a person in his custody under the governor's warrant, in willful disobedience to the last section [31-4-10 NMSA 1978], shall be guilty of a misdemeanor and, on conviction, shall be fined (not more than $1,000.00 or be imprisoned not more than six months, or both).

History: Laws 1937, ch. 65, § 11; 1941 Comp., § 42-1911; 1953 Comp., § 41-19-11.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — Necessity that demanding state show probable cause to arrest fugitive in extradition proceedings, 90 A.L.R.3d 1074.

31-4-12. Confinement in jail when necessary.

The officer or persons executing the governor's warrant of arrest, or the agent of the demanding state to whom the prisoner may have been delivered, may, when necessary, confine the prisoner in the jail of any county or city through which he may pass; and the keeper of such jail must receive and safely keep the prisoner until the officer or person having charge of him is ready to proceed on his route, such officer or person being chargeable with the expense of keeping.

The officer or agent of a demanding state to whom a prisoner may have been delivered following extradition proceedings in another state, or to whom a prisoner may have been delivered after waiving extradition in such other state, and who is passing through this state with such a prisoner for the purpose of immediately returning such prisoner to the demanding state may, when necessary, confine the prisoner in the jail of any county or city through which he may pass; and the keeper of such jail must receive and safely keep the prisoner until the officer or agent having charge of him is ready to proceed on his route, such officer or agent, however, being chargeable with the expense of keeping; provided, however, that such officer or agent shall produce and show to the keeper of such jail satisfactory written evidence of the fact that he is actually transporting such prisoner to the demanding state after a requisition by the executive authority of such demanding state. Such prisoner shall not be entitled to demand a new requisition while in this state.

History: Laws 1937, ch. 65, § 12; 1941 Comp., § 42-1912; 1953 Comp., § 41-19-12.

ANNOTATIONS

Identification of officer required before he can accept prisoners. — Under the provisions of the Uniform Criminal Extradition Act, 31-4-1 to 31-4-30 NMSA 1978, there is no requirement that guards, as such, be designated by name. It is certain, however, that the sheriff or other designated officer who represents the executive authority of the requisitioning state and is the agent of that state for receipt of prisoners, has to be named and duly accredited as the demanding state's agent before prisoners will be delivered to him. 1961-62 Op. Att'y Gen. No. 61-9.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 31A Am. Jur. 2d Extradition § 58 to 62.

35 C.J.S. Extradition § 67.

31-4-13. Arrest prior to requisition.

Whenever any person within this state shall be charged on the oath of any credible person before any judge or magistrate of this state with the commission of any crime in any other state and, except in cases arising under Section 6 [31-4-6 NMSA 1978] with having fled from justice, or with having been convicted of a crime in that state and having escaped from confinement, or having broken the terms of his bail, probation or parole, or whenever complaint shall have been made before any judge or magistrate in this state setting forth on the affidavit of any credible person in another state that a

crime has been committed in such other state and that the accused has been charged in such state with the commission of the crime, and, except in cases arising under Section 6, has fled from justice, or with having been convicted of a crime in that state and having escaped from confinement, or having broken the terms of his bail, probation or parole, and is believed to be in this state, the judge or magistrate shall issue a warrant directed to any peace officer commanding him to apprehend the person named therein, wherever he may be found in this state, and to bring him before the same or any other judge, magistrate or court who or which may be available in or convenient of access to the place where the arrest may be made, to answer the charge or complaint and affidavit, and a certified copy of the sworn charge or complaint and affidavit upon which the warrant is issued shall be attached to the warrant.

History: Laws 1937, ch. 65, § 13; 1941 Comp., § 42-1913; 1953 Comp., § 41-19-13.

ANNOTATIONS

Prisoner is not entitled to bail after governor's extradition warrant has been served. State ex rel. Schiff v. Brennan, 99 N.M. 641, 662 P.2d 642 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 31A Am. Jur. 2d Extradition § 58 to 62.

35 C.J.S. Extradition § 67.

31-4-14. Arrest without a warrant.

The arrest of a person may be lawfully made also by any peace officer or a private person without a warrant upon reasonable information that the accused stands charged in the courts of a state with a crime punishable by death or imprisonment for a term exceeding one year, but when so arrested the accused must be taken before a judge or magistrate with all practicable speed and complaint must be made against him under oath setting forth the ground for the arrest as in the preceding section [31-4-13 NMSA 1978]; and thereafter his answer shall be heard as if he had been arrested on a warrant.

History: Laws 1937, ch. 65, § 14; 1941 Comp., § 42-1914; 1953 Comp., § 41-19-14.

ANNOTATIONS

Bondsman arresting third party. — Neither the common-law nor statutory authority of a bondsman to make a warrantless arrest of his principal absolves a bondsman of criminal responsibility ensuing from the armed, unauthorized, and forcible entry into the residence of a third party. State v. Lopez, 105 N.M. 538, 734 P.2d 778 (Ct. App. 1986), cert. denied, 479 U.S. 1092, 107 S. Ct. 1305, 94 L. Ed. 2d 160 (1987).

A foreign bondsman must comply with this article in seeking the rearrest of his principal. State v. Lopez, 105 N.M. 538, 734 P.2d 778 (Ct. App. 1986), cert. denied, 479 U.S.

1092, 107 S. Ct. 1305, 94 L. Ed. 2d 160 (1987); Lopez v. McCotter, 875 F.2d 273 (10th Cir.), cert. denied, 493 U.S. 996, 110 S. Ct. 549, 107 L. Ed. 2d 546 (1989).

Retroactive application of *State v. Lopez.* — The decision of the New Mexico court of appeals in *State v. Lopez*, 105 N.M. 538, 734 P.2d 778 (Ct. App. 1986), holding that a foreign bondsman must comply with this article in seeking the rearrest of his principal was so "unexpected" under preexisting law as to prevent its application retroactively. Lopez v. McCotter, 875 F.2d 273 (10th Cir.), cert. denied, 493 U.S. 996, 110 S. Ct. 549, 107 L. Ed. 2d 546 (1989).

31-4-15. Commitment to await requisition; bail.

If from the examination before the judge or magistrate it appears that the person held is the person charged with having committed the crime alleged and, except in cases arising under Section 6 [31-4-6 NMSA 1978], that he has fled from justice, the judge or magistrate must, by a warrant reciting the accusation, commit him to the county jail for such a time not exceeding thirty days and specified in the warrant, as will enable the arrest of the accused to be made under a warrant of the governor on a requisition of the executive authority of the state having jurisdiction of the offense, unless the accused give bail as provided in the next section [31-4-16 NMSA 1978], or until he shall be legally discharged.

History: Laws 1937, ch. 65, § 15; 1941 Comp., § 42-1915; 1953 Comp., § 41-19-15.

ANNOTATIONS

Constitutional basis for extradition not contingent upon right to speedy trial. — United States Const., art. IV, § 2, the basis for extradition, by its terms, is not made contingent upon a sixth amendment right to a speedy trial. State v. Sandoval, 95 N.M. 254, 620 P.2d 1279 (1980).

Concepts of res judicata, double jeopardy and estoppel do not apply to extradition proceedings and are not within the purview of inquiry in an extradition proceeding. State v. Sandoval, 95 N.M. 254, 620 P.2d 1279 (1980).

No bail for parole violators under interstate compact. — The extradition statutes, this section and 31-4-16 NMSA 1978, provide for bail in certain instances. These provisions for bail however, would not apply in the case where the parole board is investigating a parolee being held in jail for parole violation under the terms of the interstate compact. 1957-58 Op. Att'y Gen. No. 57-33.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 31A Am. Jur. 2d Extradition § 58 to 62.

35 C.J.S. Extradition § 67.

31-4-16. Bail; in what cases; conditions of bond.

Unless the offense with which the prisoner is charged is shown to be an offense punishable by death or life imprisonment under the laws of the state in which it was committed, a judge or magistrate in this state may admit the person arrested to bail by bond, with sufficient sureties, and in such sum as he deems proper, conditioned for his appearance before him at a time specified in such bond, and for his surrender, to be arrested upon the warrant of the governor of this state.

History: Laws 1937, ch. 65, § 16; 1941 Comp., § 42-1916; 1953 Comp., § 41-19-16.

ANNOTATIONS

Prisoner is not entitled to bail after governor's extradition warrant has been served. State ex rel. Schiff v. Brennan, 99 N.M. 641, 662 P.2d 642 (1983).

No bail for parole violators under interstate compact. — The extradition statutes, this section and 31-4-15 NMSA 1978, provide for bail in certain instances. These provisions for bail however, would not apply in the case where the parole board is investigating a parolee being held in jail for parole violation under the terms of the interstate compact. 1957-58 Op. Att'y Gen. No. 57-33.

But otherwise for parolees not under compact. — It may be that an out-of-state parolee not under the parole board's supervision under the terms of the interstate compact may be entitled to bail under the extradition provisions. 1957-58 Op. Att'y Gen. No. 57-33.

When right to bail governed by laws of sister state. — New Mexico Const., art. II, § 13, affords the right to bail to all persons charged with or convicted of crime under the laws of the state of New Mexico. A fugitive from justice is charged with or convicted of crime under the laws of a sister state; therefore, it is the constitution and laws of that state which should dictate whether the right to bail exists and in what form. 1974 Op. Att'y Gen. No. 74-38.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 31A Am. Jur. 2d Extradition § 63, 66, 121.

Bond to indemnify public against expense of extradition or other criminal proceedings in event they are unsuccessful as contrary to public policy, 94 A.L.R. 355.

Right of extraditee to bail after issuance of governor's warrant and pending final disposition of habeas corpus claim, 13 A.L.R.5th 118.

35 C.J.S. Extradition § 18.

31-4-17. Extension of time of commitment, adjournment.

If the accused is not arrested under warrant of the governor by the expiration of the time specified in the warrant or bond, a judge or magistrate may discharge him or may recommit him for a further period not to exceed sixty days, or a judge or magistrate judge may again take bail for his appearance and surrender, as provided in Section 16 [31-4-16 NMSA 1978], but within a period not to exceed sixty days after the date of such new bond.

History: Laws 1937, ch. 65, § 17; 1941 Comp., § 42-1917; 1953 Comp., § 41-19-17.

ANNOTATIONS

Constitutional basis for extradition not contingent upon right to speedy trial. — United States Const., art. IV, § 2, the basis for extradition, by its terms, is not made contingent upon a sixth amendment right to a speedy trial. State v. Sandoval, 95 N.M. 254, 620 P.2d 1279 (1980).

Concepts of res judicata, double jeopardy and estoppel do not apply to extradition proceedings and are not within the purview of inquiry in an extradition proceeding. State v. Sandoval, 95 N.M. 254, 620 P.2d 1279 (1980).

31-4-18. Forfeiture of bail.

If the prisoner is admitted to bail, and fails to appear and surrender himself according to the conditions of his bond, the judge, or magistrate, by proper order, shall declare the bond forfeited and order his immediate arrest without warrant if he be within this state. Recovery may be had on such bond in the name of the state as in the case of other bonds given by the accused in criminal proceedings within this state.

History: Laws 1937, ch. 65, § 18; 1941 Comp., § 42-1918; 1953 Comp., § 41-19-18.

31-4-19. Persons under criminal prosecution in this state at time of requisition.

If a criminal prosecution has been instituted against such person under the laws of this state and is still pending, the governor, in his discretion, either may surrender him on demand of the executive authority of another state or hold him until he has been tried and discharged or convicted and punished in this state.

History: Laws 1937, ch. 65, § 19; 1941 Comp., § 42-1919; 1953 Comp., § 41-19-19.

ANNOTATIONS

Cross references. — For obtaining a person detained in another state, under prosecution or conviction, see 31-4-5 NMSA 1978.

For nonwaiver by New Mexico, see 31-4-23 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 35 C.J.S. Extradition § 15.

31-4-20. Guilt or innocence of accused, when inquired into.

The guilt or innocence of the accused as to the crime of which he is charged may not be inquired into by the governor or in any proceeding after the demand for extradition accompanied by a charge of crime in legal form as above provided shall have been presented to the governor, except as it may be involved in identifying the person held as the person charged with the crime.

History: Laws 1937, ch. 65, § 20; 1941 Comp., § 42-1920; 1953 Comp., § 41-19-20.

ANNOTATIONS

Defendant's guilt or innocence reserved for courts of demanding state. — Questions relating to the guilt or innocence of the defendant for the crime charged in the demanding state, logically, are reserved for the courts of the demanding state and may not be inquired into by the courts of the asylum state except for the identity of the person held as being the person charged with the crime. State v. Sandoval, 95 N.M. 254, 620 P.2d 1279 (1980).

And asylum state may not adjudicate defendant's right to speedy trial. — An asylum state, in extradition proceedings, is without authority to adjudicate the defendant's right to a speedy trial in the demanding state upon charges lodged against him there. State v. Sandoval, 95 N.M. 254, 620 P.2d 1279 (1980).

Concepts of res judicata, double jeopardy and estoppel do not apply to extradition proceedings and are not within the purview of inquiry in an extradition proceeding. State v. Sandoval, 95 N.M. 254, 620 P.2d 1279 (1980).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 31A Am. Jur. 2d Extradition §§ 127 to 143.

Necessity and sufficiency of identification of accused as the person charged, to warrant extradition, 93 A.L.R.2d 912.

Necessity that demanding state show probable cause to arrest fugitive in extradition proceedings, 90 A.L.R.3d 1074.

Modern status of rule relating to jurisidictional of state court to try criminal defendant brought within jurisdiction illegally or as result of fraud or mistake, 25 A.L.R.4th 157.

35 C.J.S. Extradition § 29.

31-4-21. Governor may recall warrant or issue alias.

The governor may recall his warrant of arrest or may issue another warrant whenever he deems proper.

History: Laws 1937, ch. 65, § 21; 1941 Comp., § 42-1921; 1953 Comp., § 41-19-21.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 31A Am. Jur. 2d Extradition § 122.

31-4-22. Written waiver of extradition proceedings.

Any person arrested in this state charged with having committed any crime in another state or alleged to have escaped from confinement or broken the terms of his bail, probation or parole may waive the issuance and service of the warrant provided for in Sections 31-4-7 and 31-4-8 NMSA 1978 and all other procedure incidental to extradition proceedings by executing or subscribing in the presence of a magistrate or a judge of a magistrate court or of any court of record within this state a writing which states that he consents to return to the demanding state; provided, however, that before such waiver shall be executed or subscribed by such person it shall be the duty of such judge to inform such person of his rights to the issuance and service of a warrant of extradition and to obtain a writ of habeas corpus as provided for in Section 31-4-10 NMSA 1978.

If and when such consent has been duly executed it shall forthwith be forwarded to the office of the governor of this state and filed therein. The judge shall direct the officer having such person in custody to deliver forthwith such person to the duly accredited agent or agents of the demanding state, and shall deliver or cause to be delivered to such agent or agents a copy of such consent; provided, however, that nothing in this section shall be deemed to limit the rights of the accused person to return voluntarily and without formality to the demanding state, nor shall this waiver procedure be deemed to be an exclusive procedure or to limit the powers, rights or duties of the officers of the demanding state or of this state.

History: Laws 1937, ch. 65, § 25a; 1941 Comp., § 42-1922; 1953 Comp., § 41-19-22; 1981, ch. 258, § 1.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 31A Am. Jur. 2d Extradition § 54, 55, 57.

31-4-23. Nonwaiver by this state.

Nothing in this act [31-4-1 to 31-4-30 NMSA 1978] contained shall be deemed to constitute a waiver by this state of its right, power or privilege to try such demanded person for crime committed within this state, or of its right, power or privilege to regain

custody of such person by extradition proceedings or otherwise for the purpose of trial, sentence or punishment for any crime committed within this state, nor shall any proceedings had under this act which result in, or fail to result in, extradition be deemed a waiver by this state of any of its rights, privileges or jurisdiction in any way whatsoever.

History: Laws 1937, ch. 65, § 25b; 1941 Comp., § 42-1923; 1953 Comp., § 41-19-23.

ANNOTATIONS

Cross references. — For criminal prosecution pending in this state, see 31-4-19 NMSA 1978.

Prosecution continues upon defendant's return. — Jurisdiction to prosecute on forgery charge was not waived when defendant, prior to trial for the charge, was extradited under this section and subsequently returned to the state. State v. Blankenship, 79 N.M. 178, 441 P.2d 218 (Ct. App. 1968).

31-4-24. Fugitives from this state; duty of governors.

Whenever the governor of this state shall demand a person charged with crime or with escaping from confinement or breaking the terms of his bail, probation or parole in this state, from the executive authority of any other state, or from the chief justice or an associate justice of the supreme court of the District of Columbia authorized to receive such demand under the laws of the United States, he shall issue a warrant under the seal of this state, to some agent, commanding him to receive the person so charged if delivered to him and convey him to the proper officer of the county in this state in which the offense was committed.

History: Laws 1937, ch. 65, § 22; 1941 Comp., § 42-1924; 1953 Comp., § 41-19-24.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 31A Am. Jur. 2d Extradition §§ 95 to 103, 114 to 122.

35 C.J.S. Extradition §§ 35, 36.

31-4-25. Application for issuance of requisition; by whom made; contents.

A. When the return to this state of a person charged with crime in this state is required, the prosecuting attorney shall present to the governor his written application for a requisition for the return of the person charged, in which application shall be stated the name of the person so charged, the crime charged against him, the approximate time, place and circumstances of its commission, the state in which he is believed to be,

including the location of the accused therein, at the time the application is made and certifying that, in the opinion of the said prosecuting attorney, the ends of justice require the arrest and return of the accused to this state for trial and that the proceeding is not instituted to enforce a private claim.

B. When the return to this state is required of a person who has been convicted of a crime in this state and has escaped from confinement or broken the terms of his bail, probation or parole, the prosecuting attorney of the county in which the offense was committed, the parole board, or the warden of the institution or sheriff of the county, from which escape was made, shall present to the governor a written application for a requisition for the return of such person, in which application shall be stated the name of the person, the crime of which he was convicted, the circumstances of his escape from confinement or of the breach of the terms of his bail, probation or parole, the state in which he is believed to be, including the location of the person therein at the time application is made.

C. The application shall be verified by affidavit, shall be executed in duplicate and shall be accompanied by two certified copies of the indictment returned, or information and affidavit filed or of the complaint made to the judge of magistrate, stating the offense with which the accused is charged, or of the judgment of conviction or of the sentence. The prosecuting officer, parole board, warden or sheriff may also attach such further affidavits and other documents in duplicate as he shall deem proper to be submitted with such application. One copy of the application, with the action of the governor indicated by endorsement thereon, and one of the certified copies of the indictment, complaint, information and affidavits, or of the judgment of conviction or of the sentence shall be filed in the office of the secretary of state to remain of record in that office. The other copies of all papers shall be forwarded with the governor's requisition.

History: Laws 1937, ch. 65, § 23; 1941 Comp., § 42-1925; 1953 Comp., § 41-19-25.

31-4-26. Costs and expenses.

When the punishment of the crime shall be the confinement of the criminal in the penitentiary, the expenses shall be paid out of the state treasury, on the certificate of the governor and warrant of the auditor; and in all other cases they shall be paid out of the county treasury in the county wherein the crime is alleged to have been committed.

History: Laws 1937, ch. 65, § 24; 1941 Comp., § 42-1926; 1953 Comp., § 41-19-26.

ANNOTATIONS

Includes extradition of juveniles. — The costs of extraditing a juvenile from another state who stands charged in New Mexico with the commission of a crime, are governed by this section. 1973 Op. Att'y Gen. No. 73-14.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 35 C.J.S. Extradition § 20.

31-4-27. Immunity from service of process in certain civil actions.

A person brought into this state by, or after waiver of, extradition based on a criminal charge shall not be subject to service of personal process in civil actions arising out of the same facts as the criminal proceedings for which he is being or has been returned, until he has been convicted in the criminal proceedings, or, if acquitted, until he has had reasonable opportunity to return to the state from which he was extradited.

History: Laws 1937, ch. 65, § 25; 1941 Comp., § 42-1927; 1953 Comp., § 41-19-27; Laws 1975, ch. 69, § 1.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 31A Am. Jur. 2d Extradition § 159.

Immunity of nonresident defendant in criminal case from service of process, 20 A.L.R.2d 163.

31-4-28. No right of asylum; no immunity from other criminal prosecutions while in this state.

After a person has been brought back to this state by, or after waiver of, extradition proceedings, he may be tried in this state for other crimes which he may be charged with having committed here as well as that specified in the requisition for his extradition.

History: Laws 1937, ch. 65, § 26; 1941 Comp., § 42-1928; 1953 Comp., § 41-19-28.

ANNOTATIONS

Due process clause of federal constitution is not violated by this section. 1953-54 Op. Att'y Gen. No. 53-5767.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 31A Am. Jur. 2d Extradition § 153, 157.

Right to try one for an offense other than that named in extradition proceedings, 21 A.L.R. 1405.

31-4-29. Interpretation.

The provisions of this act [31-4-1 to 31-4-30 NMSA 1978] shall be so interpreted and construed as to effectuate its general purposes to make uniform the law of those states which enact it.

History: Laws 1937, ch. 65, § 27; 1941 Comp., § 42-1929; 1953 Comp., § 41-19-29.

31-4-30. Short title.

This act [31-4-1 to 31-4-30 NMSA 1978] may be cited as the Uniform Criminal Extradition Act.

History: Laws 1937, ch. 65, § 30; 1941 Comp., § 42-1930; 1953 Comp., § 41-19-30.

31-4-31. Transfer under treaty; governor.

When a treaty is in effect between the United States and a foreign country providing for the transfer of convicted criminal offenders who are citizens or nationals of foreign countries to the foreign countries of which they are citizens or nationals, the governor is authorized, subject to the terms of such treaty, to act on behalf of the state of New Mexico and to consent to the transfer of the convicted criminal offender.

History: 1978 Comp., § 31-4-31, enacted by Laws 1978, ch. 156, § 1.

ARTICLE 5
Interstate Compacts

31-5-1 to 31-5-3. Repealed.

ANNOTATIONS

Repeals. — Laws 2001, ch. 322, art XV, repeals 31-5-1 through 31-5-3 NMSA 1978, as enacted by Laws 1937, ch. 10, §§ 1 and 2, and Laws 1959, ch. 34, § 1, regarding Uniform Act for Out-of-State Parolee Supervision, effective June 15, 2001. For provisions of the former sections, see 2000 Replacement Pamphlet.

31-5-4. [Western Interstate Corrections Compact; form.]

The Western Interstate Corrections Compact is enacted into law and entered into on behalf of New Mexico with any and all other states legally joining therein in a form substantially as follows:

WESTERN INTERSTATE CORRECTIONS COMPACT

Article I - Purpose and Policy

The party states, desiring by common action to improve their institutional facilities and provide programs of sufficiently high quality for the confinement, treatment and rehabilitation of various types of offenders, declare that it is the policy of each of the

party states to provide such facilities and programs on a basis of cooperation with one another, thereby serving the best interests of such offenders and of society. The purpose of this compact is to provide for the development and execution of such programs of cooperation for the confinement, treatment and rehabilitation of offenders.

Article II - Definitions

As used in this compact, unless the context clearly requires otherwise:

A. "state" means a state of the United States, the territory of Hawaii, or, subject to the limitation contained in Article VII, Guam.

B. "sending state" means a state party to this compact in which conviction was had.

C. "receiving state" means a state party to this compact to which an inmate is sent for confinement other than a state in which conviction was had.

D. "inmate" means a male or female offender who is under sentence to or confined in a prison or other correctional institution.

E. "institution" means any prison, reformatory or other correctional facility, including but not limited to a facility for the mentally ill or mentally defective, in which inmates may lawfully be confined.

Article III - Contracts

A. Each party state may make one or more contracts with any one or more of the other party states for the confinement of inmates on behalf of a sending state in institutions situated within receiving states. Any such contract shall provide for:

(1) its duration.

(2) payments to be made to the receiving state by the sending state for inmate maintenance; extraordinary medical and dental expenses, and any participation in or receipts by inmates of rehabilitative or correctional services, facilities, programs or treatment not reasonably included as part of normal maintenance.

(3) participation in programs of inmate employment, if any; the disposition or crediting of any payments received by inmates on account thereof; and the crediting of proceeds from or disposal of any products resulting therefrom.

(4) delivery and retaking of inmates.

(5) such other matters as may be necessary and appropriate to fix the obligations, responsibilities and rights of the sending and receiving states.

B. Prior to the construction or completion of construction of any institution or addition thereto by a party state, any other party state or states may contract therewith for the enlargement of the planned capacity of the institution or addition thereto, or for the inclusion therein of particular equipment or structures, and for the reservation of a specific percentum of the capacity of the institution to be kept available for use by inmates of the sending state or states so contracting. Any sending state so contracting may, to the extent that moneys are legally available therefor, pay to the receiving state, a reasonable sum as consideration for such enlargement of capacity, or provision of equipment or structures, and reservation of capacity. Such payment may be in a lump sum or in installments as provided in the contract.

C. The terms and provisions of this compact shall be a part of any contract entered into by the authority of [this compact] or pursuant thereto, and nothing in any such contract shall be inconsistent therewith.

Article IV - Procedures and Rights

A. Whenever the duly constituted judicial or administrative authorities in a state party to this compact, and which has entered into a contract pursuant to Article III, shall decide that confinement in, or transfer of an inmate to, an institution within the territory of another party state is necessary in order to provide adequate quarters and care or desirable in order to provide an appropriate program of rehabilitation or treatment, said officials may direct that the confinement be within an institution within the territory of said other party state, the receiving state to act in that regard solely as agent for the sending state.

B. The appropriate officials of any state party to this compact shall have access, at all reasonable times, to any institution in which it has a contractual right to confine inmates for the purpose of inspecting the facilities thereof and visiting such of its inmates as may be confined in the institution.

C. Inmates confined in an institution pursuant to the terms of this compact shall at all times be subject to the jurisdiction of the sending state and may at any time be removed therefrom for transfer to a prison or other institution within the sending state, for transfer to another institution in which the sending state may have a contractual or other right to confine inmates, for release on probation or parole, for discharge or for any other purpose permitted by the laws of the sending state; provided that the sending state shall continue to be obligated to such payments as may be required pursuant to the terms of any contract entered into under the terms of Article III.

D. Each receiving state shall provide regular reports to each sending state on the inmates of that sending state in institutions pursuant to this compact including a conduct record of each inmate and certify said record to the official designated by the sending state, in order that each inmate may have the benefit of his or her record in determining and altering the disposition of said inmate in accordance with the law which may obtain

in the sending state and in order that the same may be a source of information for the sending state.

E. All inmates who may be confined in an institution pursuant to the provisions of this compact shall be treated in a reasonable and humane manner and shall be cared for and treated equally with such similar inmates of the receiving state as may be confined in the same institution. The fact of confinement in a receiving state shall not deprive any inmate so confined of any legal rights which said inmate would have had if confined in an appropriate institution of the sending state.

F. Any hearing or hearings to which an inmate confined pursuant to this compact may be entitled by the laws of the sending state may be had before the appropriate authorities of the sending state, or of the receiving state if authorized by the sending state. The receiving state shall provide adequate facilities for such hearings as may be conducted by the appropriate officials of a sending state. In the event such hearings [hearing] or hearings are had before officials of the receiving state, the governing law shall be that of the sending state and a record of the hearing or hearings as prescribed by the sending state shall be made. Said record together with any recommendations of the hearing officials shall be transmitted forthwith to the official or officials before whom the hearing would have been had if it had taken place in the sending state. In any and all proceedings had pursuant to the provisions of this subdivision, the officials of the receiving state shall act solely as agents of the sending state and no final determination shall be made in any matter except by the appropriate officials of the sending state. Costs of records made pursuant to this subdivision shall be borne by the sending state.

G. Any inmate confined pursuant to this compact shall be released within the territory of the sending state unless the inmate, and the sending and receiving states, shall agree upon release in some other place. The sending state shall bear the cost of such return to its territory.

H. Any inmate confined pursuant to the terms of this compact shall have any and all rights to participate in and derive any benefits or incur or be relieved of any obligations or have such obligations modified or his status changed on account of any action or proceeding in which he could have participated if confined in any appropriate institution of the sending state located within such state.

I. The parent, guardian, trustee or other person or persons entitled under the laws of the sending state to act for, advise or otherwise function with respect to any inmate shall not be deprived of or restricted in his exercise of any power in respect of any inmate confined pursuant to the terms of this compact.

Article V - Acts Not Reviewable in Receiving State; Extradition

A. Any decision of the sending state in respect of any matter over which it retains jurisdiction pursuant to this compact shall be conclusive upon and not reviewable within the receiving state, but if at the time the sending state seeks to remove an inmate from

an institution in the receiving state there is pending against the inmate within such state any criminal charge or if the inmate is suspected of having committed within such state a criminal offense, the inmate shall not be returned without the consent of the receiving state until discharged from prosecution or other form of proceeding, imprisonment or detention for such offense. The duly accredited officers of the sending state shall be permitted to transport inmates pursuant to this compact through any and all states party to this compact without interference.

B. An inmate who escapes from an institution in which he is confined pursuant to this compact shall be deemed a fugitive from the sending state and from the state in which the institution is situated. In the case of an escape to a jurisdiction other than the sending or receiving state, the responsibility for institution of extradition proceedings shall be that of the sending state, but nothing contained herein shall be construed to prevent or affect the activities of officers and agencies of any jurisdiction directed toward the apprehension and return of an escapee.

Article VI - Federal Aid

Any state party to this compact may accept federal aid for use in connection with any institution or program, the use of which is or may be affected by this compact or any contract pursuant hereto and any inmate in a receiving state pursuant to this compact may participate in any such federally aided program or activity for which the sending and receiving states have made contractual provision provided that if such program or activity is not part of the customary correctional regimen the express consent of the appropriate official of the sending state shall be required therefor.

Article VII - Entry into Force

This compact shall enter into force and become effective and binding upon the states so acting when it has been enacted into law by any two contiguous states from among the states of Alaska, Arizona, California, Colorado, Hawaii, Idaho, Montana, Nebraska, Nevada, New Mexico, Oregon, Utah, Washington and Wyoming. For the purposes of this article, Alaska and Hawaii shall be deemed contiguous to each other; to any and all of the states of California, Oregon and Washington; and to Guam. Thereafter, this compact shall enter into force and become effective and binding as to any other of said states, or any other state contiguous to at least one party state upon similar action by such state. Guam may become party to this compact by taking action similar to that provided for joinder by any other eligible party state and upon the consent of congress to such joinder. For the purposes of this article, Guam shall be deemed contiguous to Alaska, Hawaii, California, Oregon and Washington.

Article VIII - Withdrawal and Termination

This compact shall continue in force and remain binding upon a party state until it shall have enacted a statute repealing the same and providing for the sending of formal written notice of withdrawal from the compact to the appropriate officials of all other

party states. An actual withdrawal shall not take effect until two years after the notices provided in said statute have been sent. Such withdrawal shall not relieve the withdrawing state from its obligations assumed hereunder prior to the effective date of withdrawal. Before the effective date of withdrawal, a withdrawing state shall remove to its territory, at its own expense, such inmates as it may have confined pursuant to the provisions of this compact.

Article IX - Other Arrangements Unaffected

Nothing contained in this compact shall be construed to abrogate or impair any agreement or other arrangement which a party state may have with a nonparty state for the confinement, rehabilitation or treatment of inmates nor to repeal any other laws of a party state authorizing the making of cooperative institutional arrangements.

Article X - Construction and Severability

The provisions of this compact shall be liberally construed and shall be severable. If any phrase, clause, sentence or provision of this compact is declared to be contrary to the constitution of any participating state or of the United States or the applicability thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this compact and the applicability thereof to any government, agency, person or circumstance shall not be affected thereby. If this compact shall be held contrary to the constitution of any state participating therein, the compact shall remain in full force and effect as to the remaining states and in full force and effect as to the state affected as to all severable matters.

History: 1953 Comp., § 41-20-11, enacted by Laws 1959, ch. 112, § 1.

ANNOTATIONS

Cross references. — For filing interstate compacts with supreme court librarian, see 14-3-20 NMSA 1978.

Interstate compacts are specifically treated in 14-3-20 NMSA 1978 (interstate compacts). State v. Ellis, 95 N.M. 427, 622 P.2d 1047 (Ct. App. 1980).

But State Rules Act is inapplicable to interstate agreements. State v. Ellis, 95 N.M. 427, 622 P.2d 1047 (Ct. App. 1980).

State does not have valid transfer agreement within Arizona. — Due to the fact that an exhaustive search of the supreme court library found only one contract for a term from April 24, 1973, to June 30, 1974, and a renewal for July 1, 1975, to June 30, 1976, New Mexico does not have a valid agreement with Arizona concerning transfers of prisoners. State v. Ellis, 95 N.M. 427, 622 P.2d 1047 (Ct. App. 1980).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 60 Am. Jur. 2d Penal and Correctional Institutions §§ 148 to 152.

Right of state or federal prisoner to credit for time served in another jurisdiction before delivery to state or federal authorities, 18 A.L.R.2d 511, 90 A.L.R.3d 408.

31-5-5. Inmate commitment or transfer.

The secretary of corrections may commit or transfer an inmate to any institution in or outside New Mexico if New Mexico has entered into a contract or contracts for the confinement of inmates in the institution pursuant to Article III of the Western Interstate Corrections Compact [31-5-4 NMSA 1978].

History: 1953 Comp., § 41-20-12, enacted by Laws 1959, ch. 112, § 2; 1985, ch. 119, § 1.

ANNOTATIONS

The 1985 amendment added the catchline, substituted "The secretary of corrections" for "Any court or other agency or officer of this state having power to commit or transfer an inmate (as defined in Article II(d) of the Western Interstate Corrections Compact) to any institution for confinement" at the beginning of the section and substituted "an inmate" for "the inmate" following "transfer."

31-5-6. [Enforcement of compact; submission of reports.]

The courts, departments, agencies and officers of New Mexico and its subdivisions shall enforce this compact [31-5-4 NMSA 1978] and do all things appropriate to the effectuation of its purposes and intent which may be within their respective jurisdictions including but not limited to the making and submission of reports required by the compact.

History: 1953 Comp., § 41-20-13, enacted by Laws 1959, ch. 112, § 3.

31-5-7. [Board of parole; hearings within and outside state.]

The New Mexico board of parole is authorized to hold hearings within and outside New Mexico pursuant to Article IV (F) of the Western Interstate Corrections Compact [31-5-4 NMSA 1978].

History: 1953 Comp., § 41-20-14, enacted by Laws 1959, ch. 112, § 4.

ANNOTATIONS

Cross references. — As to state board of probation and parole referring to corrections division of the criminal justice department, see 33-1-7 NMSA 1978.

31-5-8. [Contracts of governor; approval by board of finance.]

The governor may enter into contracts on behalf of New Mexico to implement the participation of this state in the Western Interstate Corrections Compact pursuant to Article III of the compact [31-5-4 NMSA 1978], provided that any contract entered into by the governor must be approved by the state board of finance before the same shall be binding.

History: 1953 Comp., § 41-20-15, enacted by Laws 1959, ch. 112, § 5.

31-5-9. [Release of inmate from institution outside state; transportation to home or place of employment.]

If an inmate is released from an institution outside of New Mexico, pursuant to Article IV (G) of the compact [31-5-4 NMSA 1978], the superintendent of the penitentiary shall provide him with transportation to either his home or place of employment if in New Mexico, or if neither of these is applicable to any point in New Mexico selected by the inmate.

History: 1953 Comp., § 41-20-16, enacted by Laws 1959, ch. 112, § 6.

ANNOTATIONS

Severability clauses. — Laws 1959, ch. 112, § 7, provides for the severability of the act if any part or application thereof is held invalid.

31-5-10. Interstate Compact on Mentally Disordered Offenders.

The Interstate Compact on Mentally Disordered Offenders is entered into with all other jurisdictions legally joining therein in a form substantially as follows:

INTERSTATE COMPACT ON MENTALLY DISORDERED OFFENDERS

Article 1 - Purpose and Policy

A. The party states, desiring by common action to improve their programs for the care and treatment of mentally disordered offenders, declare that it is the policy of each of the party states to:

(1) strengthen their own programs and laws for the care and treatment of the mentally disordered offender;

(2) encourage and provide for such care and treatment in the most appropriate locations, giving due recognition to the need to achieve adequacy of diagnosis, care, treatment, aftercare and auxiliary services and facilities and, to every

extent practicable, to do so in geographic locations convenient for providing a therapeutic environment;

(3) authorize cooperation among the party states in providing services and facilities, when it is found that cooperative programs can be more effective and efficient than programs separately pursued;

(4) place such mentally disordered offender in a legal status which will facilitate his care, treatment and rehabilitation;

(5) authorize research and training of personnel on a cooperative basis in order to improve the quality or quantity of personnel available for the proper staffing of programs, services and facilities for mentally disordered offenders; and

(6) care for and treat mentally disordered offenders under conditions which will improve the public safety.

B. Within the policies set forth in this article, it is the purpose of this compact to:

(1) authorize negotiation, entry into and operations under contractual arrangements among any two or more of the party states for the establishment and maintenance of cooperative programs in any one or more of the fields for which specific provision is made in the several articles of this compact;

(2) set the limits within which such contracts may operate, so as to assure protection of the civil rights of mentally disordered offenders and protection of the rights and obligations of the public and of the party states; and

(3) facilitate the proper disposition of criminal charges pending against mentally disordered offenders, so that programs for their care, treatment and rehabilitation may be carried on efficiently.

Article 2 - Definitions

As used in this compact:

A. "mentally disordered offender" means a person who has been determined, by adjudication or other method legally sufficient for the purpose in the party state where the determination is made, to be mentally ill and:

(1) is under sentence for the commission of crime; or

(2) who is confined or committed on account of the commission of an offense for which, in the absence of mental illness, the person would be subject to incarceration in a penal or correctional facility;

B. "patient" means a mentally disordered offender who is cared for, treated or transferred pursuant to this compact;

C. "sending state" means a state party to this compact in which the mentally disordered offender was convicted; or the state in which he would be subject to trial on or conviction of an offense except for his mental condition; or, within the meaning of Article 5 of this compact, the state whose authorities have filed a petition in connection with an untried indictment, information or complaint; and

D. "receiving state" means a state party to this compact to which a mentally disordered offender is sent for care, aftercare, treatment or rehabilitation, or within the meaning of Article 5 of this compact, the state in which a petition in connection with an untried indictment, information or complaint has been filed.

Article 3 - Contracts

A. Each party state may make one or more contracts with any one or more of the other party states for the care and treatment of mentally disordered offenders on behalf of a sending state in facilities situated in receiving states, or for the participation of mentally disordered offenders in programs of aftercare on conditional release administered by the receiving state. Any such contract shall provide for:

(1) its duration;

(2) payments to be made to the receiving state by the sending state for patient care, treatment and extraordinary services, if any;

(3) determination of responsibility for ordering or permitting the furnishing of extraordinary services, if any;

(4) participation in compensated activities, if any, available to patients, the disposition or crediting of any payment received by patients on account thereof and the crediting of proceeds from or disposal of any products resulting therefrom;

(5) delivery and retaking of mentally disordered offenders; and

(6) other matters as necessary and appropriate to fix the obligations, responsibilities and rights of the sending and receiving states.

B. Prior to the construction or completion of construction of any facility for mentally disordered offenders or addition to such facility by a party state, any other party state or states may contract therewith for the enlargement of the planned capacity of the facility or addition thereto, or for the inclusion therein of particular equipment or structures, and for the reservation of a specific percentage of the capacity of the facility to be kept available for use by patients of the sending state or states so contracting. Any sending state so contracting may, to the extent that money is legally available therefor, pay to

the receiving state a reasonable sum as consideration for such enlargement of capacity or provision of equipment or structures and reservation of capacity. The payment may be in a lump sum or in installments as provided in the contract.

C. A party state may contract with any one or more other party states for the training of professional or other personnel whose services, by reason of such training, would become available for or be improved in respect of ability to participate in the care and treatment of mentally disordered offenders. Such contracts may provide for such training to take place at any facility being operated or to be operated for the care and treatment of mentally disordered offenders, at any institution or facility having resources suitable for the offering of such training or may provide for the separate establishment of training facilities, provided that no separate establishment shall be undertaken unless it is determined that an appropriate existing facility or institution cannot be found at which to conduct the contemplated program. Any contract entered into pursuant to this subarticle shall provide for:

(1) the administration, financing and precise nature of the program;

(2) the status and employment or other rights of the trainees; and

(3) all other necessary matters.

D. No contract entered into pursuant to this compact shall be inconsistent with any provision thereof.

Article 4 - Procedures and Rights

A. Whenever the duly constituted judicial or administrative authorities in a state party to this compact, and which has entered into a contract pursuant to Article 3, decide that custody, care and treatment in, or transfer of a patient to, a facility within the territory of another party state, or conditional release for aftercare in another party state is necessary in order to provide adequate care and treatment or is desirable in order to provide an appropriate program of therapy or other treatment, or is desirable for clinical reasons, said officials may direct that the custody, care and treatment be within a facility or in a program of aftercare within the territory of the other party state, the receiving state to act in that regard solely as agent for the sending state.

B. The appropriate officials of any state party to this compact shall have access at all reasonable times to any facility in which it has a contractual right to secure care or treatment of patients for the purpose of inspection and visiting such of its patients as may be in the facility or served by it.

C. Except as otherwise provided in Article 6, patients in a facility pursuant to the terms of this compact shall at all times be subject to the jurisdiction of the sending state and may at any time be removed for transfer to a facility within the sending state, for transfer to another facility in which the sending state may have a contractual or other

right to secure care and treatment of patients, for release on aftercare or other conditional status, for discharge or for any other purpose permitted by the laws of the sending state, provided that the sending state shall continue to be obligated to such payments as may be required pursuant to the terms of any contract entered into under the terms of Article 3.

D. Each receiving state shall provide regular reports to each sending state on the patients of that sending state in facilities pursuant to this compact, including a psychiatric and behavioral record of each patient, and certify the record to the official designated by the sending state in order that each patient may have the benefit of his or her record in determining and altering the disposition of the patient in accordance with the law which may obtain in the sending state and in order that the record may be a source of information for the sending state.

E. All patients who may be in a facility or receiving aftercare from a facility pursuant to the provisions of this compact shall be treated in a reasonable and humane manner and shall be cared for, treated and supervised in accordance with the standards pertaining to the program administered at the facility. The fact of presence in a receiving state shall not deprive any patient of any legal rights which the patient would have had if in custody or receiving care, treatment or supervision as appropriate in the sending state.

F. Any hearing or hearings to which a patient present in a receiving state pursuant to this compact may be entitled by the laws of the sending state shall be had before the appropriate authorities of the sending state, or of the receiving state if authorized by the sending state. The receiving state shall provide adequate facilities for such hearings as may be conducted by the appropriate officials of a sending state. In the event such hearing or hearings are had before officials of the receiving state, the governing law shall be that of the sending state and a record of the hearing or hearings as prescribed by the sending state shall be made. The record, together with any recommendations of the hearing officials, shall be transmitted forthwith to the official or officials before whom the hearing would have been had if it had taken place in the sending state. In all proceedings pursuant to the provisions of this subarticle, the officials of the receiving state shall act solely as agents of the sending state, and no final determination shall be made in any matter except by the appropriate officials of the sending state. Costs of records made pursuant to this subarticle shall be borne by the sending state.

G. Any patient confined pursuant to this compact shall be released within the territory of the sending state unless the patient and the sending and receiving states agree upon release in some other place. The sending state shall bear the cost of such return to its territory.

H. Any patient pursuant to the terms of this compact shall be subject to civil process and shall have all rights to sue, be sued and participate in and derive any benefits or incur or be relieved of any obligations or have such obligations modified or his status changed on account of any action or proceeding in which he could have participated if

in any appropriate facility of the sending state or being supervised therefrom, as the case may be, located within such state.

I. The parent, guardian, trustee or other person or persons entitled under the laws of the sending state to act for, advise or otherwise function with respect to any patient shall not be deprived of, or restricted in his exercise of, any power in respect of any patient pursuant to the terms of this compact.

Article 5 - Disposition of Charges

A. Whenever the authorities responsible for the care and treatment of a mentally disordered offender, whether convicted or adjudicated in the state or subject to care, aftercare, treatment or rehabilitation pursuant to a contract, are of the opinion that charges based on untried indictments, informations or complaints in another party state present obstacles to the proper care and treatment of a mentally disordered offender or to the planning or execution of a suitable program for him, such authorities may petition the appropriate court in the state where the untried indictment, information or complaint is pending for prompt disposition thereof. If the mentally disordered offender is a patient in a receiving state, the appropriate authorities of the sending state, upon recommendation of the appropriate authorities in the receiving state, shall, if they concur in the recommendation, file the petition contemplated by this subarticle.

B. The court shall hold a hearing on the petition within thirty days of the filing thereof. The hearing shall be only to determine whether the proper safeguarding and advancement of the public interest, the condition of the mentally disordered offender and the prospects for more satisfactory care, treatment and rehabilitation of him warrant disposition of the untried indictment, information or complaint prior to termination of the defendant's status as a mentally disordered offender in the sending state. The prosecuting officer of the jurisdiction from which the untried indictment, information or complaint is pending, the petitioning authorities and such other persons as the court may determine shall be entitled to be heard.

C. Upon any hearing pursuant to this article, the court may order such adjournments or continuances as may be necessary for the examination or observation of the mentally disordered offender or for the securing of necessary evidence. In granting or denying any such adjournment or continuance, the court shall give primary consideration to the purposes of this compact, and more particularly to the need for expeditious determination of the legal and mental status of a mentally disordered offender so that his care, treatment and discharge to the community only under conditions which will be consonant with the public safety may be implemented.

D. The presence of a mentally disordered offender within a state wherein a petition is pending or being heard pursuant to this article, or his presence within any other state through which he is being transported in connection with such petition or hearing, shall be only for the purposes of this compact, and no court, agency or person shall have or obtain jurisdiction over the mentally disordered offender for any other purpose by

reason of his presence pursuant to this article. The mentally disordered offender shall, at all times, remain in the custody of the sending state. Any acts of officers, employees or agencies of the receiving state in providing or facilitating detention, housing or transportation for the mentally disordered offender shall be only as agents for the sending state.

E. Promptly upon conclusion of the hearing, the court shall dismiss the untried indictment, information or complaint, if it finds that the purposes enumerated in Subarticle B of this article would be served thereby. Otherwise, the court shall make such order with respect to the petition and the untried indictment, information or complaint as may be appropriate in the circumstances and consistent with the status of the defendant as a mentally disordered offender in the custody of, and subject to the jurisdiction of, the sending state.

F. No fact or other matter established or adjudicated at any hearing pursuant to this article or in connection therewith shall be deemed established or adjudicated, nor shall the same be admitted in evidence, in any subsequent prosecution of the untried indictment, information or complaint concerned in a petition filed pursuant to this article unless:

(1) the defendant or his duly empowered legal representative requested or expressly acquiesced in the making of the petition, and was afforded an opportunity to participate in person in the hearing; or

(2) the defendant himself offers or consents to the introduction of the determination or adjudication at such subsequent proceedings.

Article 6 - Acts Not Reviewable in Receiving State; Return

A. Any decision of the sending state in respect of any matter over which it retains jurisdiction pursuant to this compact shall be conclusive upon, and not reviewable within, the receiving state, but, if at the time the sending state seeks to remove a patient from the receiving state, there is pending against the patient within such state any criminal charge, or if the patient is suspected of having committed within such state a criminal offense, the patient shall not be returned without the consent of the receiving state until discharged from prosecution or other form of proceeding, imprisonment or detention for such offense. The duly accredited officers of the sending state shall be permitted to transport patients pursuant to this compact through all states party to this compact without interference.

B. A patient who escapes while receiving care and treatment, or who violates provisions of aftercare by leaving the jurisdiction, or while being detained or transported pursuant to this compact, shall be deemed an escapee from the sending state and from the state in which the facility is situated or the aftercare was being provided. In the case of an escape to a jurisdiction other than the sending or receiving state, the responsibility for return shall be that of the sending state, but nothing contained herein shall be

construed to prevent or affect the activities of officers and agencies of any jurisdiction directed toward the apprehension and return of an escapee.

Article 7 - Federal Aid

Any state party to this compact may accept federal aid for use in connection with any facility or program, the use of which is or may be affected by this compact or any contract pursuant thereto, and any patient in a receiving state pursuant to this compact may participate in any such federally aided program or activity for which the sending and receiving states have made contractual provision, provided that, if such program or activity is not part of the customary regimen of the facility or program, the express consent of the appropriate official of the sending state shall be required therefor.

Article 8 - Entry into Force

This compact shall enter into force and become effective and binding upon the states so acting when it has been enacted into law by any two states from among the states of Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, North Dakota, Ohio, South Dakota and Wisconsin. Thereafter, this compact shall enter into force and become effective and binding as to any other of said states, or any other state, upon similar action by such state.

Article 9 - Withdrawal and Termination

This compact shall continue in force and remain binding upon a party state until it has enacted a statute repealing the compact and providing for the sending of formal written notice of withdrawal from the compact to the appropriate officials of all other party states. An actual withdrawal shall not take effect until two years after the notices provided in the statute have been sent. Such withdrawal shall not relieve the withdrawing state from its obligations assumed hereunder prior to the effective date of withdrawal. Before the effective date of withdrawal, a withdrawing state shall remove to its territory, at its own expense, such patients as it may have in other party states pursuant to the provisions of this compact.

Article 10 - Other Arrangements Unaffected

Nothing contained in this compact shall be construed to abrogate or impair any agreement or other arrangement which a party state may have with a nonparty state for the custody, care, treatment, rehabilitation or aftercare of patients, nor to repeal any other laws of a party state authorizing the making of cooperative arrangements.

Article 11 - Construction and Severability

The provisions of this compact shall be liberally construed and shall be severable. If any phrase, clause, or sentence or provision of this compact is declared to be contrary to the constitution of any participating state or of the United States, or the applicability

thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this compact and the applicability thereof to any government, agency, person or circumstance shall not be affected thereby. If this compact is held contrary to the constitution of any state participating therein, the compact shall remain in effect as to the remaining states and in effect as to the state affected as to all severable matters.

History: 1953 Comp., § 41-20-17, enacted by Laws 1967, ch. 201, § 1.

ANNOTATIONS

Cross references. — For filing interstate compacts with supreme court librarian, see 14-3-20 NMSA 1978.

Rights not created. — Provisions relating to mechanisms by which corrections officials can arrange to transfer inmates needing psychiatric care to an appropriate facility were not meant to create rights enforceable by inmates against state officials; thus, this section did not create a liberty interest subject to due process protections. Riddle v. Mondragon, 83 F.3d 1197 (10th Cir. 1996).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 53 Am. Jur. 2d Mentally Incompetent Persons § 1 et seq.

Extraterritorial effect and recognition of adjudication of competency or incompetency, sanity or insanity, 102 A.L.R. 444.

Prejudicial effect of argument or comment that accused, if acquitted on ground of insanity, would be released from institution to which committed, 44 A.L.R.2d 978.

Right, without judicial proceeding, to arrest and detain one who is, or is suspected of being, mentally deranged, 92 A.L.R.2d 570.

Release of one committed to institution as consequence of acquittal of crime on ground of insanity, 95 A.L.R.2d 54.

Instructions in criminal case in which defendant pleads insanity as to his hospital confinement in the event of acquittal, 11 A.L.R.3d 737, 81 A.L.R.4th 659.

Appealability of orders or rulings, prior to final judgment in criminal case, as to accused's mental competency, 16 A.L.R.3d 714.

Validity of statutory provision for commitment to mental institution of one acquitted of crime on ground of insanity without formal determination of mental condition at time of acquittal, 50 A.L.R.3d 144.

Validity of statutes authorizing asexualization or sterilization of criminals or mental defectives, 53 A.L.R.3d 960.

Jurisdiction of court to permit sterilization of mentally defective person in absence of specific statutory authority, 74 A.L.R.3d 1210.

Right to relief under Federal Civil Rights Act of 1871 (42 U.S.C. § 1983) for alleged wrongful commitment to or confinement in mental hospital, 16 A.L.R. Fed. 440.

31-5-11. Compact authority.

The governor may negotiate and enter into contracts on behalf of this state pursuant to Article 3 of the Interstate Compact on Mentally Disordered Offenders [31-5-10 NMSA 1978] and may perform the contracts. No funds, personnel, facilities, equipment, supplies or materials shall be pledged for, committed or used on account of any such contract unless legally available therefor.

History: 1953 Comp., § 41-20-18, enacted by Laws 1967, ch. 201, § 2.

31-5-12. Agreement on Detainers.

The Agreement on Detainers is entered into with all other jurisdictions legally joining therein in a form substantially as follows:

AGREEMENT ON DETAINERS

Article 1 - Findings

The party states find that charges outstanding against a prisoner, detainers based on untried indictments, informations or complaints, and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party states and the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations or complaints. The party states also find that proceedings with reference to such charges and detainers, when emanating from another jurisdiction, cannot properly be had in the absence of cooperative procedures. It is the further purpose of this agreement to provide such cooperative procedures.

Article 2 - Definitions

As used in this agreement:

A. "state" means a state of the United States, the United States, a territory or possession of the United States, the District of Columbia or the commonwealth of Puerto Rico;

B. "sending state" means a state in which a prisoner is incarcerated at the time that he initiates a request for final disposition pursuant to Article 3 of this agreement or at the time that a request for custody or availability is initiated pursuant to Article 4 of this agreement; and

C. "receiving state" means the state in which trial is to be had on an indictment, information or complaint pursuant to Article 3 or Article 4 of this agreement.

Article 3 - Prisoner's Request for Final Disposition

A. Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party state, and whenever during the continuance of the term of imprisonment there is pending in any other party state any untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within one hundred eighty days after he has caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. The request of the prisoner shall be accompanied by a certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner and any decisions of the state parole agency relating to the prisoner.

B. The written notice and request for final disposition referred to in Subarticle A shall be given or sent by the prisoner to the warden, commissioner of corrections or other official having custody of him who shall promptly forward it together with the certificate to the appropriate prosecuting official and court by registered or certified mail, return receipt requested.

C. The warden, commissioner of corrections or other official having custody of the prisoner shall promptly inform him of the source and contents of any detainer lodged against him and shall also inform him of his right to make a request for final disposition of the indictment, information or complaint on which the detainer is based.

D. Any request for final disposition made by a prisoner pursuant to Subarticle A shall operate as a request for final disposition of all untried indictments, informations or complaints on the basis of which detainers have been lodged against the prisoner from the state to whose prosecuting official the request for final disposition is specifically directed. The warden, commissioner of corrections or other official having custody of the

prisoner shall forthwith notify all appropriate prosecuting officers and courts in the several jurisdictions within the state to which the prisoner's request for final disposition is being sent of the proceeding being initiated by the prisoner. Any notification sent pursuant to this subarticle shall be accompanied by copies of the prisoner's written notice, request and the certificate. If trial is not had on any indictment, information or complaint contemplated hereby prior to the return of the prisoner to the original place of imprisonment, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

E. Any request for final disposition made by a prisoner pursuant to Subarticle A shall also be deemed to be a waiver of extradition with respect to any charge or proceeding contemplated thereby or included therein by reason of Subarticle D, and a waiver of extradition to the receiving state to serve any sentence there imposed upon him, after completion of his term of imprisonment in the sending state. The request for final disposition shall also constitute a consent by the prisoner to the production of his body in any court where his presence may be required in order to effectuate the purposes of this agreement and a further consent voluntarily to be returned to the original place of imprisonment in accordance with the provisions of this agreement. Nothing in this subarticle shall prevent the imposition of a concurrent sentence if otherwise permitted by law.

F. Escape from custody by the prisoner subsequent to his execution of the request for final disposition referred to in Subarticle A shall void the request.

Article 4 - Prosecutor's Request for Final Disposition

A. The appropriate officer of the jurisdiction in which an untried indictment, information or complaint is pending is entitled to have a prisoner against whom he has lodged a detainer and who is serving a term of imprisonment in any party state made available in accordance with Article 5 A of this agreement upon presentation of a written request for temporary custody or availability to the appropriate authorities of the state in which the prisoner is incarcerated, but the court having jurisdiction of the indictment, information or complaint shall have duly approved, recorded and transmitted the request, and there shall be a period of thirty days after receipt by the appropriate authorities before the request is honored, within which period the governor of the sending state may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner.

B. Upon receipt of the officer's written request as provided in Subarticle A, the appropriate authorities having the prisoner in custody shall furnish the officer with a certificate stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner and any decisions of the state parole agency relating to the prisoner. Said authorities simultaneously shall furnish all other officers and appropriate courts in the receiving state who have lodged

detainers against the prisoner with similar certificates and with notices informing them of the request for custody or availability and of the reasons therefor.

C. In respect of any proceeding made possible by this article, trial shall be commenced within one hundred twenty days of the arrival of the prisoner in the receiving state, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

D. Nothing contained in this article shall be construed to deprive any prisoner of any right which he may have to contest the legality of his delivery as provided in Subarticle A, but such delivery may not be opposed or denied on the ground that the executive authority of the sending state has not affirmatively consented to or ordered such delivery.

E. If trial is not had on any indictment, information or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to Article 5 E of this agreement, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

Article 5 - Transfer of Custody

A. In response to a request made under Article 3 or Article 4 of this agreement, the appropriate authority in a sending state shall offer to deliver temporary custody of the prisoner to the appropriate authority in the state where the indictment, information or complaint is pending against the person in order that speedy and efficient prosecution may be had. If the request for final disposition is made by the prisoner, the offer of temporary custody shall accompany the written notice provided for in Article 3 of this agreement. In the case of a federal prisoner, the appropriate authority in the receiving state shall be entitled to temporary custody as provided by this agreement or to the prisoner's presence in federal custody at the place for trial, whichever custodial arrangement may be approved by the custodian.

B. The officer or other representative of a state accepting an offer of temporary custody shall present upon demand:

(1) proper identification and evidence of his authority to act for the state into whose temporary custody the prisoner is to be given; and

(2) a certified copy of the indictment, information or complaint on the basis of which the detainer has been lodged and on the basis of which the request for temporary custody of the prisoner has been made.

C. If the appropriate authority refuses or fails to accept temporary custody of the person, or if an action on the indictment, information or complaint on the basis of which

the detainer has been lodged is not brought to trial within the period provided in Article 3 or Article 4 of this agreement, the appropriate court of the jurisdiction where the indictment, information or complaint had been pending shall enter an order dismissing it with prejudice, and any detainer based thereon shall cease to be of any force or effect.

D. The temporary custody referred to in this agreement shall be only for the purpose of permitting prosecution on the charge or charges contained in one or more untried indictments, informations or complaints which form the basis of the detainer or detainers or for prosecution on any other charge or charges arising out of the same transaction. Except for his attendance at court and while being transported to or from any place at which his presence may be required, the prisoner shall be held in a suitable jail or other facility regularly used for persons awaiting prosecution.

E. At the earliest practicable time consonant with the purposes of this agreement, the prisoner shall be returned to the sending state.

F. During the continuance of temporary custody or while the prisoner is otherwise being made available for trial as required by this agreement, time being served on the sentence shall continue to run but good time shall be earned by the prisoner only if, and to the extent that, the law and practice of the jurisdiction which imposed the sentence may allow.

G. For all purposes other than that for which temporary custody as provided in this agreement is exercised, the prisoner shall be deemed to remain in the custody of and subject to the jurisdiction of the sending state and any escape from temporary custody may be dealt with in the same manner as an escape from the original place of imprisonment or in any other manner permitted by law.

H. From the time that a party state receives custody of a prisoner pursuant to this agreement until the prisoner is returned to the territory and custody of the sending state, the state in which the one or more untried indictments, informations or complaints are pending or in which trial is being had shall be responsible for the prisoner and shall also pay all costs of transporting, caring for, keeping and returning the prisoner. The provisions of this subarticle govern unless the states concerned have entered into a supplementary agreement providing for a different allocation of costs and responsibilities as between or among themselves. Nothing herein contained shall be construed to alter or affect any internal relationship among the departments, agencies and officers of an [and] in the government of a party state or between a party state and its subdivisions as to the payment of costs or responsibilities therefor.

Article 6 - Application

A. In determining the duration and expiration dates of the time periods provided in Articles 3 and 4 of this agreement, the running of the time periods shall be tolled whenever and for as long as the prisoner is unable to stand trial, as determined by the court having jurisdiction of the matter.

B. No provision of this agreement and no remedy made available by this agreement shall apply to any person who is adjudged to be mentally ill.

Article 7 - Compact Administrator

Each state party to this agreement shall designate an officer who, acting jointly with like officers of other party states, shall promulgate rules and regulations to carry out more effectively the terms and provisions of this agreement, and who shall provide, within and without the state, information necessary to the effective operation of this agreement.

Article 8 - Party States

This agreement shall enter into full force and effect as to a party state when such state has enacted the agreement into law. A state party to this agreement may withdraw herefrom by enacting a statute repealing this agreement. However, the withdrawal of any state shall not affect the status of any proceedings already initiated by inmates or by state officers at the time the withdrawal takes effect, nor shall it affect their rights in respect thereof.

Article 9 - Construction

This agreement shall be liberally construed so as to effectuate its purposes. The provisions of this agreement shall be severable, and if any phrase, clause, sentence or provision of this agreement is declared to be contrary to the constitution of any party state or of the United States or the applicability thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this agreement and the applicability thereof to any government, agency, person or circumstance shall not be affected thereby. If this agreement shall be held contrary to the constitution of any state party hereto, the agreement shall remain in full force and effect as to the remaining states and in full force and effect as to the state affected as to all severable matters.

History: 1953 Comp., § 41-20-19, enacted by Laws 1971, ch. 270, § 1.

ANNOTATIONS

Cross references. — For filing interstate compacts with supreme court librarian, see 14-3-20 NMSA 1978.

Agreement not applicable where detainer for sentencing only. — A request for the disposition of an outstanding sentencing is not cognizable under the Interstate Agreement on Detainers; the 180-day requirement of Paragraph A of Article 3 applies only where a detainer for "trial" is present, not where the detainer is only for sentencing. State v. Sparks, 104 N.M. 62, 716 P.2d 253 (Ct. App. 1986).

Probation and parole proceedings. — This section does not apply to probation revocation proceedings. State v. McDonald, 113 N.M. 305, 825 P.2d 238 (Ct. App. 1991).

The Interstate Agreement on Detainers applies only to detainers lodged on untried criminal charges and has no applicability to probation or parole revocation detainers. McDonald v. New Mexico Parole Bd., 955 F.2d 631 (10th Cir. 1991), cert. denied, 504 U.S. 920, 112 S. Ct. 1968, 118 L. Ed. 2d 568 (1992).

Prisoner's burden of substantial compliance. — Where a prisoner bypasses the statutory procedure and attempts to communicate directly with the receiving state, absent actual notice by the receiving state, he or she has the burden of complying substantially with the requirements of the Agreement on Detainers. State v. Tarango, 105 N.M. 592, 734 P.2d 1275 (Ct. App. 1987), overruled on other grounds Zurla v. State, 109 N.M. 640, 789 P.2d 588 (1990).

Substantial compliance for purposes of the Agreement on Detainers means the prisoner must file the proper documents, including the certificate of status, with the proper prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction, using registered or certified mail, return receipt requested. State v. Tarango, 105 N.M. 592, 734 P.2d 1275 (Ct. App. 1987), overruled on other grounds Zurla v. State, 109 N.M. 640, 789 P.2d 588 (1990).

The defendant failed to meet the requirements of this section since his petition for a writ of habeas corpus requesting revocation of the Arizona arrest warrant and removal of detainer did not constitute a request for final disposition of detainer, and there was no evidence that he gave actual notice to Arizona, or otherwise substantially complied with the statutory requirements. Palmer v. Williams, 120 N.M. 63, 897 P.2d 1111 (1995).

The defendant's letter to the district attorney's office stating, "Were you to file a detainer . . ., I could request final disposition" was inadequate to activate his rights under the Interstate Agreement for Detainers. State v. Morawe, 1996-NMCA-110, 122 N.M. 489, 927 P.2d 44.

Actual notice of critical information required. — While the defendant did not have to furnish the certificate required by Article 3A to give the prosecutor and the district court actual notice, he did have an obligation to furnish the information that would be contained therein. Since the county prosecutor and the district court did not have actual notice of critical information, such as the fact that the defendant was presently incarcerated in the Texas penal complex, the defendant was not relieved of his burden of substantially complying with the requirements of this agreement. State v. Smith, 115 N.M. 749, 858 P.2d 416 (Ct. App. 1993).

Invocation of protections. — Writs of habeas corpus ad prosequendum will not, by themselves, invoke the protections of the Interstate Agreement on Detainers. State v. Montoya, 119 N.M. 95, 888 P.2d 977 (Ct. App. 1994).

Expiration of 180-day period on Sunday. — Where the 180-day limitation period of Paragraph A of Article 3 expires on a Sunday, a trial is timely if held the next day. State v. Alderete, 95 N.M. 691, 625 P.2d 1208 (Ct. App.), cert. denied, 94 N.M. 674, 615 P.2d 991 (1980).

Time limitation tolled only when prisoner unable to stand trial or on continuance for good cause. — The time limitations of the Agreement on Detainers (31-5-12 NMSA 1978) are intended to permit sufficient time and opportunity for the disposition of all pretrial proceedings and the commencement of trial before the time limitations expire. Time is tolled only when the prisoner is "unable to stand trial"; in all other circumstances, the mechanism for reasonably or necessarily extending the time limits is by a request for continuance "for good cause shown." State v. Shaw, 98 N.M. 580, 651 P.2d 115 (Ct. App. 1982).

Evidence of "for good cause shown". — Continuances because of the unavailability of a trial judge, where the assigned judge was elected to the supreme court and the other judges in the district had a full complement of cases, and because of a local rule which required the assignment of all cases involving a single defendant to one judge were "for good cause shown," pursuant to Subsection A of Article 3 of this section. State v. Aaron, 102 N.M. 187, 692 P.2d 1336 (Ct. App. 1984).

The state had good cause to request a continuation beyond the 120-day limit for commencement of the defendant's trial based on its discovery that the grand jury that indicted the defendant included an unsworn juror, a deficiency that required additional time to correct. State v. Livernois, 1997-NMSC-019, 123 N.M. 128, 934 P.2d 1057.

Continuation of trial date does not violate 180-day period. — Where a trial has in fact been continued although there is no formal order continuing the trial date, the 180-day limitation period of Paragraph A of Article 3 is not violated. State v. Alderete, 95 N.M. 691, 625 P.2d 1208 (Ct. App.), cert. denied, 94 N.M. 674, 615 P.2d 991 (1980).

State's representation that it will reindict is not a de facto continuance under Paragraph A of Article 3. State v. Shaw, 98 N.M. 580, 651 P.2d 115 (Ct. App. 1982).

Time period does not commence anew upon refiling of indictment. — A second indictment on the identical charges for which a defendant was previously returned to New Mexico for pretrial and trial proceedings cannot avoid the time restrictions of Paragraph A of Article 3 on the theory that the time commences anew from the filing of the second indictment. State v. Shaw, 98 N.M. 580, 651 P.2d 115 (Ct. App. 1982).

When defendant's request for final disposition does not trigger 180-day rule. — Where the defendant wrote the district attorney in Albuquerque to request a final disposition of pending Arizona charges on the same day that he pleaded guilty to California felony charges, he had not entered upon "term of imprisonment" within this section; therefore, his request did not trigger section's requirement of trial within 180

days after request for disposition of the charge. State v. Duncan, 95 N.M. 215, 619 P.2d 1259 (Ct. App. 1980).

The Interstate Agreement for Detainers becomes effective only when a detainer is filed, and a letter sent by the defendant to the district attorney's office before issuance of the detainer was insufficient to trigger the 180-day trial provision. State v. Morawe, 1996-NMCA-110, 122 N.M. 489, 927 P.2d 44.

Waiver of time limits. — Although the defendant did not specifically request a waiver of the Interstate Agreement on Detainers time limitations, such a waiver was implied from the defendant's waiver of all speedy trial time limitations. State v. Montoya, 119 N.M. 95, 888 P.2d 977 (Ct. App. 1994).

Agreement not pertinent following absolute release of prisoner. — When a sending state absolutely releases a prisoner within 120 days of his arrival in the receiving state, provisions of the Agreement on Detainers cease to be pertinent. State v. Quiroz, 94 N.M. 517, 612 P.2d 1328 (Ct. App. 1980).

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. — Validity, construction, and application of interstate agreement on detainers, 98 A.L.R.3d 160.

Availability of postconviction relief under 28 USCS § 2254 based on alleged governmental violation of Interstate Agreement on Detainers Act (18 USCS Appx), 63 A.L.R. Fed. 155.

31-5-13. Definition.

As used in the Agreement on Detainers [31-5-12 NMSA 1978] with reference to the courts of this state, the phrase "appropriate court" means the district court.

History: 1953 Comp., § 41-20-20, enacted by Laws 1971, ch. 270, § 2.

31-5-14. Cooperation.

All courts, departments, agencies, officers and employees of this state and its political subdivisions are hereby directed to enforce the Agreement on Detainers [31-5-12 NMSA 1978] and to cooperate with one another and with other party states in enforcing the agreement and effectuating its purpose.

History: 1953 Comp., § 41-20-21, enacted by Laws 1971, ch. 270, § 3.

31-5-15. Habitual offenders.

Nothing in this act [31-5-12 to 31-5-16 NMSA 1978] or in the Agreement on Detainers [31-5-12 NMSA 1978] shall be construed to require the application of the habitual offenders laws to any person on account of any conviction had in a proceeding brought to final disposition by reason of the use of that agreement.

History: 1953 Comp., § 41-20-22, enacted by Laws 1971, ch. 270, § 4.

31-5-16. Transfers.

The corrections department shall give over the person of any inmate whenever required by the operation of the Agreement on Detainers [31-5-12 NMSA 1978].

History: 1953 Comp., § 41-20-23, enacted by Laws 1971, ch. 270, § 5.

ANNOTATIONS

Corrections department. — As to reorganizations of the corrections department, see 9-3-3 NMSA 1978 and notes thereto.

31-5-17. Interstate Corrections Compact.

The Interstate Corrections Compact is enacted into law and entered into by New Mexico with any other states legally joining therein in the form substantially as follows:

Article 1. Purpose and Policy

The party states, desiring by common action to fully utilize and improve their institutional facilities and provide adequate programs for the confinement, treatment and rehabilitation of various types of offenders, declare that it is the policy of each of the party states to provide such facilities and programs on a basis of cooperation with one another, thereby serving the best interests of such offenders and of society and effecting economies in capital expenditures and operational costs. The purpose of this compact is to provide for the mutual development and execution of such programs of cooperation for the confinement, treatment and rehabilitation of offenders with the most economical use of human and material resources.

Article 2. Definitions

As used in this compact, unless the context clearly requires otherwise:

A. "state" means a state of the United States, the United States of America, a territory or possession of the United States, the District of Columbia or the commonwealth of Puerto Rico;

B. "sending state" means a state party to this compact in which conviction or court commitment was had;

C. "receiving state" means a state party to this compact to which an inmate is sent for confinement other than a state in which conviction or court commitment was had;

D. "inmate" means a male or female offender who is committed under sentence to or confined in a penal or correctional institution; and

E. "institution" means any penal or correctional facility, including but not limited to a facility for the mentally ill or mentally defective, in which inmates may lawfully be confined.

Article 3. Contracts

A. Each party state may make one or more contracts with any one or more of the other party states for the confinement of inmates on behalf of a sending state in institutions situated within receiving states. Any such contract shall provide for:

(1) its duration;

(2) payments to be made to the receiving state by the sending state for inmate maintenance, extraordinary medical and dental expenses, and any participation in or receipt by inmates of rehabilitative or correctional services, facilities, programs or treatment not reasonably included as part of normal maintenance;

(3) participation in programs of inmate employment, if any; the disposition or crediting of any payments received by inmates on account thereof; and the crediting of proceeds from or disposal of any products resulting therefrom;

(4) delivery and retaking of inmates; and

(5) such other matters as may be necessary and appropriate to fix the obligations, responsibilities and rights of the sending and receiving states.

B. The terms and provisions of this compact shall be a part of any contract entered into by the authority of or pursuant thereto, and nothing in any such contract shall be inconsistent therewith.

Article 4. Procedures and Rights

A. Whenever the duly constituted authorities in a state party to this compact, and which has entered into a contract pursuant to Article 3, shall decide that confinement in, or transfer of an inmate to, an institution within the territory of another party state is necessary or desirable in order to provide adequate quarters and care or an appropriate program of rehabilitation or treatment, said officials may direct that the confinement be within an institution within the territory of said other party state, the receiving state to act in that regard solely as agent for the sending state.

B. The appropriate officials of any state party to this compact shall have access, at all reasonable times, to any institution in which it has a contractual right to confine inmates for the purpose of inspecting the facilities thereof and visiting such of its inmates as may be confined in the institution.

C. Inmates confined in an institution pursuant to the terms of this compact shall at all times be subject to the jurisdiction of the sending state and may at any time be removed therefrom for transfer to a prison or other institution within the sending state, for transfer to another institution in which the sending state may have a contractual or other right to confine inmates, for release on probation or parole, for discharge, or for any other purpose permitted by the laws of the sending state; provided that the sending state shall continue to be obligated to such payments as may be required pursuant to the terms of any contract entered into under the terms of Article 3.

D. Each receiving state shall provide regular reports to each sending state on the inmates of that sending state in institutions pursuant to this compact including a conduct record of each inmate and certify said record to the official designated by the sending state, in order that each inmate may have official review of his or her record in determining and altering the disposition of said inmate in accordance with the law which may obtain in the sending state and in order that the same may be a source of information for the sending state.

E. All inmates who may be confined in an institution pursuant to the provisions of this compact shall be treated in a reasonable and humane manner and shall be treated equally with such similar inmates of the receiving state as may be confined in the same institution. The fact of confinement in a receiving state shall not deprive any inmate so confined of any legal rights which said inmate would have had if confined in an appropriate institution of the sending state.

F. Any hearing or hearings to which an inmate confined pursuant to this compact may be entitled by the laws of the sending state may be had before the appropriate authorities of the sending state, or of the receiving state if authorized by the sending state. The receiving state shall provide adequate facilities for such hearings as may be conducted by the appropriate officials of a sending state. In the event such hearing or hearings are had before officials of the receiving state, the governing law shall be that of the sending state and a record of the hearing or hearings as prescribed by the sending state shall be made. Said record together with any recommendations of the hearing officials shall be transmitted forthwith to the official or officials before whom the hearing would have been had if it had taken place in the sending state. In any and all proceedings had pursuant to the provisions of this subdivision, the officials of the receiving state shall act solely as agents of the sending state and no final determination shall be made in any matter except by the appropriate officials of the sending state.

G. Any inmate confined pursuant to this compact shall be released within the territory of the sending state unless the inmate, and the sending and receiving states,

shall agree upon release in some other place. The sending state shall bear the cost of such return to its territory.

H. Any inmate confined pursuant to the terms of this compact shall have any and all rights to participate in and derive any benefits or incur or be relieved of any obligations or have such obligations modified or his status changed on account of any action or proceeding in which he could have participated if confined in any appropriate institution of the sending state located within such state.

I. The parent, guardian, trustee or other person or persons entitled under the laws of the sending state to act for, advise or otherwise function with respect to any inmate shall not be deprived of or restricted in his exercise of any power in respect of any inmate confined pursuant to the terms of this compact.

Article 5. Acts Not Reviewable in Receiving State: Extradition

A. Any decision of the sending state in respect of any matter over which it retains jurisdiction pursuant to this compact shall be conclusive upon and not reviewable within the receiving state, but if at the time the sending state seeks to remove an inmate from an institution in the receiving state there is pending against the inmate within such state any criminal charge or if the inmate is formally accused of having committed within such state a criminal offense, the inmate shall not be returned without the consent of the receiving state until discharged from prosecution or other form of proceeding, imprisonment or detention for such offense. The duly accredited officers of the sending state shall be permitted to transport inmates pursuant to this compact through any and all states party to this compact without interference.

B. An inmate who escapes from an institution in which he is confined pursuant to this compact shall be deemed a fugitive from the sending state and from the state in which the institution is situated. In the case of an escape to a jurisdiction other than the sending or receiving state, the responsibility for institution of extradition or rendition proceedings shall be that of the sending state, but nothing contained herein shall be construed to prevent or affect the activities of officers and agencies of any jurisdiction directed toward the apprehension and return of an escapee.

Article 6. Federal Aid

Any state party to this compact may accept federal aid for use in connection with any institution or program, the use of which is or may be affected by this compact or any contract pursuant hereto and any inmate in a receiving state pursuant to this compact may participate in any such federally aided program or activity for which the sending and receiving states have made contractual provision, provided that if such program or activity is not part of the customary correctional regimen, the express consent of the appropriate official of the sending state shall be required therefor.

Article 7. Entry into Force

This compact shall enter into force and become effective and binding upon the states so acting when it has been enacted into law by any two states. Thereafter, this compact shall enter into force and become effective and binding as to any other of said states upon similar action by such state.

Article 8. Withdrawal and Termination

This compact shall continue in force and remain binding upon a party state until it shall have enacted a statute repealing the same and providing for the sending of formal written notice of withdrawal from the compact to the appropriate officials of all other party states. An actual withdrawal shall not take effect until one year after the notices provided in said statute have been sent. Such withdrawal shall not relieve the withdrawing state from its obligations assumed hereunder prior to the effective date of withdrawal. Before the effective date of withdrawal, a withdrawing state shall remove to its territory, at its own expense, such inmates as it may have confined pursuant to the provisions of this compact.

Article 9. Other Arrangements Unaffected

Nothing contained in this compact shall be construed to abrogate or impair any agreement or other arrangement which a party state may have with a nonparty state for the confinement, rehabilitation or treatment of inmates nor to repeal any other laws of a party state authorizing the making of cooperative institutional arrangements.

Article 10. Construction and Severability

The provisions of this compact shall be liberally construed and shall be severable. If any phrase, clause, sentence or provision of this compact is declared to be contrary to the constitution of any participating state or of the United States or the applicability thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this compact and the applicability thereof to any government, agency, person or circumstance shall not be affected thereby. If this compact shall be held contrary to the constitution of any state participating therein, the compact shall remain in full force and effect as to the remaining states and in full force and effect as to the state affected as to all severable matters.

History: Laws 1982, ch. 56, § 1.

31-5-18. Secretary of corrections; powers.

The secretary of corrections is authorized and directed to do all things necessary or incidental to the carrying out of the compact [31-5-17 NMSA 1978] in every particular, and he may in his discretion delegate this authority to another appropriate official.

History: Laws 1982, ch. 56, § 2.

31-5-19. Convicted offenders; contracts with United States attorney general.

The secretary of corrections is authorized to contract with the United States attorney general for the custody, care, housing, subsistence, education, treatment and training either of persons convicted of criminal offenses in the courts of New Mexico in order that they may be housed in United States prisons or correctional facilities for these purposes or of persons convicted of criminal offenses in the courts of the United States in order that they may be housed in New Mexico correctional facilities for such purposes.

History: Laws 1982, ch. 54, § 1.

31-5-20. [Interstate Compact for Adult Offender Supervision.]

The Interstate Compact for Adult Offender Supervision is enacted into law and entered into on behalf of New Mexico with any and all other states legally joining therein in a form substantially as follows:

INTERSTATE COMPACT FOR ADULT OFFENDER SUPERVISION

ARTICLE I - Purpose

A. The compacting states to this interstate compact recognize that each state is responsible for the supervision of adult offenders in the community and is authorized pursuant to the bylaws and rules of this compact to travel across state lines both to and from each compacting state in such a manner as to track the location of offenders, transfer supervision authority in an orderly and efficient manner and, when necessary, return offenders to the originating jurisdictions. The compacting states also recognize that congress, by enacting the Crime Control Act, 4 U.S.C. Section 112, 1965, has authorized and encouraged compacts for cooperative efforts and mutual assistance in the prevention of crime.

B. It is the purpose of this compact and the interstate commission created hereunder, through means of joint and cooperative action among the compacting states:

(1) to provide the framework for the promotion of public safety and protection of the rights of victims in the community through the control and regulation of the interstate movement of offenders;

(2) to provide for the effective tracking, supervision and rehabilitation of these offenders by the sending and receiving states; and

(3) to equitably distribute the costs, benefits and obligations of the compact among the compacting states.

C. In addition, this compact will:

(1) create an interstate commission that will establish uniform procedures to manage the movement between states of adults placed under community supervision and released to the community under the jurisdiction of courts, paroling authorities, corrections or other criminal justice agencies and that will promulgate rules to achieve the purpose of this compact;

(2) ensure an opportunity for input and timely notice to victims and to jurisdictions as to where defined offenders are authorized to travel or to relocate across state lines;

(3) establish a system of uniform data collection, access to information on active cases by authorized criminal justice officials and regular reporting of compact activities to heads of state councils, state executive, judicial and legislative branches and criminal justice administrators;

(4) monitor compliance with rules governing interstate movement of offenders and initiate interventions to address and correct noncompliance; and

(5) coordinate training and education regarding regulations of interstate movement of offenders for officials involved in such activity.

D. The compacting states recognize that there is no "right" of any offender to live in another state and that duly accredited officers of a sending state may at all times enter a receiving state and there apprehend and retake any offender under supervision subject to the provisions of this compact and bylaws and rules promulgated hereunder.

E. It is the policy of the compacting states that the activities conducted by the interstate commission created herein are the formation of public policies and are therefore public business.

ARTICLE II - Definitions

As used in this compact, unless the context clearly requires a different construction:

A. "adult" means both individuals legally classified as adults and juveniles treated as adults by court order, statute or operation of law;

B. "bylaws" mean those bylaws established by the interstate commission for its governance or for directing or controlling the interstate commission's actions or conduct;

C. "compact" means the Interstate Compact for Adult Offender Supervision;

D. "compact administrator" means the individual in each compacting state appointed pursuant to the terms of this compact responsible for the administration and management of the state's supervision and transfer of offenders subject to the terms of this compact, the rules adopted by the interstate commission and policies adopted by the state council under this compact;

E. "compacting state" means any state that has enacted the enabling legislation for this compact;

F. "commissioner" means the voting representative of each compacting state appointed pursuant to Article III of this compact;

G. "interstate commission" means the interstate commission for adult offender supervision established by this compact;

H. "member" means the commissioner of a compacting state or his designee, who shall be a person officially connected with the commissioner;

I. "non-compacting state" means any state that has not enacted the enabling legislation for this compact;

J. "offender" means an adult placed under or subject to supervision as the result of the commission of a criminal offense and released to the community under the jurisdiction of courts, paroling authorities, corrections or other criminal justice agencies;

K. "person" means any individual, corporation, business enterprise or other legal entity, either public or private;

L. "rules" means acts of the interstate commission, duly promulgated pursuant to Article VIII of this compact, substantially affecting interested parties in addition to the interstate commission, which shall have the force and effect of law in the compacting states;

M. "state" means a state of the United States, the District of Columbia and any other territorial possessions of the United States; and

N. "state council" means the resident members of the state council for interstate adult offender supervision created by each compacting state under Article IV of this compact.

ARTICLE III - The Compact Commission

A. The compacting states hereby create the "interstate commission for adult offender supervision". The interstate commission shall be a body corporate and joint agency of the compacting states. The interstate commission shall have all the

responsibilities, powers and duties set forth herein, including the power to sue and be sued and such additional powers as may be conferred upon it by subsequent action of the respective legislatures of the compacting states in accordance with the terms of this compact. The interstate commission shall consist of commissioners selected and appointed by resident members of a state council for interstate adult offender supervision for each state. In addition to the commissioners who are the voting representatives of each state, the interstate commission shall include individuals who are not commissioners but who are members of interested organizations; such non-commissioner members must include a member of the national organizations of governors, legislators, state chief justices, attorneys general and crime victims. All non-commissioner members of the interstate commission shall be ex-officio, nonvoting members. The interstate commission may provide in its bylaws for such additional, ex-officio, nonvoting members as it deems necessary.

B. Each compacting state represented at any meeting of the interstate commission is entitled to one vote. A majority of the compacting states shall constitute a quorum for the transaction of business, unless a larger quorum is required by the bylaws of the interstate commission. The interstate commission shall meet at least once each calendar year. The chairperson may call additional meetings and, upon the request of twenty-seven or more compacting states, shall call additional meetings. Public notice shall be given of all meetings and meetings shall be open to the public.

C. The interstate commission shall establish an executive committee that shall include commission officers, members and others as shall be determined by the bylaws. The executive committee shall have the power to act on behalf of the interstate commission during periods when the interstate commission is not in session, with the exception of rulemaking and amendment to the compact. The executive committee shall oversee the day-to-day activities managed by the executive director and interstate commission staff, administer enforcement and compliance with the provisions of the compact and its bylaws as directed by the interstate commission and perform other duties as directed by the interstate commission or set forth in the bylaws.

ARTICLE IV - The State Council

Each compacting state shall create a "state council for interstate adult offender supervision" that shall be responsible for the appointment of the commissioner who shall serve on the interstate commission from that state. Each state council shall appoint as its commissioner the compact administrator from that state to serve on the interstate commission in such capacity under or pursuant to applicable law of the compacting state. While each compacting state may determine the membership of its own state council, its membership must include at least one representative from the legislative, judicial and executive branches of government and victims groups and its compact administrator. Each compacting state retains the right to determine the qualifications of the compact administrator who shall be appointed by the state council or by the governor in consultation with the legislature and the judiciary. In addition to appointment of its commissioner to the interstate commission, each state council shall

exercise oversight and advocacy concerning its participation in interstate commission activities and other duties as may be determined by each compacting state, including development of policy concerning operations and procedures of the compact within that state.

ARTICLE V - Powers and Duties of the Interstate Commission

The interstate commission shall have the following powers:

A. to adopt a seal and suitable bylaws governing the management and operation of the interstate commission;

B. to promulgate rules that shall have the force and effect of statutory law and shall be binding in the compacting states to the extent and in the manner provided in this compact;

C. to oversee, supervise and coordinate the interstate movement of offenders subject to the terms of this compact and any bylaws adopted and rules promulgated by the interstate commission;

D. to enforce compliance with compact provisions and interstate commission rules and bylaws, using all necessary and proper means, including the use of judicial process;

E. to establish and maintain offices;

F. to purchase and maintain insurance and bonds;

G. to borrow, accept or contract for services of personnel, including members and their staffs;

H. to establish and appoint committees and hire staff that it deems necessary for the carrying out of its functions, including an executive committee as required by Article III that shall have the power to act on behalf of the interstate commission in carrying out its powers and duties hereunder;

I. to elect or appoint such officers, attorneys, employees, agents or consultants and to fix their compensation, define their duties and determine their qualifications; and to establish the interstate commission's personnel policies and programs relating to, among other things, conflicts of interest, rates of compensation and qualifications of personnel;

J. to accept any and all donations and grants of money, equipment, supplies, materials and services and to receive, utilize and dispose of same;

K. to lease, purchase, accept contributions or donations of, or otherwise to own, hold, improve or use any property, real, personal or mixed;

L. to sell, convey, mortgage, pledge, lease, exchange, abandon or otherwise dispose of any property, real, personal or mixed;

M. to establish a budget and make expenditures and levy dues as provided in Article X of this compact;

N. to sue and be sued;

O. to provide for dispute resolution among compacting states;

P. to perform such functions as may be necessary or appropriate to achieve the purposes of this compact;

Q. to report annually to the legislatures, governors, judiciary and state councils of the compacting states concerning the activities of the interstate commission during the preceding year. The reports shall also include any recommendations that may have been adopted by the interstate commission;

R. to coordinate education, training and public awareness regarding the interstate movement of offenders for officials involved in such activity; and

S. to establish uniform standards for the reporting, collecting and exchanging of data.

ARTICLE VI - Organization and Operation of the Interstate Commission

A. The interstate commission shall, by a majority of the members, within twelve months of the first interstate commission meeting, adopt bylaws to govern its conduct as may be necessary or appropriate to carry out the purposes of the compact, including:

(1) establishing the fiscal year of the interstate commission;

(2) establishing an executive committee and such other committees as may be necessary;

(3) providing reasonable standards and procedures:

(a) for the establishment of committees; and

(b) for any general or specific delegation of any authority or function of the interstate commission;

(4) providing reasonable procedures for calling and conducting meetings of the interstate commission and ensuring reasonable notice of each such meeting;

(5) establishing the titles and responsibilities of the officers of the interstate commission;

(6) providing reasonable standards and procedures for the establishment of the personnel policies and programs of the interstate commission. Notwithstanding any civil service or other similar laws of any compacting state, the bylaws shall exclusively govern the personnel policies and programs of the interstate commission;

(7) providing a mechanism for winding-up the operations of the interstate commission and for the equitable return of any surplus funds that may exist upon the termination of the compact after the payment and reserving of all of its debts and obligations;

(8) providing transition rules for "start-up" administration of the compact; and

(9) establishing standards and procedures for compliance and technical assistance in carrying out the compact.

B. The interstate commission shall, by a majority of the members, elect from among its members a chairperson and a vice chairperson, each of whom shall have such authorities and duties as may be specified in the bylaws. The chairperson or, in his absence or disability, the vice chairperson, shall preside at all meetings of the interstate commission. The officers so elected shall serve without compensation or remuneration from the interstate commission; provided that, subject to the availability of budgeted funds, the officers shall be reimbursed for any actual and necessary costs and expenses incurred by them in the performance of their duties and responsibilities as officers of the interstate commission. The interstate commission shall, through its executive committee, appoint or retain an executive director for such period, upon such terms and conditions and for such compensation as the interstate commission may deem appropriate. The executive director shall serve as secretary to the interstate commission, and hire and supervise such other staff as may be authorized by the interstate commission, but shall not be a member.

C. The interstate commission shall maintain its corporate books and records in accordance with the bylaws.

D. The members, officers, executive director and employees of the interstate commission shall be immune from suit and liability, either personally or in their official capacity, for any claim for damage to or loss of property or personal injury or other civil liability caused or arising out of any actual or alleged act, error or omission that occurred within the scope of interstate commission employment, duties or responsibilities; provided that nothing in this paragraph shall be construed to protect any such person from suit or liability for any damage, loss, injury or liability caused by the intentional or

willful and wanton misconduct of any such person. The interstate commission shall defend the commissioner of a compacting state, or his representatives or employees or the interstate commission's representatives or employees, in any civil action seeking to impose liability, arising out of any actual or alleged act, error or omission that occurred within the scope of interstate commission employment, duties or responsibilities, or that the defendant had a reasonable basis for believing occurred within the scope of interstate commission employment, duties or responsibilities; provided that the actual or alleged act, error or omission did not result from intentional wrongdoing on the part of such person. The interstate commission shall indemnify and hold the commissioner of a compacting state, the appointed designee or employees or the interstate commission's representatives or employees, harmless in the amount of any settlement or judgment obtained against such persons arising out of any actual or alleged act, error or omission that occurred within the scope of interstate commission employment, duties or responsibilities, or that such persons had a reasonable basis for believing occurred within the scope of interstate commission employment, duties or responsibilities; provided that the actual or alleged act, error or omission did not result from gross negligence or intentional wrongdoing on the part of such person.

ARTICLE VII - Activities of the Interstate Commission

A. The interstate commission shall meet and take such actions as are consistent with the provisions of this compact.

B. Except as otherwise provided in this compact and unless a greater percentage is required by the bylaws, in order to constitute an act of the interstate commission such act shall have been taken at a meeting of the interstate commission and shall have received an affirmative vote of a majority of the members present.

C. Each member of the interstate commission shall have the right and power to cast a vote to which that compacting state is entitled and to participate in the business and affairs of the interstate commission. A member shall vote in person on behalf of the compacting state and shall not delegate a vote to another compacting state. However, a state council shall appoint another authorized representative, in the absence of the commissioner from that state, to cast a vote on behalf of the compacting state at a specified meeting. The bylaws may provide for members' participation in meetings by telephone or other means of telecommunication or electronic communication. Any voting conducted by telephone, or other means of telecommunication or electronic communication shall be subject to the same quorum requirements of meetings where members are present in person.

D. The interstate commission shall meet at least once during each calendar year. The chairperson of the interstate commission may call additional meetings at any time and, upon the request of a majority of the members, shall call additional meetings.

E. The interstate commission's bylaws shall establish conditions and procedures under which the interstate commission shall make its information and official records

available to the public for inspection or copying. The interstate commission may exempt from disclosure any information or official records to the extent they would adversely affect personal privacy rights or proprietary interests. In promulgating such rules, the interstate commission may make available to law enforcement agencies records and information otherwise exempt from disclosure, and may enter into agreements with law enforcement agencies to receive or exchange information or records subject to non-disclosure and confidentiality provisions.

F. Public notice shall be given of all meetings and all meetings shall be open to the public, except as set forth in the rules or as otherwise provided in the compact. The interstate commission shall promulgate rules consistent with the principles contained in the federal Government in the Sunshine Act, 5 U.S.C. Section 552(b), as may be amended. The interstate commission and any of its committees may close a meeting to the public where it determines by a two-thirds' vote that a meeting would be likely to:

(1) relate solely to the interstate commission's internal personnel practices and procedures;

(2) disclose matters specifically exempted from disclosure by statute;

(3) disclose trade secrets or commercial or financial information that is privileged or confidential;

(4) involve accusing any person of a crime, or formally censuring any person;

(5) disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy;

(6) disclose investigatory records compiled for law enforcement purposes;

(7) disclose information contained in or related to examination, operating or condition reports prepared by, or on behalf of or for the use of, the interstate commission with respect to a regulated entity for the purpose of regulation or supervision of such entity;

(8) disclose information, the premature disclosure of which would significantly endanger the life of a person or the stability of a regulated entity; or

(9) specifically relate to the interstate commission's issuance of a subpoena or its participation in a civil action or proceeding.

G. For every meeting closed pursuant to this provision, the interstate commission's chief legal officer shall publicly certify that, in his opinion, the meeting may be closed to the public, and shall reference each relevant exemptive provision. The interstate commission shall keep minutes that shall fully and clearly describe all matters discussed in any meeting and shall provide a full and accurate summary of any actions taken, and

the reasons therefor, including a description of each of the views expressed on any item and the record of any roll-call vote, reflected in the vote of each member on the question. All documents considered in connection with any action shall be identified in the minutes.

H. The interstate commission shall collect standardized data concerning the interstate movement of offenders as directed through its bylaws and rules, which shall specify the data to be collected, the means of collection and data exchange and reporting requirements.

ARTICLE VIII - Rulemaking Functions of the Interstate Commission

A. The interstate commission shall promulgate rules in order to effectively and efficiently achieve the purposes of the compact, including transition rules governing administration of the compact during the period in which it is being considered and enacted by the states. Rulemaking shall occur pursuant to the criteria set forth in this article and the bylaws and rules adopted pursuant thereto. Such rulemaking shall substantially conform to the principles of the federal Administrative Procedure Act, 5 U.S.C. Section 551 et seq., and the federal Advisory Committee Act, 5 U.S.C. Section 1 et seq., as may be amended. All rules and amendments shall become binding as of the date specified in each rule or amendment.

B. If a majority of the legislatures of the compacting states rejects a rule, by enactment of a statute or resolution in the same manner used to adopt the compact, then such rule shall have no further force and effect in any compacting state.

C. When promulgating a rule, the interstate commission shall:

(1) publish the proposed rule stating with particularity the text of the rule that is proposed and the reason for the proposed rule;

(2) allow persons to submit written data, facts, opinions and arguments, which information shall be publicly available;

(3) provide an opportunity for an informal hearing; and

(4) promulgate a final rule and its effective date, if appropriate, based on the rulemaking record.

D. Not later than sixty days after a rule is promulgated, any interested person may file a petition in the United States district court for the District of Columbia or in the federal district court where the interstate commission's principal office is located for judicial review of such rule. If the court finds that the interstate commission's action is not supported by substantial evidence, as defined in the Administrative Procedure Act, in the rulemaking record, the court shall hold the rule unlawful and set it aside. Subjects to be addressed within twelve months after the first meeting must at a minimum include:

(1) notice to victims and opportunity to be heard;

(2) offender registration and compliance;

(3) violations or returns;

(4) transfer procedures and forms;

(5) eligibility for transfer;

(6) collection of restitution and fees from offenders;

(7) data collection and reporting;

(8) the level of supervision to be provided by the receiving state;

(9) transition rules governing the operation of the compact and the interstate commission during all or part of the period between the effective date of the compact and the date on which the last eligible state adopts the compact; and

(10) mediation, arbitration and dispute resolution.

E. The existing rules governing the operation of the previous compact superseded by this compact shall be null and void twelve months after the first meeting of the interstate commission created hereunder.

F. Upon determination by the interstate commission that an emergency exists, it may promulgate an emergency rule that shall become effective immediately upon adoption, provided that the usual rulemaking procedures provided hereunder shall be retroactively applied to said rule as soon as reasonably possible, in no event later than ninety days after the effective date of the rule.

ARTICLE IX - Oversight, Enforcement, and Dispute Resolution by the Interstate Commission

A. The interstate commission shall oversee the interstate movement of adult offenders in the compacting states and shall monitor such activities being administered in non-compacting states that may significantly affect compacting states. The courts and executive agencies in each compacting state shall enforce this compact and shall take all actions necessary and appropriate to effectuate the compact's purposes and intent. In any judicial or administrative proceeding in a compacting state pertaining to the subject matter of this compact that may affect the powers, responsibilities or actions of the interstate commission, the interstate commission shall be entitled to receive all service of process in any such proceeding and shall have standing to intervene in the proceeding for all purposes.

B. The compacting states shall report to the interstate commission on issues or activities of concern to them and cooperate with and support the interstate commission in the discharge of its duties and responsibilities. The interstate commission shall attempt to resolve any disputes or other issues that are subject to the compact and that may arise among compacting states and non-compacting states. The interstate commission shall enact a bylaw or promulgate a rule providing for both mediation and binding dispute resolution for disputes among the compacting states.

C. The interstate commission, in the reasonable exercise of its discretion, shall enforce the provisions of this compact using any or all means set forth in Section B of Article XII of this compact.

ARTICLE X - Finance

A. The interstate commission shall pay or provide for the payment of the reasonable expenses of its establishment, organization and ongoing activities.

B. The interstate commission shall levy on and collect an annual assessment from each compacting state to cover the cost of the internal operations and activities of the interstate commission and its staff that must be in a total amount sufficient to cover the interstate commission's annual budget as approved each year. The aggregate annual assessment amount shall be allocated based upon a formula to be determined by the interstate commission, taking into consideration the population of the compacting state and the volume of interstate movement of offenders in each compacting state and shall promulgate a rule binding upon all compacting states that governs said assessment.

C. The interstate commission shall not incur any obligations of any kind prior to securing the funds adequate to meet the same; nor shall the interstate commission pledge the credit of any of the compacting states, except by and with the authority of the compacting state.

D. The interstate commission shall keep accurate accounts of all receipts and disbursements. The receipts and disbursements of the interstate commission shall be subject to the audit and accounting procedures established under its bylaws. However, all receipts and disbursements of funds handled by the interstate commission shall be audited yearly by a certified or licensed public accountant and the report of the audit shall be included in and become part of the annual report of the interstate commission.

ARTICLE XI - Compacting States, Effective Date and Amendment

A. Any state is eligible to become a compacting state. The compact shall become effective and binding upon legislative enactment of the compact into law by no less than thirty-five of the states. The initial effective date shall be the later of July 1, 2001, or upon enactment into law by the thirty-fifth state. Thereafter it shall become effective and binding, as to any other compacting state, upon enactment of the compact into law by that state. The governors of non-compacting states or their designees will be invited to

participate in interstate commission activities on a non-voting basis prior to adoption of the compact by all states and territories of the United States.

B. Amendments to the compact may be proposed by the interstate commission for enactment by the compacting states. No amendment shall become effective and binding upon the interstate commission and the compacting states unless and until it is enacted into law by unanimous consent of the compacting states.

ARTICLE XII - Withdrawal, Default, Termination and Judicial Enforcement

A. Once effective, the compact shall continue in force and remain binding upon each and every compacting state; provided that a compacting state may withdraw from the compact by enacting a statute specifically repealing the statute that enacted the compact into law. The effective date of withdrawal is the effective date of the repeal. The withdrawing state shall immediately notify the chairperson of the interstate commission in writing upon the introduction of legislation repealing this compact in the withdrawing state. The interstate commission shall notify the other compacting states of the withdrawing state's intent to withdraw within sixty days of its receipt thereof. The withdrawing state is responsible for all assessments, obligations and liabilities incurred through the effective date of withdrawal, including any obligations, the performance of which extend beyond the effective date of withdrawal. Reinstatement following withdrawal of any compacting state shall occur upon the withdrawing state reenacting the compact or upon such later date as determined by the interstate commission.

B. If the interstate commission determines that any compacting state has at any time defaulted in the performance of any of its obligations or responsibilities under this compact, the bylaws or any duly promulgated rules, the interstate commission may impose any or all of the following penalties:

(1) fines, fees and costs in such amounts as are deemed to be reasonable as fixed by the interstate commission;

(2) remedial training and technical assistance as directed by the interstate commission; and

(3) suspension and termination of membership in the compact. Suspension shall be imposed only after all other reasonable means of securing compliance under the bylaws and rules have been exhausted. Immediate notice of suspension shall be given by the interstate commission to the governor, the chief justice or chief judicial officer of the state, the majority and minority leaders of the defaulting state's legislature and the state council.

The grounds for default include failure of a compacting state to perform such obligations or responsibilities imposed upon it by this compact, interstate commission bylaws or duly promulgated rules. The interstate commission shall immediately notify the defaulting state in writing of the penalty imposed by the interstate commission on

the defaulting state pending a cure of the default. The interstate commission shall stipulate the conditions and the time period within which the defaulting state must cure its default. If the defaulting state fails to cure the default within the time period specified by the interstate commission, in addition to any other penalties imposed herein, the defaulting state may be terminated from the compact upon an affirmative vote of a majority of the compacting states, and all rights, privileges and benefits conferred by this compact shall be terminated from the effective date of suspension. Within sixty days of the effective date of termination of a defaulting state, the interstate commission shall notify the governor, the chief justice or chief judicial officer and the majority and minority leaders of the defaulting state's legislature and the state council of such termination. The defaulting state is responsible for all assessments, obligations and liabilities incurred through the effective date of termination, including any obligations, the performance of which extends beyond the effective date of termination. The interstate commission shall not bear any costs relating to the defaulting state unless otherwise mutually agreed upon between the interstate commission and the defaulting state. Reinstatement following termination of any compacting state requires both a re-enactment of the compact by the defaulting state and the approval of the interstate commission pursuant to the rules.

C. The interstate commission may, by majority vote of the members, initiate legal action in the United States district court for the District of Columbia or, at the discretion of the interstate commission, in the federal district where the interstate commission has its offices to enforce compliance with the provisions of the compact and its duly promulgated rules and bylaws against any compacting state in default. In the event judicial enforcement is necessary, the prevailing party shall be awarded all costs of such litigation, including reasonable attorney fees.

D. The compact dissolves effective upon the date of the withdrawal or default of the compacting state, which reduces membership in the compact to one compacting state. Upon the dissolution of this compact, the compact becomes null and void and shall be of no further force or effect, and the business and affairs of the interstate commission shall be wound-up and any surplus funds shall be distributed in accordance with the bylaws.

ARTICLE XIII - Severability and Construction

A. The provisions of this compact shall be severable and if any phrase, clause, sentence or provision is deemed unenforceable, the remaining provisions of the compact shall be enforceable.

B. The provisions of this compact shall be liberally constructed to effectuate its purposes.

ARTICLE XIV - Binding Effect of Compact and Other Laws

A. Nothing herein prevents the enforcement of any other law of a compacting state that is not inconsistent with this compact. All compacting states' laws conflicting with this compact are superseded to the extent of the conflict.

B. All lawful actions of the interstate commission, including all rules and bylaws promulgated by the interstate commission, are binding upon the compacting states. All agreements between the interstate commission and the compacting states are binding in accordance with their terms. Upon the request of a party to a conflict over meaning or interpretation of interstate commission actions, and upon a majority vote of the compacting states, the interstate commission may issue advisory opinions regarding such meaning or interpretation. In the event any provision of this compact exceeds the constitutional limits imposed on the legislature of any compacting state, the obligations, duties, powers or jurisdiction sought to be conferred by such provision upon the interstate commission shall be ineffective and such obligations, duties, powers or jurisdiction shall remain in the compacting state and shall be exercised by the agency thereof to which such obligations, duties, powers or jurisdiction are delegated by law in effect at the time this compact becomes effective.

History: Laws 2001, ch. 322, § 1.

ANNOTATIONS

Compiler's notes. — Laws 2001, ch. 322, art. XI provides that the compact becomes effective on the latter of July 1, 2001, or enactment of the compact into law by the thirty-fifth jurisdiction. As of June 19, 2002, 35 states had entered the compact.

ARTICLE 6
Grand Jury

31-6-1. Grand jury panels; calling; qualifying.

The district judge may convene one or more grand juries at any time, without regard to court terms. A grand jury shall serve for a period of no longer than three months. The district judge shall summon and qualify as a panel for grand jury service such number of jurors as he deems necessary. Each grand jury shall be composed of twelve regular jurors and a sufficient number of alternates to insure the continuity of the inquiry and the taking of testimony. All deliberations shall be conducted by any twelve jurors, comprised of regular jurors or substituted alternates. No more than twelve jurors may deliberate. No juror may vote on an indictment unless the juror has heard all evidence presented on the charge. The district judge may discharge or excuse members of a grand jury and substitute alternate grand jurors as necessary. The names of jurors summoned for grand jury service shall be drawn from the master jury wheel of the district court for the county.

History: 1953 Comp., § 41-5-1, enacted by Laws 1969, ch. 276, § 1; 1981, ch. 262, § 1; 1983, ch. 62, § 1.

ANNOTATIONS

The 1983 amendment inserted "regular" in the fourth sentence, added "and a sufficient number of alternates to insure the continuity of the inquiry and the taking of testimony" at the end of the fourth sentence and inserted the fifth and sixth sentences.

Repeals. — Laws 1969, ch. 276, § 14, repeals former 41-5-1, 1953 Comp., relating to right to challenge grand jury.

Directory nature of section. — This section and 31-6-2 NMSA 1978 are merely directory, not mandatory. State v. Apodaca, 105 N.M. 650, 735 P.2d 1156 (Ct. App. 1987), overruled on other grounds, State v. Garcia, 110 N.M. 419, 796 P.2d 1115 (Ct. App. 1990).

Substitution of grand jurors by the court clerk is proper where he acts pursuant to a standing order of the district judge, so long as such an order does not amount to an abuse of discretion. State v. Gilbert, 98 N.M. 530, 650 P.2d 814 (1982).

Effect of grand jury no bill. — A grand jury no bill does not prevent the district attorney from either resubmitting a matter to the grand jury or charging a defendant by information; this result is reached because of the absence of limitation upon the district attorney's authority as prosecutor. State v. Chavez, 93 N.M. 270, 599 P.2d 1067 (Ct. App.), cert. denied, 93 N.M. 172, 598 P.2d 215 (1979).

When court may refuse to present matters to grand jury. — A district court to which an otherwise valid citizen petition for grand jury is presented possesses the discretion to determine whether the matters stated in the petition are reasonably within the lawful scope of grand jury inquiry. Only where the petition clearly seeks to involve a grand jury in matters beyond its purview may the court refuse to present those matters to a grand jury or to convene a grand jury where no regularly sitting grand jury is available. 1982 Op. Att'y Gen. No. 82-14.

Length of session governed by court. — The determination as to when grand jury had completed the business before them rested with the court. State v. Raulie, 35 N.M. 135, 290 P. 789 (1930) (decided under former law).

Effect of saving clause's absence. — The absence of a saving clause in either Laws 1969, ch. 222 or ch. 276 indicates the legislature did not intend the repealed law relative to jury selection to remain effective after July 1, 1969 and did intend that the provisions of both Laws 1969, ch. 222 and ch. 276 be complied with insofar as possible, after that date. 1969 Op. Att'y Gen. No. 69-98.

Law reviews. — For article, "The Grand Jury: True Tribunal of the People or Administrative Agency of the Prosecutor?" see 2 N.M.L. Rev. 141 (1972).

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 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 criminal procedure, see 12 N.M.L. Rev. 271 (1982).

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. — 38 Am. Jur. 2d Grand Jury § 7 et seq.

Misconduct of officers in selection or summoning of jurors or grand jurors as contempt of court, 7 A.L.R. 345.

Matters within investigating powers of grand jury, 22 A.L.R. 1356, 106 A.L.R. 1383, 120 A.L.R. 437.

Power of grand jury to contract, 26 A.L.R. 605.

Effect of, and remedies for, exclusion of eligible class or classes of persons from jury list in criminal case, 52 A.L.R. 919.

Constitutional or statutory changes affecting grand jury on substituting information for indictment as an ex post facto law, 53 A.L.R. 716.

Quo warranto to test right to serve as grand or petit juror, 91 A.L.R. 1009.

Communicating with grand jury or member thereof as a criminal offense, 112 A.L.R. 319.

Contemporaneous existence on functioning of two or more grand juries, 121 A.L.R. 814.

Eligibility of women as jurors, 157 A.L.R. 461.

Exclusion of women as violation of constitutional rights of accused or as ground for reversal of conviction, 9 A.L.R.2d 661.

Attorneys: exclusion from jury list in criminal cases, 32 A.L.R.2d 890.

Jurisdiction or power of grand jury after expiration of term of court for which organized, 75 A.L.R.2d 544.

Accused's right to inspection of minutes of state grand jury, 20 A.L.R.3d 7.

Validity and construction of statute authorizing grand jury to submit report concerning public servant's noncriminal misconduct, 63 A.L.R.3d 586.

Law enforcement officers as qualified jurors in criminal cases, 72 A.L.R.3d 895.

Former law enforcement officers as qualified jurors in criminal cases, 72 A.L.R.3d 958.

Validity of enactment requiring juror to be an elector or voter or have qualifications thereof, 78 A.L.R.3d 1147.

Validity of indictment as affected by substitution or addition of grand jurors after commencement of investigation, 2 A.L.R.4th 980.

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

Exclusion of women from grand or trial jury or jury panel in criminal case as violation of constitutional rights of accused or as ground for reversal of conviction - state cases, 70 A.L.R.5th 587.

Purposeful inclusion of Negroes in grand or petit jury as unconstitutional discrimination, 4 A.L.R. Fed. 449.

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.

38A C.J.S. Grand Juries §§ 6, 7, 8, 11, 14 et seq., 20 et seq.

31-6-2. Foreman of grand jury.

The jurors shall select one of their number as foreman of the grand jury. The foreman shall preside over the sessions of the grand jury. The foreman shall administer oaths to witnesses. The foreman will sign all reports, indictments or other undertakings of the grand jury. The foreman may appoint one member of the grand jury as a clerk to aid in the keeping of notes or minutes and the tallying of votes during secret sessions when no persons other than grand jury members may be present. The foreman may recess the sessions of the grand jury and reconvene them. The foreman, for good cause, may request the court to excuse or discharge individual grand jurors and to replace them with alternate grand jurors as necessary to continue the work of the grand jury.

History: 1953 Comp., § 41-5-2, enacted by Laws 1969, ch. 276, § 2; 1979, ch. 337, § 1.

ANNOTATIONS

Repeals. — Laws 1969, ch. 276, § 14, repeals former 41-5-2, 1953 Comp., relating to challenges of the grand jury panel.

Directory nature of section. — Section 31-6-1 and this section are merely directory, not mandatory. State v. Apodaca, 105 N.M. 650, 735 P.2d 1156 (Ct. App. 1987), overruled on other grounds, State v. Garcia, 110 N.M. 419, 796 P.2d 1115 (Ct. App. 1990).

Law reviews. — 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. — 38A C.J.S. Grand Juries §§ 54, 55.

31-6-3. Challenge to grand jury.

Any person held to answer for an offense by grand jury indictment, upon arraignment to the charge therein, by motion to quash the indictment stating with particularity the ground therefor, may challenge the validity of the grand jury. A failure to file such motion is a waiver of the challenge. Grounds that may be presented by such motion are limited to the following:

A. the grand jury was not selected in accordance with law;

B. a member of the grand jury returning the indictment was ineligible to serve as a juror;

C. a member of the grand jury returning the indictment was a witness or is likely to become a witness; or

D. a member of the grand jury returning the indictment was not qualified to serve due to a conflict of interest, bias, partiality or inability to follow the law.

History: 1953 Comp., § 41-5-3, enacted by Laws 1969, ch. 276, § 3; 2003, ch. 363, § 1.

ANNOTATIONS

Cross references. — For drawing and empaneling jurors, see 38-5-1 NMSA 1978.

The 2003 amendment, effective July 1, 2003, inserted "or is likely to become a witness; or" at the end of Subsection C and added Subsection D.

Repeals. — Laws 1969, ch. 276, § 14, repeals former 41-5-3, 1953 Comp., relating to challenges to individual grand jurors.

The effect of this section is to prohibit a grand juror from testifying before the grand jury of which he or she is a member. Defendant's contention that grand jurors were

witnesses against him because the grand jury had returned two indictments against him prior to returning the present indictment, and had "witnessed" the actions of defendant which led to a subsequent contempt citation was without merit as it perverted the meaning of "witness" as used in the grand jury statutes. State v. Hogervorst, 90 N.M. 580, 566 P.2d 828 (Ct. App.), cert. denied, 90 N.M. 636, 567 P.2d 485 (1977).

Challenge is not to court's jurisdiction. — 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, 99 N.M. 109, 654 P.2d 562 (Ct. App. 1982).

Juror's bias not ground for attack where indictment sufficient. — Bias or prejudice on the part of an individual grand juror furnishes no ground of attack on an indictment that is sufficient on its face. State v. Laskay, 103 N.M. 799, 715 P.2d 72 (Ct. App. 1986).

Unless prejudice caused indictment by malice or ill will. — A challenge would not be precluded in the event that grand jurors were so prejudiced against a person that the jurors would be ineligible to serve because an indictment by jurors so prejudiced would violate their oath to indict no person through malice, hatred or ill will. State v. Laskay, 103 N.M. 799, 715 P.2d 72 (Ct. App. 1986).

Residence as qualification for grand jury service is question of fact. State v. Watkins, 92 N.M. 470, 590 P.2d 169 (Ct. App. 1979).

Temporary absence of person from county of residence, without the intention of abandoning that residence, will not destroy the person's qualification to serve as a grand juror. State v. Watkins, 92 N.M. 470, 590 P.2d 169 (Ct. App. 1979).

Where grand jury which heard defendant's false testimony returned indictment for perjury based on that testimony, such jurors are not witnesses under this section, nor are they presumed to be biased. State v. Watkins, 92 N.M. 470, 590 P.2d 169 (Ct. App. 1979).

Effect of saving clause's absence. — The absence of a saving clause in either Laws 1969, ch. 222 or ch. 276 indicates the legislature did not intend the repealed law relative to jury selection to remain effective after July 1, 1969 and did intend that the provisions of both Laws 1969, ch. 222 and ch. 276 be complied with insofar as possible, after that date. 1969 Op. Att'y Gen. No. 69-98.

Accused not present during empaneling. — It was never the practice to bring accused into court when empaneling the grand jury. Territory v. Young, 2 N.M. 93 (1881) (decided under former law).

Objections raised before plea available. — Any objections to legal qualifications of grand jurors were to be raised and presented in proper form to court before defendant

entered his plea of not guilty and were not available on motion in arrest of judgment. Territory v. Armijo, 7 N.M. 571, 37 P. 1117 (1894) (decided under former law).

But not after plea. — Objections to character of grand jury, or qualification of an individual member, came too late after plea to the merits. Territory v. Romero, 2 N.M. 474 (1883) (decided under former law).

Law reviews. — 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. — 38 Am. Jur. 2d Grand Jury § 20 et seq.

Effect of, and remedies for, exclusion from grand jury list of eligible class or classes of persons, 52 A.L.R. 919.

Prejudice of member of grand jury against defendant as ground of attack on indictment, 88 A.L.R. 899.

Women as grand jurors, 157 A.L.R. 461.

Right to challenge personnel of grand jury, 169 A.L.R. 1169.

Women: exclusion of women from grand jury a violation of constitutional rights of accused or as ground for reversal of conviction, 9 A.L.R.2d 661.

Failure to swear or irregularity in swearing witnesses appearing before grand jury as ground for dismissal of indictment, 23 A.L.R.4th 154.

Presence of unauthorized persons during state grand jury proceedings as affecting indictment, 23 A.L.R.4th 397.

Age group underrepresentation in grand jury or petit jury venire, 62 A.L.R.4th 859.

Exclusion of women from grand or trial jury or jury panel in criminal case as violation of constitutional rights of accused or as ground for reversal of conviction - state cases, 70 A.L.R.5th 587.

Standing of criminal defendant to challenge, on constitutional grounds, discriminatory composition of federal grand jury where defendant is not member of class allegedly excluded, 68 A.L.R. Fed. 175.

38A C.J.S. Grand Juries §§ 27, 59 et seq.

31-6-4. Time and place for hearing; privacy of hearings; witnesses permitted to have attorney present.

A. A grand jury shall conduct its hearing during the usual business hours of the court which convened it. Hearings and deliberations may be conducted at any place ordered by the convening judge and provided by the court. Inspections or grand jury views of places under inquiry may be made when directed by the foreman wherever deemed necessary within the county, but no oral testimony or other evidence may be received except during formal private sessions.

B. All deliberations shall be conducted in a private room outside the hearing or presence of any person other than the grand jury members. All taking of testimony shall be in private with no persons present other than the grand jury, the persons required or entitled to assist the grand jury and the attorney, if any, of the target.

C. Persons required or entitled to be present at the taking of testimony before the grand jury include the district attorney and the attorney general and their staffs, interpreters, court reporters, security officers, the witness and an attorney for the target. Security personnel may be present only with special leave of the district court and are neither potential witnesses nor otherwise interested parties in the matter being presented to the grand jury.

D. If a target has his attorney present, the attorney may be present only while the target witness is testifying and may advise the witness but may not speak so that he can be heard by the grand jurors or otherwise participate in the proceedings. At least twenty-four hours before grand jury proceedings begin, the target's attorney may submit proposed questions and exhibits to the district attorney or the attorney general.

History: 1953 Comp., § 41-5-4, enacted by Laws 1969, ch. 276, § 4; 1979, ch. 337, § 2; 1981, ch. 262, § 2; 2003, ch. 363, § 2.

ANNOTATIONS

The 2003 amendment, effective July 1, 2003, deleted "witness" following "target" in Subsection B and present Subsection D; rewrote Subsection C; and added Subsection D.

Repeals. — Laws 1969, ch. 276, § 14, repeals former 41-5-4, 1953 Comp., relating to trial of challenges to the grand jury.

Purpose of section is to maintain utmost secrecy; therefore, it has been the practice for more than 200 years for the investigations of the grand jury to be in private, except that the district attorney and his assistant are present, since secrecy is the vital requisite of grand jury procedure. State v. Hill, 88 N.M. 216, 539 P.2d 236 (Ct. App. 1975).

"Unusual business hours". — Although the language of this section requires the grand jury to conduct its hearing during the usual business hours of the court, a distinction must be made between the business hours of the judge who convenes the grand jury and the business hours of the court. Because a particular judge is

unavailable after 5:00 p.m. does not make access to the court impossible. State v. Weiss, 105 N.M. 283, 731 P.2d 979 (Ct. App. 1986).

Where the grand jury was convened at 8:30 a.m. and returned a true bill at 2:12 a.m. on the following morning, this unusually extended session of the grand jury was not a substantial violation of defendants' rights, though it constituted a technical violation of this section. State v. Weiss, 105 N.M. 283, 731 P.2d 979 (Ct. App. 1986).

"Prejudice" is appropriate constitutional standard. — Inasmuch as "prejudice" is an appropriate standard in considering the exercise of constitutional rights before a trial jury which determines guilt, there is no reason to apply a stricter standard in considering the exercise of constitutional rights before a grand jury which determines probable cause to accuse. State v. Martinez, 97 N.M. 585, 642 P.2d 188 (Ct. App. 1982).

No opportunity for improper influence on grand jury allowed. — The law protects the fairness and impartiality of the grand jury hearing. Not only must there be no improper influence exercised, there must be no opportunity for improper influence on the grand jury. State v. Hill, 88 N.M. 216, 539 P.2d 236 (Ct. App. 1975).

Presence of unauthorized persons in a grand jury proceeding jeopardizes the basic purpose of the proceeding and opens the door to a number of potential abuses. State v. Bigler, 98 N.M. 732, 652 P.2d 754 (Ct. App. 1982).

Type of evidence presented not included within meaning of section. — This section does not deal with the type of evidence which may be presented to a grand jury. State v. Evans, 89 N.M. 765, 557 P.2d 1114 (Ct. App.), cert. denied, 90 N.M. 7, 558 P.2d 619 (1976).

Unauthorized person's presence requires dismissal of indictment. — The presence of an unauthorized person before the grand jury requires dismissal of the indictment without the necessity of showing prejudice. Davis v. Traub, 90 N.M. 498, 565 P.2d 1015 (1977).

As well as issuance of writ. — Writ of prohibition is properly issued when the indictment is dismissed because of the presence of an unauthorized person before the grand jury. Davis v. Traub, 90 N.M. 498, 565 P.2d 1015 (1977).

District attorney's presence during deliberations prohibited. — The presence of the district attorney during deliberations of the grand jury is specifically and unequivocably prohibited by this section, which is clear and is not subject to construction. No one other than the grand jury members may be present during the time the grand jury is deliberating. Like other statutes governing grand jury proceedings, it is to be rigorously observed and strictly enforced. Baird v. State, 90 N.M. 667, 568 P.2d 193 (1977).

However, such impropriety may be waived. — Notwithstanding the fact that district attorney violated this section by his presence during grand jury deliberations, defendant

charged with murder waived her objections based upon such improprieties by entering into a plea and disposition agreement which was approved and accepted by the trial court through a plea of no contest to the charge of involuntary manslaughter. The defects of the grand jury proceedings were not so fundamental that they could not be waived. Baird v. State, 90 N.M. 667, 568 P.2d 193 (1977).

Actions of state or defense attorneys insufficient to invalidate indictment. — The mere fact that assistant attorneys general disagree in the grand jury's presence, or that defense attorneys would have presented different legal advice to the grand jury, does not invalidate the indictment. State v. Carr, 95 N.M. 755, 626 P.2d 292 (Ct. App. 1981), cert. denied, 95 N.M. 669, 625 P.2d 1186, 454 U.S. 853, 102 S. Ct. 298, 70 L. Ed. 2d 145 (1981), overruled on other grounds, State v. Olguin, 118 N.M. 91, 879 P.2d 92 (Ct. App. 1994).

Attorney not "present" merely because he took deposition testimony. — Because the grand jury has the power to subpoena "records or other evidence relevant to its inquiry," the grand jury could properly consider deposition testimony, and the fact that the deposition was taken by attorney did not make attorney present, within the meaning of this section, when the deposition was read to the grand jury. State v. Evans, 89 N.M. 765, 557 P.2d 1114 (Ct. App.), cert. denied, 90 N.M. 7, 558 P.2d 619 (1976).

No statutory right to counsel. — Neither the Grand Jury Act nor the Public Defender Act provides a target witness testifying before a grand jury with a right to counsel such that an indictment must be dismissed if counsel is not present and there is no express voluntary, knowing, and intelligent waiver of counsel's presence. State v. Tisthammer, 1998-NMCA-115, 126 N.M. 52, 966 P.2d 760, cert. denied, 126 N.M. 107, 967 P.2d 447 (1998).

Postponement to obtain counsel. — A target witness has no statutory right to counsel; therefore, the state was not required to postpone the grand jury proceedings to allow the witness time to obtain counsel. State v. Tisthammer, 1998-NMCA-115, 126 N.M. 52, 966 P.2d 760, cert. denied, 126 N.M. 107, 967 P.2d 447 (1998).

When district attorney's assistant not permitted in grand jury room. — It is highly improper for council employed to prosecute a case to be permitted to go into the grand jury room where the defendant cannot be heard and has no one to represent him. This duty should be performed alone by the proper officer of the law and assistant to the district attorney may not be present or participate in the grand jury hearing room. State v. Hill, 88 N.M. 216, 539 P.2d 236 (Ct. App. 1975).

Prosecuting attorney assists grand jury, but not as partisan. — While this statute contemplates that the prosecuting attorney will assist the grand jury, nevertheless the prosecuting attorney does not appear before the grand jury as a partisan, bent upon obtaining an indictment; the presence and participation of an attorney ordered by the trial judge to assist in the prosecution of a case, who was employed by the father-in-law

of the deceased, in the grand jury hearing was unlawful and in violation of this section and invalidated the indictment. State v. Hill, 88 N.M. 216, 539 P.2d 236 (Ct. App. 1975).

Conflict of interest precludes prosecutor's appearance. — The prosecutor himself is unauthorized to appear before the grand jury if there is a conflict of interest (1) in which his own property is damaged by criminal mischief, or (2) arising from prior employment with the defendant; since the prosecutor is a public officer with duties quasi-judicial in nature, with an obligation to protect not only the public interest but also the rights of the accused, in the performance of his duties he must not only be disinterested and impartial but must also appear to be so, scrupulously refraining from words or conduct that may influence the decision of the grand jury and observing limits of essential fairness. State v. Hill, 88 N.M. 216, 539 P.2d 236 (Ct. App. 1975).

Attorney general's investigator not "authorized person" to assist in hearing. — Claim that an investigator for the attorney general was an "authorized person" and his presence in the grand jury room was not improper inasmuch as he had been appointed a grand jury aide pursuant to 31-6-7 NMSA 1978, had no merit because grand jury aides are not authorized by statute to be present in the grand jury room unless they fall within the categories specified in this section. Davis v. Traub, 90 N.M. 498, 565 P.2d 1015 (1977).

Or considered among "staff". — Attorney general's assertion that any member of his staff could properly be present during the grand jury hearings was an erroneous interpretation of this section and ignored the meaning of the words "persons required or entitled to assist the grand jury." Such persons are enumerated in the statute. Staff in this context refers to the legal staff of the district attorney or the attorney general's office, e.g. assistant district attorneys or assistant attorneys general. Davis v. Traub, 90 N.M. 498, 565 P.2d 1015 (1977).

Presence of person not officially listed as court reporter upheld. — Person who was present during grand jury deliberations for purpose of monitoring an electronic device that recorded the grand jury testimony was within the definition of court reporter for purposes of this section. Defendant's claim that such person was not authorized to be present because he was not listed as official court reporter was frivolous, there being no contention that the operator's presence was not for the purpose of operating the recording device. State v. Baird, 90 N.M. 678, 568 P.2d 204 (Ct. App.), aff'd, 90 N.M. 667, 568 P.2d 193 (1977).

"Target witness", referred to in Subsections B and C, is anyone who is the focus of a grand jury's investigation. State v. Hall, 103 N.M. 207, 704 P.2d 461 (Ct. App. 1985).

Failure to notify of target status. — Defendant was not entitled to notice that he was a target of the grand jury investigation when at the time the offense (perjury before the grand jury) had not yet been committed. State v. Albin, 104 N.M. 315, 720 P.2d 1256 (Ct. App. 1986).

Simultaneous appearance of two witnesses violates statute. — Since this section refers to "the witness" in the singular, incident which occurred during grand jury investigation wherein two witnesses appeared before the grand jury simultaneously clearly violated the terms of the statute. Davis v. Traub, 90 N.M. 498, 565 P.2d 1015 (1977).

Presumption of prejudice when indictment quashed. — A showing of prejudice is not required when an unauthorized person is present at grand jury proceedings in order to have the indictment quashed. Prejudice is presumed. State v. Hill, 88 N.M. 216, 539 P.2d 236 (Ct. App. 1975).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 38 Am. Jur. 2d Grand Jury § 30 et seq.

Communicating with grand jury as contempt, 29 A.L.R. 489.

Communicating with grand jury or member thereof as criminal offense, 112 A.L.R. 319.

Duty of secrecy on part of members of, or witnesses or other persons present before, grand jury, 127 A.L.R. 272.

Absence of grand jurors during hearing as affecting indictment, 156 A.L.R. 248.

Validity and construction of statutes permitting grand jury witnesses to be accompanied by counsel, 90 A.L.R.3d 1333.

Presence of unauthorized persons during state grand jury proceedings as affecting indictment, 23 A.L.R.4th 397.

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.

38A C.J.S. Grand Juries §§ 68, 69, 70, 71, 73.

31-6-5. Return of indictments.

Indictments shall be returned by the grand jury within twenty-four hours following the day when the indictment is voted. Indictments shall not name persons as unindicted coconspirators. Indictments may be filed and prosecution and trial had thereon without regard to court terms. No-bills shall be sealed and filed with the district court clerk. Upon application to the court by the state for good cause shown, or upon request by the target, the court may release a sealed no-bill.

History: 1953 Comp., § 41-5-5, enacted by Laws 1969, ch. 276, § 5; 1979, ch. 337, § 3; 2003, ch. 363, § 3.

ANNOTATIONS

The 2003 amendment, effective July 1, 2003, deleted "or the person named in the proposed indictment, the court may release a sealed no-bill" and inserted "or upon request by the target, the court may release a sealed no-bill" in the last sentence.

Repeals. — Laws 1969, ch. 276, § 14, repeals former 41-5-5, 1953 Comp., relating to the court's decision on the grand jury challenge and the duty of the clerk to record it.

"Returned by the grand jury" defined. — "Returned by the grand jury" in this section means an indictment voted by the grand jury, signed by the foreman and filed either with the court clerk or the judge. Where these requirements were met, the fact that the entire grand jury was not present at the time of the "return" did not invalidate the indictment. State v. Blakley, 90 N.M. 744, 568 P.2d 270 (Ct. App. 1977).

Filing regardless of whether court in session. — This provision implies that an indictment may be filed without regard to whether court was in session when it was filed. State v. Ellis, 89 N.M. 194, 548 P.2d 1212 (Ct. App.), cert. denied, 89 N.M. 206, 549 P.2d 284 (1976).

And could include weekends. — The 24-hour period of this section does not include Saturdays and Sundays if the court which convened the grand jury was not in session on those days. Where the grand jury voted the indictment on Friday night, return of the indictment on the following Monday complied with this section. State v. Blakley, 90 N.M. 744, 568 P.2d 270 (Ct. App. 1977).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 41 Am. Jur. 2d Indictments and Informations § 31.

Power of grand jury to withdraw or alter indictment, or return of "not a true bill," 82 A.L.R. 1057.

42 C.J.S. Indictments and Informations § 23.

31-6-6. Oaths; grand jurors; witnesses; officers; penalty.

A. The following oaths shall be administered by the district judge to jurors, officers of the court or others assigned to assist the grand jury, and by the foreman to witnesses:

(1) JUROR OATH: "You, as members of this grand jury, do swear (or affirm) that you will diligently inquire and true indictment make, of all public offenses against the people of this state, committed or triable within this county, of which you shall receive legal evidence; that you shall indict no person through malice, hatred or ill will; nor have any not indicted through fear, favor or affection, or for any reward or the hope or promise thereof; but in all your indictments, reports or undertakings, you shall present

the truth, according to the best of your skill and understanding, and further that you will forever keep secret whatever you or any other juror may have said or in what manner you or any other juror may have voted on any matter before you; and that you will keep secret the testimony of any witness heard by you unless ordered by the court to disclose the same in the trial or prosecution of the witness for perjury before the grand jury, so help you God.";

(2) OATH FOR OFFICER OR OTHER PERSON: "You do swear (or affirm) that you will keep secret all proceedings occurring in your presence or of which you may learn as a result of your service in aid of the grand jury, so help you God."; and

(3) OATH FOR WITNESS: "You do swear (or affirm) that the testimony which you are about to give will be the truth, so help you God."

B. Any person found to have violated the oath under Paragraph (1) or (2) of Subsection A of this section shall be guilty of a misdemeanor. This subsection shall not apply to communications by the prosecuting attorney to his staff or grand jury aides and in obtaining and presenting evidence, preparing indictments, reports and other undertakings of the grand jury and in preparation for trial.

History: 1953 Comp., § 41-5-6, enacted by Laws 1969, ch. 276, § 6; 1979, ch. 337, § 4.

ANNOTATIONS

Repeals. — Laws 1969, ch. 276, § 14, repeals former 41-5-6, 1953 Comp., relating to the effect of the challenge to the grand jury panel.

Registration of oath not required. — All that this section requires is that an oath be taken and while it is desirable that a signed oath be registered, registration is not an absolute requirement. State v. Gilbert, 98 N.M. 530, 650 P.2d 814 (1982).

Duty of juror was that of secrecy forever concerning matters coming before him except as otherwise provided by statute. In re Hittson, 20 N.M. 319, 150 P. 733 (1915) (decided under former law).

Impeachment of indictment by grand jury. — Members of grand jury were not permitted to impeach an indictment duly found, returned in open court and filed as such, by testifying as to what was said by the prosecution officer while advising with them in his official capacity. United States v. Tallmadge, 14 N.M. 293, 91 P. 729 (1907) (decided under former law).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 38 Am. Jur. 2d Grand Jury § 17.

Officer, member of grand jury as, within constitutional or statutory provision in relation to oath or affirmation, 118 A.L.R. 1098.

Duty of secrecy on part of members of, or witnesses or other persons present before, grand jury, 127 A.L.R. 272.

Accused's right to, and prosecution's privilege against, disclosure of identity of informer, 76 A.L.R.2d 262.

Failure to swear or irregularity in swearing witnesses appearing before grand jury as ground for dismissal of indictment, 23 A.L.R.4th 154.

38A C.J.S. Grand Juries § 56.

31-6-7. Assistance for grand jury; report.

A. The district court shall assign necessary personnel to aid the grand jury in carrying out its duties. The district attorney or his assistants shall attend the grand jury, examine witnesses and prepare indictments, reports and other undertakings of the grand jury.

B. When engaged in the investigation of an offense over which he has jurisdiction, the attorney general or his assistants may attend a grand jury, examine witnesses and prepare indictments, reports and other undertakings of the grand jury.

C. When a grand jury is convened in response to a citizens' grand jury petition pursuant to Article 2, Section 14 of the constitution of New Mexico, the district attorney or his assistants, unless otherwise disqualified, shall attend and conduct the grand jury.

D. A prosecuting attorney attending a grand jury and all grand jurors shall conduct themselves in a fair and impartial manner at all times during grand jury proceedings.

E. A grand jury, in its discretion, may make a formal, written report as to the condition and operation of any public office or institution it has investigated. The report shall not charge any public officer or other person with willful misconduct, corruption or malfeasance unless an indictment or accusation for removal from public office is also returned by the grand jury. The right of every person to be properly charged, face his accusers and be heard in his defense in open court shall not be circumvented by the report.

History: 1953 Comp., § 41-5-7, enacted by Laws 1969, ch. 276, § 7; 1979, ch. 337, § 5; 2001, ch. 98, § 1; 2003, ch. 363, § 4.

ANNOTATIONS

The 2001 amendment, effective July 1, 2001, added the Subsection A designation; in present Subsection A, substituted "necessary personnel" for "court reporters, bailiffs, interpreters, clerks or other persons as required", deleted the former second sentence, which read "The attorney general, when requested by the district court, shall assist the

grand jury", inserted "or his assistants" following "district attorney," deleted the former last sentence which read "The prosecuting attorney shall conduct himself in a fair and impartial manner at all times when assisting the grand jury"; and added Subsections B to E.

The 2003 amendment, effective July 1, 2003, inserted "and all grand jurors" following "grand jury" and substituted "during grand jury proceedings" for "when assisting the grand jury" in Subsection D.

Repeals. — Laws 1969, ch. 276, § 14, repeals former 41-5-7, 1953 Comp., relating to the effect of a challenge to an individual grand juror.

"Prejudice" is appropriate constitutional standard. — Inasmuch as "prejudice" is an appropriate standard in considering the exercise of constitutional rights before a trial jury which determines guilt, there is no reason to apply a stricter standard in considering the exercise of constitutional rights before a grand jury which determines probable cause to accuse. State v. Martinez, 98 N.M. 585, 642 P.2d 188 (Ct. App. 1982).

When prosecutorial misconduct during the presentment of the case is claimed, the defendant has a burden to show demonstrable prejudice. State v. Velasquez, 99 N.M. 109, 654 P.2d 562 (Ct. App. 1982).

But not where unauthorized person present. — A defendant need not show prejudice where an unauthorized person is present during the proceedings, or where the district attorney is present during grand jury deliberations. State v. Velasquez, 99 N.M. 109, 654 P.2d 562 (Ct. App. 1982).

Prosecutor to protect public interest and rights of accused. — In dealing with the grand jury, the prosecutor's duty is to protect both the public's interest and the rights of the accused. State v. Cruz, 99 N.M. 690, 662 P.2d 1357 (1983).

Where prosecutor's conduct violative of section. — Prosecutor's conduct of grand jury, where the total case was presented to the grand jury in less than nine minutes and all questioning was by leading questions, clearly violates this section. State v. Sanchez, 95 N.M. 27, 618 P.2d 371 (Ct. App. 1980), overruled on other grounds Buzbee v. Donnelly, 96 N.M. 692, 634 P.2d 1244 (1981).

Prosecutorial comments found not to violate this section. — See State v. Martinez, 97 N.M. 585, 642 P.2d 188 (Ct. App. 1982).

Failure to present evidence not directly negating guilt. — The failure of the prosecutor to present evidence that did not directly negate guilt did not breach his duty to assist the grand jury fairly and impartially. State v. Juarez, 109 N.M. 764, 790 P.2d 1045 (Ct. App. 1990).

Section does not provide for judicial review as to whether exculpatory evidence was withheld from the grand jury. State v. McGill, 89 N.M. 631, 556 P.2d 39 (Ct. App. 1976).

Law reviews. — 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 Criminal Procedure, see 20 N.M.L. Rev. 285 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 38 Am. Jur. 2d Grand Jury § 33 et seq.

Presence of unauthorized persons during state grand jury proceedings as affecting indictment, 23 A.L.R.4th 397.

Duty of prosecutor to present exculpatory evidence to state grand jury, 49 A.L.R.5th 639.

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.

38A C.J.S. Grand Juries §§ 74, 94 et seq., 102 et seq.

31-6-8. Record of testimony.

All proceedings in the grand jury room, with the exception of the deliberations of the grand jury, shall be reported verbatim and the notes or transcriptions thereof certified by the court reporter or stenographer making them, with the notes or transcriptions then deposited with the clerk or other officer of the district court as directed by the district judge. Upon order of the district court in cases where an indictment is returned, the notes may be caused to be transcribed and certified by the stenographer or court reporter who made them, if available, or by another person qualified and competent to transcribe them accurately. Copies of documentary evidence or a summary thereof if directed by the district court exhibited to the grand jury shall be made a part of the record. In cases where an indictment is not returned, the notes or transcriptions shall be destroyed unless ordered by the district judge to be preserved for good cause shown, including but not limited to the prosecution of a witness for perjury.

History: 1953 Comp., § 41-5-8, enacted by Laws 1969, ch. 276, § 8; 1979, ch. 337, § 6; 1983, ch. 62, § 2.

ANNOTATIONS

The 1983 amendment inserted "good cause shown, including but not limited to" in the last sentence.

Repeals. — Laws 1969, ch. 276, § 14, repeals former 41-5-8, 1953 Comp., relating to the court's appointment of the foreman of the grand jury.

Purpose of recording requirement. — The recording requirement of this section serves a number of purposes. The defendant has an opportunity to impeach the witness at trial if there is any inconsistency between grand jury testimony and trial testimony. Prosecutorial abuses of the grand jury system are restrained, and the prosecution can support its case at trial. State v. Velasquez, 99 N.M. 109, 654 P.2d 562 (Ct. App. 1982).

Absent prejudice, failure to record not grounds for dismissal. — In the absence of actual prejudice, there is no statutory nor constitutional ground for a dismissal of the indictment by virtue of a failure to record the grand jury proceeding. State v. Bigler, 98 N.M. 732, 652 P.2d 754 (Ct. App. 1982).

Advisement of elements of crime charged. — The practice of simply providing the grand jury with a written manual containing uniform jury 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 the indictments, does not comply with this section, 31-6-10 NMSA 1978, Rule 5-506(B) NMRA, or UJI 14-8001. 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.

Defendant entitled to inspect record at time of trial. — A defendant, at the trial of a criminal action, was entitled to inspect the grand jury testimony of the state's witness. State v. Morgan, 67 N.M. 287, 354 P.2d 1002 (1960) (decided under former law).

And to examine portion of testimony after trial. — 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's grand jury testimony relating to the crime for which defendant is charged. The witness may be cross-examined concerning that testimony. If otherwise, an accused is denied the right to confront the witnesses against him. State v. Sparks, 85 N.M. 429, 512 P.2d 1265 (Ct. App. 1973).

But not in advance of trial. — Accused was not entitled to transcript of testimony of all witnesses who testified before grand jury with respect to criminal charge out of which indictments against him arose, in advance of trial, in the absence of showing of any particularized need. State v. Tackett, 78 N.M. 450, 432 P.2d 415 (1967), cert. denied, 390 U.S. 1026, 88 S. Ct. 1414, 20 L. Ed. 2d 283 (1968) (decided under former law).

Review of minutes by trial court harmless error. — Reading and review of grand jury minutes by trial court, although improper, was harmless error since such review was not the basis for allegedly erroneous ruling. State v. Elam, 86 N.M. 595, 526 P.2d 189 (Ct. App.), cert. denied, 86 N.M. 593, 526 P.2d 187 (1974).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 38 Am. Jur. 2d Grand Jury § 35.

Libel and slander: proceedings, presentments, investigations, and reports of grand jury as privileged, 48 A.L.R.2d 716.

Accused's right to inspection of minutes of state grand jury, 20 A.L.R.3d 7.

Discovery, in civil proceeding, of records of criminal investigation by state grand jury, 69 A.L.R.4th 298.

38A C.J.S. Grand Juries §§ 111, 171 et seq.

31-6-9. Charge to grand jury.

The district judge convening a grand jury shall charge it with its duties and direct it as to any special inquiry into violations of law that he wishes it to make.

History: 1953 Comp., § 41-5-9, enacted by Laws 1969, ch. 276, § 9; 1993, ch. 71, § 1.

ANNOTATIONS

The 1993 amendment, effective June 18, 1993, rewrote this section to the extent that a detailed comparison is impracticable.

Repeals. — Laws 1969, ch. 276, § 14, repeals former 41-5-9, 1953 Comp., relating to the oath administered to the foreman of the grand jury.

Limiting grand jury investigation. — The district court does not possess discretion to limit the investigative prerogative of the grand jury. Once convened for a specific inquiry, a grand jury should be obliged likewise to inquire into other offenses of which it may have knowledge. State ex rel. Deschamps v. Kase, 114 N.M. 38, 834 P.2d 415 (1992) (decided prior to 1993 amendment).

District courts may limit grand jury investigations to specific incidents identified in the petition. Therefore 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 petitioners seek nothing more than a witch hunt. District Court v. McKenna, 118 N.M. 402, 881 P.2d 1387 (1994), cert. denied, 514 U.S. 1018, 115 S. Ct. 1361, 131 L. Ed. 2d 218 (1995).

Indictment for perjury committed before grand jury. — A grand jury may properly indict a defendant for perjury on the basis of defendant's false testimony before the grand jury since such an indictment is consistent with the juror's duty to inquire into public offenses. State v. Watkins, 92 N.M. 470, 590 P.2d 169 (Ct. App. 1979).

Distinction between grand and petit juries. — There was a wide distinction between a grand and a petit jury as to their functions and methods of procedure. The action of the former was simply preliminary; it was an inquiry by the grand inquest as to whether

there was such probability for the statements made before them, which were usually ex parte, of the guilt of a certain person, that he ought to be placed on trial. Territory v. Young, 2 N.M. 93 (1881) (decided under former law).

Duty to share knowledge of offenses committed with fellow jurors. — It was not expected that in every instance each grand juror be free from all previous knowledge of the cases, or even of the precise circumstances of the cases coming before them for official action; on the contrary, it was stated in the statute as to their powers and duties, which was to be read to every grand jury as a part of the charge, that if a member knew of an offense committed, he was to declare the same to his fellow jurors. Territory v. Young, 2 N.M. 93 (1881) (decided under former law).

Law reviews. — For article, "Prisoners Are People," see 10 Nat. Resources J. 869 (1970).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 38 Am. Jur. 2d Grand Jury § 18.

Matters within investigating powers of grand jury, 22 A.L.R. 1356, 106 A.L.R. 1383, 120 A.L.R. 437.

Erroneous instructions by court to grand jury as grounds for quashing indictment, 105 A.L.R. 575.

Contemporaneous existence or functioning of two or more grand juries, 121 A.L.R. 814.

Individual's right to present complaint or evidence of criminal offense, 24 A.L.R.4th 316.

38A C.J.S. Grand Juries §§ 74, 75.

31-6-9.1. Abuse of grand jury procedures.

The prosecuting attorney shall not use the grand jury solely for the purpose of obtaining additional evidence against an already indicted person on the charge or accusation for which the person was indicted.

History: Laws 1979, ch. 337, § 12.

ANNOTATIONS

Misuse of protected information. — A grand jury indictment will be dismissed only if the defendant can affirmatively demonstrate how he was prejudiced by the prosecutor's alleged misuse of the protected grand jury information. State v. Benavidez, 1999-NMCA-053, 127 N.M. 189, 979 P.2d 234.

Use of defendant's testimony at second grand jury hearing for impeachment at trial did not affect the validity of the second indictment since the grand jury was ordered in

response to the defendant's own motion. State v. Martinez, 1996-NMCA-109, 122 N.M. 476, 927 P.2d 31.

31-6-10. Requirement for indictment; number of jurors concurring.

Before the grand jury may vote an indictment charging an offense against the laws of the state, it must be satisfied from the lawful evidence before it that an offense against the laws has been committed and that there is probable cause to accuse by indictment the person named, of the commission of the offense so that he may be brought to trial therefor. In the absence of an indictment against a person holding public office or a presentment for the removal of a local elected officer, the grand jury shall not denigrate that person's moral fitness to hold public office. Eight jurors must concur to return an indictment.

History: 1953 Comp., § 41-5-10, enacted by Laws 1969, ch. 276, § 10; 1979, ch. 337, § 7.

ANNOTATIONS

Cross references. — For number of jurors necessary to concur in finding indictment, see N.M. Const., art. II, § 14.

Repeals. — Laws 1969, ch. 276, § 14, repeals former 41-5-10, 1953 Comp., relating to the oath administered to grand jurors.

Advisement of elements of crime charged. — The practice of simply providing the grand jury with a written manual containing uniform jury 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 the indictments, does not comply with this section, 31-6-8 NMSA 1978, Rule 5-506(B) NMRA, or UJI 14-8001. 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.

But rule does not apply to defenses. — The rule requiring instruction to the grand jury on the essential elements of the crime charged does not apply to defenses. State v. Augustin M., 2003-NMCA-065, 133 N.M. 636, 68 P.3d 182, cert. granted, 133 N.M. 727, 69 P.3d 237 (2003).

Sufficiency of evidence not subject to judicial review. — The statutes concerning the evidence adduced before grand juries do not provide for judicial review of the sufficiency of the evidence considered by the grand jury. State v. Paul, 82 N.M. 619, 485 P.2d 375 (Ct. App.), cert. denied, 82 N.M. 601, 485 P.2d 357 (1971).

As well as evidence establishing probable cause. — The sufficiency of the evidence presented to a grand jury to establish probable cause for an indictment is not subject to

judicial review. State v. Elam, 86 N.M. 595, 526 P.2d 189 (Ct. App.), cert. denied, 86 N.M. 593, 526 P.2d 187 (1974).

Massive amount of evidence found to support grand jury's finding of probable cause to accuse. See State v. Ballinger, 99 N.M. 707, 663 P.2d 366 (Ct. App. 1983).

Law reviews. — 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. — 41 Am. Jur. 2d Indictments and Informations § 26 et seq.

What is "infamous" offense within constitutional or statutory provision in relation to presentment or indictment by grand jury, 24 A.L.R. 1002.

Quashing indictment for lack or insufficiency of evidence before grand jury, 59 A.L.R. 567.

Grand jury's failure or refusal to find indictment upon investigation as affecting right to file information, 120 A.L.R. 713.

Absence of grand jurors during hearing as affecting indictment, 156 A.L.R. 248.

Waiver: right to waive indictment, information, or other formal accusation, 56 A.L.R.2d 837.

Hearsay: admission of hearsay evidence incompetent at trial as affecting, in absence of statutory regulation, validity of indictment or conviction, 37 A.L.R.3d 612.

Incompetent witness, validity of indictment where grand jury heard, 39 A.L.R.3d 1064.

42 C.J.S. Indictments and Informations § 13 et seq.

31-6-11. Evidence before grand jury.

A. Evidence before the grand jury upon which it may find an indictment is that which is lawful, competent and relevant, including the oral testimony of witnesses under oath and any documentary or other physical evidence exhibited to the jurors. The Rules of Evidence shall not apply to a grand jury proceeding. The sufficiency of the evidence upon 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.

B. It is the duty of the grand jury to weigh all the evidence submitted to it, and when it has reason to believe that other lawful, competent and relevant evidence is available that would disprove or reduce a charge or accusation or that would make an indictment unjustified, then it shall order the evidence produced. At least twenty-four hours before

grand jury proceedings begin, the target or his counsel may alert the grand jury to the existence of evidence that would disprove or reduce an accusation or that would make an indictment unjustified, by notifying the prosecuting attorney who is assisting the grand jury in writing regarding the existence of that evidence.

C. A district attorney shall use reasonable diligence to notify a person in writing that the person is the target of a grand jury investigation. Unless the district judge presiding over the grand jury determines by clear and convincing evidence that providing notification may result in flight by the target, result in obstruction of justice or pose a danger to another person, the target of a grand jury investigation shall be notified in writing of the following information:

(1) that he is the target of an investigation;

(2) the nature of the alleged crime being investigated and the date of the alleged crime and any applicable statutory citations;

(3) the target's right to testify no earlier than four days after receiving the target notice if he is in custody, unless for good cause the presiding judge orders a different time period or the target agrees to testify sooner;

(4) the target's right to testify no earlier than ten days after receiving the target notice if he is not in custody, unless for good cause the presiding judge orders a different time period or the target agrees to testify sooner;

(5) the target's right to choose to remain silent; and

(6) the target's right to assistance of counsel during the grand jury investigation.

History: 1953 Comp., § 41-5-11, enacted by Laws 1969, ch. 276, § 11; 1979, ch. 337, § 8; 1981, ch. 238, § 1; 2003, ch. 363, § 5.

ANNOTATIONS

The 2003 amendment, effective July 1, 2003, inserted "that which is lawful, competent and relevant, including" in the first sentence, added the second sentence, and deleted "or competency" following "sufficiency" in Subsection A; inserted "lawful" following "other", "and relevant" following "competent" and "or reduce" following "disprove" in the first sentence and deleted the last three sentences, which read "The target shall be notified of his target status and be given an opportunity to testify, if he desires to do so, unless the prosecutor determines that notification may result in flight, endanger other persons, obstruct justice, or the prosecutor is unable with reasonable diligence to notify said person. A showing of reasonable diligence in notifying the target by the prosecutor is not required unless and until the target establishes actual and substantial prejudice as a result of an alleged failure by the prosecutor to exercise reasonable diligence in

notifying the target of his target status before the grand jury. The prosecuting attorney assisting the grand jury shall present evidence that directly negates the guilt of the target where he is aware of such evidence" and added the present second sentence in Subsection B; and added Subsection C.

Repeals. — Laws 1969, ch. 276, § 14, repeals former 41-5-11, 1953 Comp., relating to the oath given to jurors subsequently admitted.

Constitutional claim not supported. — Allegation of due process claim that, while detained, appellant was denied his right to testify at a grand jury hearing, as required by Subsection C of this section, does not and cannot support a constitutional claim. Hoffman v. Martinez, ____F.3d____ (10th Cir. 2004).

"Prejudice" is appropriate constitutional standard. — Inasmuch as "prejudice" is an appropriate standard in considering the exercise of constitutional rights before a trial jury which determines guilt, there is no reason to apply a stricter standard in considering the exercise of constitutional rights before a grand jury which determines probable cause to accuse. State v. Martinez, 97 N.M. 585, 642 P.2d 188 (Ct. App. 1982).

Constitution does not give defendant right to cross-examine witnesses appearing before the grand jury. State v. Salazar, 81 N.M. 512, 469 P.2d 157 (Ct. App. 1970).

Application of target notification requirement. — The target notification requirement under Subsection B (now see Subsection C) applies to persons whom a grand jury investigates on its own initiative. State v. Gonzales, 96 N.M. 513, 632 P.2d 748 (Ct. App.), cert. denied, 96 N.M. 543, 632 P.2d 1181 (1981).

Whether statutory notice requirement has been met is question of fact. Rogers v. State, 94 N.M. 218, 608 P.2d 530 (Ct. App. 1980).

Four-days' notice to defendant of target status deemed sufficient. — Four-days' notice of a grand jury investigation and of target status is certainly sufficient time for the defendant to exercise his right to testify. State v. Cruz, 99 N.M. 690, 662 P.2d 1357 (1983).

Any effective form of notice deemed sufficient. — This section does not specify the method of giving notice; any method, written or oral, suffices so long as the method employed complies with the statutory intent that the target be given an opportunity to testify. Rogers v. State, 94 N.M. 218, 608 P.2d 530 (Ct. App. 1980).

Notice to target's attorney may amount to compliance with the notice requirement, depending on the facts of the case. Rogers v. State, 94 N.M. 218, 608 P.2d 530 (Ct. App. 1980).

Failure to notify of target status. — Defendant was not entitled to notice that he was a target of the grand jury investigation when at the time the offense (perjury before the

grand jury) had not yet been committed. State v. Albin, 104 N.M. 315, 720 P.2d 1256 (Ct. App. 1986).

Defect in required notice must be raised before trial. — The issue of whether notice has been given to the target of a grand jury investigation as required by this section 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, 94 N.M. 218, 608 P.2d 530 (Ct. App. 1980).

Untimely motion to dismiss. — 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 to waive 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.

When notice requirement is issue, prosecutor has burden of establishing either that the target was notified or that notification was excused under the "unless" clause, because the prosecutor is the party affirming that the grand jury indictment is proper. Rogers v. State, 94 N.M. 218, 608 P.2d 530 (Ct. App. 1980).

Defendant assumed to have actual notice. — When the prosecutor advised the trial court in the presence of the defendant and his counsel that the parties had stipulated that letters advising the defendant of grand jury proceedings against him had not been returned as undelivered, it may be assumed that the defendant had received actual notice. State v. Garcia, 98 N.M. 186, 646 P.2d 1250 (Ct. App. 1982).

Subsection B "prejudice". — The prejudice with which former Subsection B is concerned is prejudice in charging criminal conduct on the basis of probable cause. State v. Penner, 100 N.M. 377, 671 P.2d 38 (Ct. App. 1983).

Hearing on contention of juror bias. — Petitioner deserved a full review on interlocutory appeal from an order denying his motion to dismiss the indictments against him, where his contentions that several grand jurors were biased against him and other targeted witnesses before presentation of any evidence, and that he was led to believe that he could not present his own statement or explanation of the allegations against him, raised, at the very least, the issue of demonstrable prejudice to him. Anaya v. State, 104 N.M. 150, 717 P.2d 1119 (1986).

Burden of showing prejudice. — Because the prejudice involved in former Subsection B is prejudice to the defendant in the bringing of a criminal charge, defendant's burden is to establish that his missing testimony would have changed the vote of the grand jury on the issue of probable cause. State v. Penner, 100 N.M. 377, 671 P.2d 38 (Ct. App. 1983).

Trial court did not err by denying defendant's motion to dismiss an indictment for failure of the state to present certain statements where he did not establish demonstrable

prejudice by showing a substantial probability of a different outcome. State v. Lucero, 1998-NMSC-044, 126 N.M. 552, 972 P.2d 1143.

Prejudice to a defendant will not be presented from a lack of target notice and a lack of a chance to testify during a grand jury hearing. The defendant still must demonstrate the vote of the grand jury on the issue of probable cause. State v. Haynes, 2000-NMCA-060, 129 N.M. 304, 6 P.3d 1026.

Failure to disclose polygraph score. — Where the prosecution specifically told grand jury that defendant passed polygraph test, but failed to tell the grand jury his actual score on the test, the trial court properly refused defendant's motion to dismiss. The defendant failed to show that he was prejudiced, that the evidence directly negated his guilt, or that the allegedly exculpatory evidence would have been admissible at trial. State v. Blue, 1998-NMCA-135, 125 N.M. 826, 965 P.2d 945.

The trial court did not err in denying the defendant's motion to dismiss the indictment based on his inability to testify before the grand jury because he was incarcerated at the time. The defendant did not demonstrate that his missing testimony would have changed the vote of the grand jury on the issue of probable cause. State v. Dominguez, 115 N.M. 445, 853 P.2d 147 (Ct. App. 1993).

Prosecutor to impartially assist grand jury. — Although, following the 1981 amendment of this section, a prosecutor is not limited to presenting evidence admissible at trial to the grand jury, he is still constrained by his duty to assist the grand jury in a fair and impartial manner. Buzbee v. Donnelly, 96 N.M. 692, 634 P.2d 1244 (1981).

Statements explaining law or procedure. — Statements by a prosecutor to the grand jury explaining the law or procedure are proper so long as the statements are not in conflict with the charge given to the grand jury by the court or are not otherwise incorrect statements of the law or improper. State v. Hewitt, 108 N.M. 179, 769 P.2d 92 (Ct. App. 1988).

No requirement to instruct on defenses. — The rule requiring instruction to the grand jury on the essential elements of the crime charged does not apply to defenses. State v. Augustin M., 2003-NMCA-065, 133 N.M. 636, 68 P.3d 182, cert. granted, 133 N.M. 727, 69 P.3d 237 (2003).

In a prosecution for possession of marijuana in which the defendant argued that his possession and use of marijuana was a religious belief and sacrament, the prosecutor had no duty to instruct the grand jury on the defendant’s “religious-use defense". State v. Augustin M., 2003-NMCA-065, 133 N.M. 636, 68 P.3d 182, cert. granted, 133 N.M. 727, 69 P.3d 237 (2003).

Evidence directly negating guilt does not require special instruction to the grand jury to weigh and consider the impact of the potentially exculpatory evidence in making

a probable cause determination. State v. Augustin M., 2003-NMCA-065, 133 N.M. 636, 68 P.3d 182, cert. granted, 133 N.M. 727, 69 P.3d 237 (2003).

Grand jury findings conclusive. — The findings of a grand jury, when made by and through an indictment, duly returned into court, and regular upon its face, are conclusive, and the courts are without power or jurisdiction to inquire into the subject and review the testimony submitted to the grand jury to determine whether or not the required kind or degree of evidence was submitted. State v. Stevens, 93 N.M. 434, 601 P.2d 67 (Ct. App.), cert. denied, 93 N.M. 683, 604 P.2d 821 (1979), 458 U.S. 1109, 102 S. Ct. 3489, 73 L. Ed. 2d 1371 (1982).

Statutes governing evidence directory. — The statutes governing the kind, character and degree of evidence which should be produced before a grand jury in order to warrant the returning of an indictment are directory and are for the guidance of the grand jury. State v. McGill, 89 N.M. 631, 556 P.2d 39 (Ct. App. 1976).

Sufficiency of evidence not subject to judicial review. — The statutes concerning the evidence adduced before grand juries do not provide for judicial review of the sufficiency of the evidence considered by the grand jury. State v. Paul, 82 N.M. 619, 485 P.2d 375 (Ct. App.), cert. denied, 82 N.M. 601, 485 P.2d 357 (1971).

Courts powerless to review action of grand jury on indictments. — Unless there is some clear statutory authority to do so, the courts are without power to review the action of the grand jury to determine whether or not it had sufficient or insufficient, legal or illegal, competent or incompetent evidence upon which to return an indictment. State v. McGill, 89 N.M. 631, 556 P.2d 39 (Ct. App. 1976); Maldonado v. State, 93 N.M. 670, 604 P.2d 363 (1979).

Courts powerless to review action of grand jury on indictments; exception. – On a pretrial motion to dismiss charges alleging the sexual exploitation of children, 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 Sexual Exploitation of Children Act, 30-6A-1 to -4 NMSA 1978. State v. Rendleman, 2003-NMCA-150, 134 N.M. 744, 82 P.3d 554, cert. denied, 2003-NMCERT-003, 135 N.M. 51, 84 P.3d 668.

Including sufficiency of evidence supporting indictment. — Sufficiency of evidence to support grand jury indictment is not subject to judicial review. State v. Chance, 29 N.M. 34, 221 P. 183 (1923); State v. Paul, 82 N.M. 619, 485 P.2d 375 (Ct. App.), cert. denied, 82 N.M. 601, 485 P.2d 357 (1971); State v. Harge, 94 N.M. 11, 606 P.2d 1105 (Ct. App. 1979), overruled on other grounds Buzbee v. Donnelly, 96 N.M. 692, 634 P.2d 1244 (1981).

An indictment duly returned into court and regular on its face cannot be challenged with respect to the kind and degree of evidence. Buzbee v. Donnelly, 96 N.M. 692, 634 P.2d 1244 (1981).

Or whether exculpatory evidence withheld. — Subsection B and 31-6-7 NMSA 1978 do not provide for judicial review as to whether exculpatory evidence was withheld from the grand jury. State v. McGill, 89 N.M. 631, 556 P.2d 39 (Ct. App. 1976).

Withholding of exculpatory evidence may cause denial of due process. — A defendant could be denied due process by a prosecutor withholding exculpatory evidence from the jury, since the grand jury has a duty to protect a citizen against unfounded accusation, and only specified persons are authorized by statute to present matters to the grand jury. State v. McGill, 89 N.M. 631, 556 P.2d 39 (Ct. App. 1976).

The withholding of exculpatory evidence from a grand jury by a prosecutor violates an accused's due process rights only when the withholding affects the outcome of the proceeding and prejudices the accused. Buzbee v. Donnelly, 96 N.M. 692, 634 P.2d 1244 (1981).

Exculpatory circumstantial evidence. — There is no requirement that potentially exculpatory circumstantial evidence be considered by the grand jury in making a probable cause determination. State v. Augustin M., 2003-NMCA-065, 133 N.M. 636, 68 P.3d 182, cert. granted, 133 N.M. 727, 69 P.3d 237 (2003).

Prosecutor's broad discretion to present exculpatory evidence. — Although a prosecutor is required to present direct exculpatory evidence to the grand jury, he is invested with wide discretion as to the selection and presentation of evidence. Mandamus will not lie where the effect of its issuance would be to improperly limit the scope of the state's prosecutorial discretion. Kerpan v. Sandoval County Dist. Att'ys Office, 106 N.M. 764, 750 P.2d 464 (Ct. App. 1988).

This section is not violated simply because the prosecutor fails to produce evidence that is exculpatory, or through negligence fails to pursue an investigative lead that would produce directly exculpatory evidence. The prosecutor must know of the existence of the evidence and that it is exculpatory before the duty to produce it arises. State v. Armijo, 118 N.M. 802, 887 P.2d 1269 (Ct. App. 1994).

Due process afforded where inadmissible evidence not admitted at trial. — Where inadmissible evidence which has been presented to the grand jury is not admitted at trial, the indictment is not void and the defendant is afforded due process. Maldonado v. State, 93 N.M. 670, 604 P.2d 363 (1979).

Use of direct evidence negating accused's guilt. — By the words "that directly negates the guilt," in the last sentence in Subsection B, the legislature intended to permit the use of direct evidence negating guilt of the accused and to prohibit the use of indirect, or circumstantial, evidence negating guilt. Buzbee v. Donnelly, 96 N.M. 692, 634 P.2d 1244 (1981).

Subsection B requires a prosecutor to present to a grand jury only directly exculpatory evidence; he is not required to present evidence that does not directly negate guilt. State v. Juarez, 109 N.M. 764, 790 P.2d 1045 (Ct. App. 1990).

Exclusion of testimony not negating defendant's guilt. — Where testimony does not tend to negate defendant's guilt, its exclusion from the grand jury proceedings is no ground for dismissing the indictment. State v. Gonzales, 95 N.M. 636, 624 P.2d 1033 (Ct. App. 1981), overruled on other grounds Buzbee v. Donnelly, 96 N.M. 692, 634 P.2d 1244 (1981); State v. Lara, 110 N.M. 507, 797 P.2d 296 (Ct. App. 1990).

Causation in vehicular homicide case. — Even though causation is an essential element of the charge of vehicular homicide, the prosecutor is not required to instruct the grand jury on causation, including the definitions of proximate cause. State v. Augustin M., 2003-NMCA-065, 133 N.M. 636, 68 P.3d 182, cert. granted, 133 N.M. 727, 69 P.3d 237 (2003).

Trial court abused its discretion in quashing an indictment, where there was no indication that prosecutor's answers to jurors' questions improperly influenced the independent judgment of the jury so as to exclude or disregard the evidence urged to be considered by defendant. State v. Hewitt, 108 N.M. 179, 769 P.2d 92 (Ct. App. 1988).

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

For note, "Criminal Procedure - Grand Jury - Inadmissible Evidence, Due Process," see 11 N.M.L. Rev. 451 (1981).

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 criminal procedure, see 13 N.M.L. Rev. 341 (1983).

For annual survey of New Mexico Criminal Procedure, see 20 N.M.L. Rev. 285 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 38 Am. Jur. 2d Grand Jury § 37.

Indictment based on evidence illegally procured, 24 A.L.R. 1432.

Quashing indictment for lack or insufficiency of evidence before grand jury, 59 A.L.R. 567.

Admission of hearsay evidence incompetent at trial as affecting, in absence of statutory regulation, validity of indictment or conviction, 37 A.L.R.3d 612.

Incompetent witness, validity of indictment where grand jury heard, 39 A.L.R.3d 1064.

Individual's right to present complaint or evidence of criminal offense to grand jury, 24 A.L.R.4th 316.

Duty of prosecutor to present exculpatory evidence to state grand jury, 49 A.L.R.5th 639.

38A C.J.S. Grand Juries §§ 98, 101, 112 et seq., 171 et seq.

31-6-11.1. Renewed presentation of evidence forbidden.

After a grand jury acts on the merits of evidence presented to it and returns a no-bill, the same matter shall not be presented again to that jury or another grand jury on the same evidence.

History: Laws 1979, ch. 337, § 11.

ANNOTATIONS

Subsequent indictment for more serious crime permitted. — Where a defendant is originally indicted for second-degree murder, but later the district attorney reviews the case and decides the evidence supports first-degree murder, he may seek and obtain a second indictment, this time for first-degree murder. State v. Sena, 99 N.M. 272, 657 P.2d 128 (1983).

Subsequent information permitted after a no-bill. — Neither the N.M. Const., art. II, § 14 nor this section limits the state's ability to proceed by information after a grand jury has returned a no-bill. State v. Isaac M., 2001-NMCA-088, 131 N.M. 235, 34 P.3d 624, cert. denied, 131 N.M. 221, 34 P.3d 610 (2002).

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

31-6-12. Subpoena powers; notice to witnesses.

A. The grand jury has power to order the attendance of witnesses before it, to cause the production of all public and private records or other evidence relevant to its inquiry and to enforce such power by subpoena issued on its own authority through the district court convening the grand jury and executed by any public officer charged with the execution of legal process of the district court; provided that all subpoenaed witnesses shall be given a minimum of thirty-six hours' notice unless a shorter period is specifically approved for each witness by a judge of the district court.

B. The target of the investigation shall not be subpoenaed except where it is found by the prosecuting attorney to be essential to the investigation. If the target and his attorney, if he has one, sign a document stating that the target will assert the fifth amendment, he shall be excused from testifying on those matters as to which the district judge determines he has a valid fifth-amendment privilege.

C. Subpoenas directed to witnesses shall be returnable only when the grand jury is sitting.

History: 1953 Comp., § 41-5-12, enacted by Laws 1969, ch. 276, § 12; 1975, ch. 15, § 1; 1979, ch. 337, § 9.

ANNOTATIONS

Repeals. — Laws 1969, ch. 276, § 14, repeals former 41-5-12, 1953 Comp., relating to the charge and instructions given to the grand jury by the court.

Grand jury can issue subpoena, despite court's lack of jurisdiction. — Where no statute confers jurisdiction upon the district court to order the production of handwriting exemplars, a grand jury could issue a subpoena for the exemplars and the district court could enforce the subpoena. Sanchez v. Attorney Gen., 93 N.M. 210, 598 P.2d 1170 (Ct. App. 1979).

Subdivision A applies to target. — The provision of Subdivision A of this section, "that all subpoenaed witnesses shall be given a minimum of 36 hours' notice unless a shorter period is specifically approved for each witness by a judge of the district court," applies to a target, whether or not the target has been subpoenaed. Rogers v. State, 94 N.M. 218, 608 P.2d 530 (Ct. App. 1980).

Target defendant. — Defendant could not have been designated as a target defendant for a crime which had not yet been committed. State v. Albin, 104 N.M. 315, 720 P.2d 1256 (Ct. App. 1986).

Law reviews. — For annual survey of New Mexico law relating to criminal procedure, see 12 N.M.L. Rev. 271 (1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 38A C.J.S. Grand Juries §§ 98, 101, 112 et seq.

31-6-13. Compensation of jurors and witnesses.

Grand jurors shall be paid by the district court a per diem allowance and mileage for their necessary travel for their attendance and service in the amounts provided by law for trial or petit jurors. Witnesses attending the grand jury under subpoena shall be paid by the district court a per diem allowance and mileage for their necessary travel in the amounts provided by law for witnesses attending trials.

History: 1953 Comp., § 41-5-13, enacted by Laws 1969, ch. 276, § 13.

ANNOTATIONS

Cross references. — For mileage and compensation for jurors and jury commissioners, see 38-5-15 NMSA 1978.

For per diem and mileage for witnesses, see 38-6-4 NMSA 1978.

Repeals. — Laws 1969, ch. 276, § 14, repeals former 41-5-13, 1953 Comp., relating to the retirement of the grand jury for their inquiry into the offenses.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 38A C.J.S. Grand Juries § 12.

31-6-14. Multiple representation.

A lawyer or lawyers who are associated in practice shall not continue multiple representation of clients in a grand jury proceeding if the exercise of the lawyer's independent professional judgment on behalf of one of the clients will be or is likely to be adversely affected by his representation of another client. If the court determines that this principle is violated, it may order separate representation of witnesses, giving appropriate weight to an individual's right to counsel of his own choosing.

History: Laws 1979, ch. 337, § 13.

31-6-15. Witness immunity; protection from harrassment [harassment] and unreasonable inconvenience.

A. If a witness is granted immunity in return for evidence, none of his testimony or any evidence obtained as a fruit of his testimony shall be used against him in any criminal prosecution except that such person may be prosecuted for any perjury committed in such testimony or in producing such evidence, or for contempt for failing to give an answer or produce evidence.

B. Witnesses shall not be harrassed [harassed] nor subjected to unreasonable repeated appearances by the grand jury or the prosecuting attorney assisting the grand jury.

History: Laws 1979, ch. 337, § 10; 1978 Comp., § 31-3A-1, recompiled as 1978 Comp., § 31-6-15.

ANNOTATIONS

Bracketed material. — The bracketed material in the catchline and in Subsection B was inserted by the compiler; it was not enacted by the legislature, and it is not part of the law.

Cross references. — As to witness immunity generally, see Rule 5-116 NMRA and Rule 4-412 NMRA.

Section applies only to immunity for testimony before grand juries and not to immunity for testimony at trial. State v. Summerall, 105 N.M. 82, 728 P.2d 833 (1986).

The very purpose of granting immunity is to reach the truth. State v. Boeglin, 100 N.M. 470, 672 P.2d 643 (1983).

Witness must testify truthfully. — Implicit in Subsection A is the fact that a witness must testify truthfully or be subject to being prosecuted: (1) for perjury committed in such testimony or in producing such evidence; or (2) for contempt for failure to give an answer or produce evidence. To hold otherwise would make this statute meaningless. State v. Boeglin, 100 N.M. 470, 672 P.2d 643 (1983).

Prosecutor applies for, court grants, use immunity. — Taken together, Rule 5-116, Rule 11-412, and this section give the trial court the authority to grant use immunity when it is applied for by the prosecutor. State v. Summerall, 105 N.M. 82, 728 P.2d 835 (Ct. App. 1986).

Limitations to derivative use immunity. — This statute and its implementing rules, Rule 5-116 and Rule 11-412 NMRA, 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, 118 N.M. 572, 883 P.2d 1269 (1994).

Law reviews. — For note, "Criminal Procedure - The Fifth Amendment Privilege Against Self-Incrimination Applies to Juveniles in Court-Ordered Psychological Evaluations: State v. Christopher P.," see 23 N.M.L. Rev. 305 (1993).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Propriety of blanket or per se rule prohibiting federal grand jury from indicting witness who has previously testified before same grand jury under grant of use immunity, 139 A.L.R. Fed. 489.

ARTICLE 7
Indictments and Proof of Ownership for Offenses Concerning Domestic Animals

31-7-1. [Description of bovine animals; proof of brand; prima facie evidence of ownership.]

In the prosecution of any offense arising under the laws of this state in regard to the unlawful taking, handling, killing, driving or other unlawful disposition of animals of the bovine kind, the description "neat cattle" in any indictment shall be deemed sufficient, and the proof of the brand by a certified copy of the registration thereof in the brand book, under the seal of the cattle sanitary board [livestock board], certified to by the secretary of said board, shall be sufficient to identify all horses, mules, asses or neat cattle, and shall be prima facie proof that the person owning the recorded brand is the owner of the animal branded with such brand.

History: Laws 1895, ch. 6, § 6; C.L. 1897, § 67; Code 1915, § 122; C.S. 1929, § 4-1408; 1941 Comp., § 42-704; 1953 Comp., § 41-7-4.

ANNOTATIONS

Cross references. — For recording of brands, see 77-9-5 NMSA 1978.

For certified copy of brand fee, see 77-2-7.4 NMSA 1978.

Livestock board. — Laws 1967, ch. 213, § 2, creates the livestock board and transfers all the powers held by the cattle sanitary board to the livestock board, and Laws 1971, ch. 50, § 2, makes the livestock board the sole board for the registration of brands and marks on horses, mules, asses, cattle and sheep. See 77-2-7.2 NMSA 1978.

Purpose of section. — This section merely sets up a procedure that may be followed by state in prosecution involving the unlawful disposition of bovines and was not intended to be available to defendant. State v. Reed, 55 N.M. 231, 230 P.2d 966 (1951), cert. denied, 342 U.S. 932, 72 S. Ct. 374, 96 L. Ed. 694 (1952).

Use of statutory description "one neat cattle" is sufficient description as commonly applied in the United States to describe a beast of the bovine genus. Territory v. Christman, 9 N.M. 582, 58 P. 343 (1899).

And just "cow" sufficient. — Description in indictment of stolen animal as a cow was sufficient to support conviction under section making it an offense to steal any neat cattle. Wilburn v. Territory, 10 N.M. 402, 62 P. 968 (1900).

Certificate of record sufficient proof. — Proof of brand by certificate of record, signed by secretary of cattle sanitary board, (now livestock board), is sufficient. Territory v. Caldwell, 14 N.M. 535, 98 P. 167 (1908).

Recorded brand under this section is sufficient to identify animals classed therein. Barnett v. Wedgewood, 28 N.M. 312, 211 P. 601 (1922).

Title established by certificate of recorded brand. — Where title to animals, the subject of larceny, is sought to be established by brand, a certificate of the recorded brand must be shown. Territory v. Smith, 12 N.M. 229, 78 P. 42 (1904); Hancock v. Beasley, 14 N.M. 239, 91 P. 735 (1907).

Introduction of certified copy of brand in evidence. — It is only necessary to introduce a certified copy of recorded brand in evidence, where evidence of ownership depends upon brand on animal. State v. Analla, 18 N.M. 294, 136 P. 600 (1913).

Brand alone not sufficient evidence of ownership. — Proof that calf bore defendant's brand in prosecution for stealing and branding the animal did not constitute prima facie evidence that defendants owned the animal, under provisions of this section. State v. Reed, 55 N.M. 231, 230 P.2d 966 (1951), cert. denied, 342 U.S. 932, 72 S. Ct. 374, 96 L. Ed. 694 (1952).

Prima facie proof of ownership. — Recorded brand is prima facie proof that person owning recorded brand is owner of animal bearing such brand. Barnett v. Wedgewood, 28 N.M. 312, 211 P. 601 (1922).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 4 Am. Jur. 2d Animals § 9; 41 Am. Jur. 2d Indictments and Informations § 149.

Stealing carcass as within statute making it larceny to steal cattle or livestock, 78 A.L.R.2d 1100.

3A C.J.S. Animals § 26; 42 C.J.S. Indictments and Informations § 108.

ARTICLE 8
Out-of-State Witnesses

31-8-1. [Attendance of witnesses from without a state; definitions.]

"Witness," as used in this act [31-8-1 to 31-8-6 NMSA 1978], shall include a person whose testimony is desired in any proceeding or investigation by a grand jury or in a criminal action, prosecution or proceeding.

The word "state" shall include any territory of the United States and District of Columbia.

The word "summons" shall include a subpoena, order or other notice requiring the appearance of a witness.

History: Laws 1937, ch. 66, § 1; 1941 Comp., § 42-1213; 1953 Comp., § 41-12-13.

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Am. Jur. 2d, A.L.R. and C.J.S. references. — 81 Am. Jur. 2d Witnesses §§ 34, 35, 39.

Admissions to prevent continuance sought to secure testimony of absent witness in criminal case, 9 A.L.R.3d 1180.

Availability under Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings of subpoena duces tecum, 7 A.L.R.4th 836.

Sufficiency of evidence to support or require finding that out-of-state witness in criminal case is "material witness" justifying certificate to secure attendances under Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings, 12 A.L.R.4th 742.

Sufficiency of evidence to support or require finding that in-state witness in criminal case is "material and necessary" justifing issuance of summons directing attendance of witness under Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings, 12 A.L.R.4th 771.

97 C.J.S. Witnesses § 17.

31-8-2. Summoning witness in this state to testify in another state.

If a judge of a court of record in any state which by its laws has made provision for commanding persons within that state to attend and testify in this state certifies under the seal of such court that there is a criminal prosecution pending in such court, or that a grand jury investigation has commenced or is about to commence, that a person being within this state is a material witness in such prosecution, or grand jury investigation and that his presence will be required for a specified number of days, upon presentation of such certificate to any judge of a court of record in the county in which such person is, such judge shall fix a time and place for a hearing, and shall make an order directing the witness to appear at a time and place certain for the hearing.

If at a hearing the judge determines that the witness is material and necessary, that it will not cause undue hardship to the witness to be compelled to attend and testify in the prosecution or a grand jury investigation in the other state and that the laws of the state in which the prosecution is pending, or grand jury investigation has commenced or is about to commence (and of any other state through which the witness may be required to pass by ordinary course of travel), will give to him protection from arrest and the service of civil and criminal process in connection with any matters which arose before his entrance into this state under the summons, he shall issue a summons, with a copy of the certificate attached, directing the witness to attend and testify in the court where the prosecution is pending, or where a grand jury investigation has commenced or is about to commence at a time and place specified in the summons. In any such hearing the certificate shall be prima facie evidence of all the facts stated therein.

If said certificate recommends that the witness be taken into immediate custody and delivered to an officer of the requesting state to assure his attendance in the requesting state, such judge may, in lieu of notification of the hearing, direct that such witness be forthwith brought before him for said hearing; and the judge at the hearing being satisfied of the desirability of such custody and delivery, for which determination the certificate shall be prima facie proof of such desirability may, in lieu of issuing subpoena or summons, order that said witness be forthwith taken into custody and delivered to an officer of the requesting state.

If the witness, who is summoned as above provided, after being paid or tendered by some properly authorized person the sum of six cents [($.06)] a mile for each mile by the ordinary traveled route to and from the court where the prosecution is pending and three dollars [($3.00)] for each day, that he is required to travel and attend as a witness, fails without good cause to attend and testify as directed in the summons, he shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this state.

History: Laws 1937, ch. 66, § 2; 1941 Comp., § 42-1214; 1953 Comp., § 41-12-14.

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Applicability to witnesses from another state. — The complex procedural requirements of this section apply to summoning witnesses from this state to appear in another state but do not apply to the converse situation. State v. Hall, 107 N.M. 17, 751 P.2d 701 (Ct. App. 1987).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 81 Am. Jur. 2d Witnesses §§ 34, 35, 39, 68 to 74.

Right of witness detained in custody for future appearance to fees for such detention, 50 A.L.R.2d 1439.

Allowance of mileage on witness fees with respect to witnesses who were not called to testify or not permitted to do so when called, 22 A.L.R.3d 675.

Sufficiency of evidence to support or require finding that in-state witness in criminal case is "material and necessary" justifying issuance of summons directly attendance of witness under Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings, 12 A.L.R.4th 771.

97 C.J.S. Witnesses §§ 17, 35 to 48.

31-8-3. Witness from another state summoned to testify in this state.

If a person in any state, which by its laws has made provision for commanding persons within its borders to attend and testify in criminal prosecutions, or grand jury investigations commenced or about to commence, in this state, is a material witness in a prosecution pending in a court of record in this state, or in a grand jury investigation which has commenced or is about to commence, a judge of such court may issue a certificate under the seal of the court stating these facts and specifying the number of days the witness will be required. Said certificate may include a recommendation that the witness be taken into immediate custody and delivered to an officer of this state to assure his attendance in this state. This certificate shall be presented to a judge of a court of record in the county in which the witness is found.

If the witness is summoned to attend and testify in this state he shall be tendered the sum of five cents [($.05)] a mile for each mile by the ordinary traveled route to and from the court where the prosecution is pending, and two dollars [($2.00)] for each day that he is required to travel and attend as a witness. A witness who has appeared in accordance with the provisions of the summons shall not be required to remain within this state a longer period of time than the period mentioned in the certificate, unless otherwise ordered by the court. If such witness, after coming into this state, fails without good cause to attend and testify as directed in the summons, he shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this state. Expenses as herein provided shall be paid from the fund from which all other witnesses are usually paid.

History: Laws 1937, ch. 66, § 3; 1941 Comp., § 42-1215; 1953 Comp., § 41-12-15.

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Preliminary hearing testimony may be used after diligent attempt to obtain witness. — Trial court did not abuse its discretion in admitting preliminary hearing testimony of absent state witness based on unavailability after prosecutor had exercised due diligence in obtaining the witness, even though prosecutor did not use a subpoena pursuant to this article to secure attendance of the witness from out of state until the witness had already become a fugitive, where the witness had made three previous voluntary appearances. State v. Martinez, 102 N.M. 94, 691 P.2d 887 (Ct. App. 1984).

Party summoning witness must act diligently. — Where no action was taken to require presence of out-of-state witness until some ten days before trial, no subpoena was issued for the witness and his presence at some future time appeared extremely doubtful, defendant had failed to show that diligence which the discretion of the court would be entitled to require. State v. Fernandez, 56 N.M. 689, 248 P.2d 679 (1952).

In seeking a continuance to secure the appearance of an absent witness, a party must show that it has used due diligence to obtain the witness' testimony. State v. Hall, 107 N.M. 17, 751 P.2d 701 (Ct. App. 1987).

Compliance with section deemed due diligence. — If the state wanted to guarantee the witness' attendance once it had located him in Kentucky but was unable to contact him directly, it should have used the procedures outlined in this section. These steps would not have guaranteed the witness' attendance at the trial; however, on the day trial was to commence, if the state had been able to show that it had used this section, it could have made a stronger argument to the court to grant a continuance based on its due diligence and good faith efforts. Because the state could rely only on efforts that had no legal effect and did not constitute due diligence, resulting in its crucial witness being absent, the court did not err in denying the state's motion for continuance and in dismissing the action. State v. Graham, 115 N.M. 745, 858 P.2d 412 (Ct. App. 1993).

Inability of witness to attend trial. — Where what out-of-state witness would testify to was pure speculation but witness was offered money for transportation and expenses, his inability to attend on day of trial did not make denial of defendant's motion for continuance until such time as witness could be produced erroneous, since required statement of facts it was believed witness would prove, as is necessary to support motion for continuance made on first day of trial, was not produced. State v. Fernandez, 56 N.M. 689, 248 P.2d 679 (1952).

Refusal of appellate court to hold witness unavailable. — The district attorney's statements that the state attempted to subpoena a material witness and that he was out-of-state were no more than bare recitals unsupported by factual elaboration. Since the record contained no evidence as to the circumstances of the state's alleged attempt and inability to subpoena the witness, the court of appeals refused to hold that the witness was unavailable for trial, and under Rule 11-804 NMRA his preliminary hearing testimony was not admissible in evidence. State v. Mann, 87 N.M. 427, 535 P.2d 70 (Ct. App. 1975).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 81 Am. Jur. 2d Witnesses §§ 34, 35, 39, 68 to 74.

Right of witness detained in custody for future appearance to fees for such detention, 50 A.L.R.2d 1439.

Allowance of mileage or witness fees with respect to witnesses who were not called to testify or not permitted to do so when called, 22 A.L.R.3d 675.

Sufficiency of evidence to support or require finding that out-of-state witness in criminal case is "material witness" justifying certificate to secure attendance under Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings, 12 A.L.R.4th 742.

97 C.J.S. Witnesses §§ 2 to 48.

31-8-4. Exemption from arrest and service of process.

If a person comes into this state in obedience to a summons directing him to attend and testify in this state he shall not while in this state pursuant to such summons be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this state under the summons.

If a person passes through this state while going to another state in obedience to a summons to attend and testify in that state or while returning therefrom, he shall not while so passing through this state be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this state under the summons.

History: Laws 1937, ch. 66, § 4; 1941 Comp., § 42-1216; 1953 Comp., § 41-12-16.

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Am. Jur. 2d, A.L.R. and C.J.S. references. — 5 Am. Jur. 2d Arrest § 128 et seq.; 62B Am. Jur. 2d Process §§ 39-43.

Power of legislature to grant or authorize committee to grant immunity from criminal prosecution to witnesses summoned before legislative committee, 87 A.L.R. 435.

6A C.J.S. Arrest §§ 6, 80 to 85; 72 C.J.S. Process §§ 27, 28.

31-8-5. Uniformity of interpretation.

This act [31-8-1 to 31-8-6 NMSA 1978] shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of the states which enact it.

History: Laws 1937, ch. 66, § 5; 1941 Comp., § 42-1217; 1953 Comp., § 41-12-17.

31-8-6. Short title.

This act [31-8-1 to 31-8-6 NMSA 1978] may be cited as "Uniform Act to Secure the Attendance of Witnesses From Without a State in Criminal Proceedings."

History: Laws 1937, ch. 66, § 6; 1941 Comp., § 42-1218; 1953 Comp., § 41-12-18.

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Am. Jur. 2d, A.L.R. and C.J.S. references. — Permissibility of testimony by telephone in state trial, 85 A.L.R.4th 476.

ARTICLE 9
Mental Illness and Competency

31-9-1. Determination of competency; raising the issue.

Whenever it appears that there is a question as to the defendant's competency to proceed in a criminal case, any further proceeding in the cause shall be suspended until the issue is determined. Unless the case is dismissed upon motion of a party, when the question is raised in a court other than the district court or a metropolitan court, the proceeding shall be suspended and the cause transferred to the district court. If the question of a defendant's competency is raised in the metropolitan court and the court determines that the defendant is incompetent to proceed in a criminal case, the cause, if not dismissed upon motion of a party, shall be transferred to the district court.

History: 1978 Comp., § 31-9-1, enacted by Laws 1988, ch. 107, § 1 and by 1988, ch. 108, § 1; 1989, ch. 94, § 1; 1993, ch. 240, § 1; 1993, ch. 249, § 1.

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Cross references. — For the interstate compact on mentally disordered offenders, see 31-5-10, 31-5-11 NMSA 1978.

For commitment of the mentally ill, see 43-1-2 to 43-1-23 NMSA 1978.

As to rule of criminal procedure governing defenses of insanity, incompetency, and lack of capacity, see Rule 5-602 NMRA.

Repeals and reenactments. — Laws 1988, ch. 108, § 1 and Laws 1988, ch. 107, § 1, both approved March 8, 1988, both repealed former 31-9-1 NMSA 1978, as amended by Laws 1987, ch. 353, § 1, and enacted identical new sections designated 31-9-1 NMSA 1978, effective May 18, 1988. For provisions of former section, see 1987 Cumulative Supplement to this pamphlet.

The 1989 amendment, effective July 1, 1989, inserted "or a metropolitan court" in the second sentence.

1993 amendments. — Identical amendments to this section were enacted by Laws 1993, ch. 240, § 1 and Laws 1993, ch. 249 § 1, both approved on April 6, 1993, and both effective June 18, 1993, which inserted "to proceed in a criminal case" in the first sentence, substituted "Unless the case is dismissed upon motion of a party, when" for "If" at the beginning of the second sentence and added the third sentence. The section is set out above as amended by Laws 1993, ch. 249, § 1. See 12-1-8 NMSA 1978.

Constitutionality. — This article did not deprive an incompetent criminal defendant of equal protection under the law, or of substantive or procedural due process. State v. Rotherham, 1996-NMSC-048, 122 N.M. 246, 923 P.2d 1131.

Competency of defendants in courts of limited jurisdiction. — Except for metropolitan courts, courts of limited jurisdiction have no authority to hold competency hearings. 2003 Op. Att'y Gen. No. 03-04.

Courts of limited jurisdiction have no authority to commit defendants to a mental health facility. 2003 Op. Att'y Gen. No. 03-04.

Multi-step competency proceeding. — The New Mexico statutory scheme provides for a multi-step competency proceeding when it appears that there is a question as to a defendant's competency. State v. Webb, 111 N.M. 78, 801 P.2d 660 (Ct. App. 1990).

Due process requires incompetent defendants to be treated differently. The conviction of an accused person while that person is legally incompetent violates due process, and thus incompetent defendants cannot be brought to trial in the same manner as competent defendants. State v. Gallegos, 111 N.M. 110, 802 P.2d 15 (1990).

Defendant cannot be validly tried while mentally incompetent to stand trial. State v. Tartaglia, 80 N.M. 788, 461 P.2d 921 (Ct. App. 1969).

Issue of insanity must be raised in good faith and supported by a showing sufficient to create a reasonable doubt as to the sanity of an accused. State v. Upton, 60 N.M. 205, 290 P.2d 440 (1955) (decided under former law).

Effect of false claim of lack of competency. — Where the file and records conclusively establish that his claim of lack of competency to stand trial was false, defendant was not entitled to a hearing on the claim. State v. Kenney, 81 N.M. 368, 467 P.2d 34 (Ct. App. 1970).

Section provides for questioning of competency prior to suspension. — This section provides that there must be a "question" as to the mental competency of a defendant to stand trial, before the court is required to suspend proceedings in the cause until the issue as to defendant's competency is determined. State v. Smith, 80 N.M. 742, 461 P.2d 157 (Ct. App. 1969).

And question of competency requires more than mere assertion. — This section requires there to be a "question" as to the accused's capacity to stand trial. The "question" is not raised by an assertion of that issue, even though the assertion is in good faith. As in the similar federal statute, there must be a showing of reasonable cause for the belief that an accused is not competent to stand trial. State v. Hollowell, 80 N.M. 756, 461 P.2d 238 (Ct. App. 1969).

Counsel's impressions of defendant's mental state insufficient. — "Wondering" about defendant's mental capacity which is based solely on counsel's impression is not reasonable cause for a belief that defendant is incompetent to stand trial. State v. Hovey, 80 N.M. 373, 456 P.2d 206 (Ct. App. 1969).

When court justified in proceeding without competency hearing. — Defense counsel's representations to the trial court that the defendant was competent to plead guilty and responsible for his actions effectively removed any question of competency from the case and justified court in proceeding without competency hearing, despite previously ordered psychiatric examination of defendant. State v. Bius, 85 N.M. 98, 509 P.2d 573 (Ct. App. 1973).

Motion must include grounds for belief of lack of capacity. — A motion on behalf of an accused for a judicial determination of mental competency to stand trial shall set forth the ground for belief that such mental capacity is lacking. When the motion does not set forth grounds for reasonable cause to believe the defendant may be insane or mentally incompetent, the motion can be denied. "The statute requires such an examination only when it is shown that there is reasonable cause to believe that an accused may be presently insane or otherwise mentally incompetent." State v. Hovey, 80 N.M. 373, 456 P.2d 206 (Ct. App. 1969).

Otherwise court not required to grant motion. — An examination is not necessary, nor is the court required to grant a motion seeking such examination unless there is a question as to the mental capacity of defendant. State v. Morales, 81 N.M. 333, 466 P.2d 899 (Ct. App.), cert. denied, 81 N.M. 305, 466 P.2d 871, cert. denied, 400 U.S. 842, 91 S. Ct. 84, 27 L. Ed. 2d 77 (1970).

Affirmative evidence of sanity found despite contrary expert testimony. — Where defendant presented two doctors who testified that defendant was not sane at the time of the commission of the crimes and the state presented one medical expert who said defendant was sane at the time of the commission of the offenses who not only had examined defendant, but had the benefit of the reports of defendant's psychiatrist and psychologist, this expert testimony was certainly affirmative evidence of sanity. State v. Lopez, 80 N.M. 599, 458 P.2d 851 (Ct. App.), cert. denied, 80 N.M. 607, 458 P.2d 859 (1969), cert. denied, 398 U.S. 942, 90 S. Ct. 1860, 26 L. Ed. 2d 279 (1970).

Possible prejudicial statement of expert not grounds for error. — Statement of medical expert that defendant had no mental disease either at the time of the commission of the criminal act or at the time of trial when the reason for testimony concerning defendant's mental condition at the time of trial was because the medical expert's examination had been primarily to determine defendant's present competency to stand trial found not to be error although possibly prejudicial. State v. Lopez, 80 N.M. 599, 458 P.2d 851 (Ct. App.), cert. denied, 80 N.M. 607, 458 P.2d 859 (1969), cert. denied, 398 U.S. 942, 90 S. Ct. 1860, 26 L. Ed. 2d 279 (1970).

Layman's observations acceptable on issue of sanity. — Testimony from layman who has observed defendant's conduct which, under rules almost universally applied, may be received on the question of sanity. State v. Ortega, 77 N.M. 7, 419 P.2d 219 (1966) (decided under former law).

Presumption of sanity. — One accused of a crime is presumed to be sane. However, if the defendant introduces competent evidence reasonably tending to support insanity at the time of the alleged offenses then an issue is raised as to the mental condition of the accused. State v. Lopez, 80 N.M. 599, 458 P.2d 851 (Ct. App.), cert. denied, 80 N.M. 607, 458 P.2d 859 (1969), cert. denied, 398 U.S. 942, 90 S. Ct. 1860, 26 L. Ed. 2d 279 (1970).

Burden of proof on defendant. — The burden of proof, when present insanity is alleged as a ground for preventing trial, sentence or execution, is generally said to be upon the defendant, to prove by a preponderance of evidence that he is too unsound mentally to be tried, sentenced or executed, as the case may be. State v. Ortega, 77 N.M. 7, 419 P.2d 219 (1966) (decided under former law).

Trial court's failure to determine competency not error. — Where defendant's claim is that the trial court erred in failing to judicially determine his mental competency and the context of this contention is that the motion was never called to the court's attention and no ruling was invoked; although, prior opinions indicate that an issue as to defendant's mental competency may still be litigated, still they do not support the view that a trial court errs in failing to decide an issue on which a ruling has not been invoked. State v. Madrigal, 85 N.M. 496, 513 P.2d 1278 (Ct. App.), cert. denied, 85 N.M. 483, 513 P.2d 1265 (1973).

Initial orders were not final orders subject to appellate review. — Where the trial court had made only the initial orders in a multi-part proceeding to determine defendant's competency to stand trial for murder, the orders finding defendant dangerous and incompetent to stand trial from which he appealed were not final orders subject to appellate review. State v. Webb, 111 N.M. 78, 801 P.2d 660 (Ct. App. 1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law § 79 et seq.

Test of present insanity which will prevent trial for crime or punishment after conviction, 3 A.L.R. 94.

Admissibility and probative force on issue as to mental condition, of evidence that one had been adjudged incompetent or insane, or had been confined in insane asylum, 7 A.L.R. 568, 68 A.L.R. 1309.

Evidence of declarations of accused on issue of insanity, 8 A.L.R. 1219.

Remedy of one convicted of crime while insane, 10 A.L.R. 213, 121 A.L.R. 267.

Showing as to mental condition which will entitle one restrained on ground of insanity to release, 19 A.L.R. 715.

Competency of testimony of nonexperts on question of sanity or insanity in criminal cases, 72 A.L.R. 579.

Judicial declaration of sanity, made after alleged offense but before acquittal on ground of insanity at time of offense, as affecting duty of court to commit defendant to asylum for insane, 88 A.L.R. 1084.

Extraterritorial effect and recognition of adjudication of competency or incompetency, sanity or insanity, 102 A.L.R. 444.

Admissibility of evidence of reputation on issue of mental condition, or testamentary or contractual incapacity or capacity, 105 A.L.R. 1443.

When finding or adjudication as to one's mental condition by official or body not clearly judicial is conclusive evidence or has effect of a judgment as regards legal mental status, 108 A.L.R. 47.

Jurisdiction of proceedings for restoration to competency of one who has allegedly regained sanity after an adjudication of incompetency, 121 A.L.R. 1509.

Right of appeal in proceeding for restoration to competency, 122 A.L.R. 541.

Investigation of present sanity to determine whether accused should be put, or continue, on trial, 142 A.L.R. 961.

Presumption of continuing insanity as applied to accused in criminal case, 27 A.L.R.2d 121.

Constitutional right to jury trial in proceeding for adjudication of incompetency or insanity, 33 A.L.R.2d 1145.

Unanimity of verdict in proceedings to determine sanity of one accused of crime, 42 A.L.R.2d 1468.

Right to counsel in insanity or incompetency adjudication proceedings, 87 A.L.R.2d 950.

Appealability of orders or rulings, prior to final judgment in criminal case, as to accused's mental competency, 16 A.L.R.3d 714.

Modern status of rules as to burden and sufficiency of proof of mental irresponsibility in criminal case, 17 A.L.R.3d 146.

Admissibility on issue of sanity of expert opinion based partly on a medical, psychological or hospital report, 55 A.L.R.3d 551.

Adequacy of defense counsel's representation of criminal client regarding incompetency, insanity, and related issues, 17 A.L.R.4th 575.

Competency to stand trial of criminal defendant diagnosed as "mentally retarded" - modern cases, 23 A.L.R.4th 493.

Malpractice liability based on prior treatment of mental disorder alleged to relate to patient's conviction of crime, 28 A.L.R.4th 712.

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.

Adequacy of defense counsel's representation of criminal client - issues of incompetency, 70 A.L.R.5th 1.

Adequacy of defense counsel's representation of criminal client - pretrial conduct or conduct at unspecified time regarding issues of insanity, 72 A.L.R.5th 109.

Incompetency at time of offense or trial as ground for vacating or setting aside sentence under 28 U.S.C. § 2255, 7 A.L.R. Fed. 565.

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.

31-9-1.1. Determination of competency; evaluation and determination.

The defendant's competency shall be professionally evaluated by a psychologist or psychiatrist or other qualified professional recognized by the district court as an expert and a report shall be submitted as ordered by the court. A hearing on the issue of the competency of an incarcerated defendant charged with a felony shall be held by the district court within a reasonable time, but in no event later than thirty days after

notification to the court of completion of the diagnostic evaluation. In the case of an incarcerated defendant not charged with a felony, the court shall hold a hearing and determine his competency within ten days of notification to the court of completion of the diagnostic evaluation.

History: 1978 Comp., § 31-9-1.1, enacted by Laws 1988, ch. 107, § 2 and by 1988, ch. 108, § 2; 1993, ch. 240, § 2; 1993, ch. 249, § 2.

ANNOTATIONS

Cross references. — As to rule of criminal procedure governing defenses of insanity, incompetency, and lack of capacity, see Rule 5-602 NMRA.

1993 amendments. — Identical amendments to this section were enacted by Laws 1993, ch. 240, § 2 and Laws 1993, ch. 249, § 2, both approved on April 6, 1993, and both effective June 18, 1993, which rewrote the section to the extent that a detailed comparison is impracticable. The section is set out above as amended by Laws 1993, ch. 249, § 2. See 12-1-8 NMSA 1978.

Duplicate laws. — Both Laws 1988, ch. 107, § 2, approved March 8, 1988, and Laws 1988, ch. 108, § 2, also approved March 8, 1988, enacted an identical section 31-9-1.1 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Right of indigent defendant in state criminal case to assistance of psychiatrist or psychologist, 85 A.L.R.4th 19.

Qualification of nonmedical psychologist to testify as to mental condition or competency, 72 A.L.R.5th 529.

31-9-1.2. Determination of competency; commitment; report.

A. When, after hearing, a court determines that a defendant is not competent to proceed in a criminal case and the court does not find that the defendant is dangerous, the court may dismiss the criminal case without prejudice in the interests of justice. Upon dismissal, the court may advise the district attorney to consider initiation of proceedings under the Mental Health and Developmental Disabilities Code [Chapter 43, Article 1 NMSA 1978] and order the defendant confined for a maximum of seven days to facilitate preparation and initiation of a petition pursuant to that code.

B. When a district court determines that a defendant charged with a felony is incompetent to proceed in the criminal case, but does not dismiss the criminal case, and the district court at that time makes a specific finding that the defendant is dangerous, the district court may commit the defendant as provided in this section for treatment to attain competency to proceed in a criminal case. The court shall enter an appropriate transport order that also provides for return of the defendant to the local facilities of the

court upon completion of the treatment. The defendant so committed shall be provided with treatment available to involuntarily committed persons, and:

(1) the defendant shall be detained by the department of health in a secure, locked facility; and

(2) the defendant, during the period of commitment, shall not be released from that secure facility except pursuant to an order of the district court that committed him.

C. Within thirty days of receipt of the court's order of commitment of an incompetent defendant and of the necessary and available documents reasonably required for admission pursuant to written policies adopted by the secretary of health or his designee, the defendant shall be admitted to a facility designated for the treatment of defendants who are incompetent to stand trial and dangerous. If, after conducting an investigation, the secretary determines that the department of health does not have the ability to meet the medical needs of a defendant ordered committed to a facility, the secretary or his designee may refuse admission to the defendant upon written certification to the committing court and the parties of the lack of ability to meet the medical needs of the defendant. The certification must be made within fourteen days of the receipt of the court's order of commitment and necessary and available documents reasonably required for admission pursuant to written policies adopted by the secretary or his designee. Within ten days of filing of the certification the court shall conduct a hearing for further disposition of the criminal case.

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.

E. Within thirty days of an incompetent defendant's admission to a facility to undergo treatment to attain competency to proceed in a criminal case, the person supervising the defendant's treatment shall file with the district court, the state and the defense an initial assessment and treatment plan and a report on the defendant's amenability to treatment to render him competent to proceed in a criminal case, an assessment of the facility's or program's capacity to provide appropriate treatment for the defendant and an opinion as to the probability of the defendant's attaining competency within a period of nine months from the date of the original finding of incompetency to proceed in a criminal case.

History: 1978 Comp., § 31-9-1.2, enacted by Laws 1988, ch. 107, § 3 and by 1988, ch. 108, § 3; 1993, ch. 240, § 3; 1993, ch. 249, § 3; 1999, ch. 149, § 1.

ANNOTATIONS

Cross references. — As to rule of criminal procedure governing defenses of insanity, incompetency, and lack of capacity, see Rule 5-602 NMRA.

1993 amendments. — Identical amendments to this section were enacted by Laws 1993, ch. 240, § 3 and Laws 1993, ch. 249, § 3, both approved on April 6, 1993, and both effective June 18, 1993, which rewrote the section to the extent that a detailed comparison is impracticable. The section is set out above as amended by Laws 1993, ch. 249, § 3. See 12-1-8 NMSA 1978.

The 1999 amendment, effective June 18, 1999, added "and order the defendant confined for a maximum of seven days to facilitate preparation and initiation of a petition pursuant to that code" at the end of Subsection A; in Subsection B, inserted "charged with a felony" following "a defendant", substituted "proceed in the criminal case" for "stand trial", substituted "commit the defendant as provided in this section for" for "order", and deleted "for a period not to exceed one year" following "in a criminal case" in the first sentence; added Subsection C and redesignated the remaining subsections accordingly; and substituted "nine months" for "one year" in Subsection E.

Duplicate laws. — Both Laws 1988, ch. 107, § 3, approved March 8, 1988, and Laws 1988, ch. 108, § 3, also approved March 8, 1988, enacted an identical section 31-9-1.2 NMSA 1978.

Finding of dangerousness as prerequisite to detention. — In the context of the competency statutes, the finding of dangerousness is a prerequisite to the applicability of the portions of the statute allowing defendant to be detained for a longer period of time. Thus, the court must make a finding of dangerousness prior to the detention authorized by 31-9-1.5 NMSA 1978, but it need not have made such a finding at a prior hearing. State v. Gallegos, 111 N.M. 110, 802 P.2d 15 (1990).

31-9-1.3. Determination of competency; ninety-day review; reports; continuing treatment.

A. Within ninety days of the entry of the order committing an incompetent defendant to undergo treatment, the district court, sitting without a jury, shall conduct a hearing, unless waived by the defense, and shall determine:

(1) whether the defendant is competent to proceed in the criminal case; and, if not,

(2) whether the defendant is making progress under treatment toward attainment of competency within nine months from the date of the original finding of incompetency; and

(3) whether the defendant remains dangerous as that term is defined in Section 31-9-1.2 NMSA 1978.

B. At least seven days prior to the review hearing, the treatment supervisor shall submit a written progress report to the court, the state and the defense indicating:

(1) the clinical findings of the treatment supervisor and the facts upon which the findings are based;

(2) the opinion of the treatment supervisor as to whether the defendant has attained competency or as to whether the defendant is making progress under treatment toward attaining competency within nine months from the date of the original finding of incompetency and whether there is a substantial probability that the defendant will attain competency within nine months from the date of the original finding of incompetency;

(3) whether the defendant is dangerous as that term is defined in Section 31-9-1.2 NMSA 1978 or whether the defendant satisfies the criteria for involuntary commitment contained in the Mental Health and Developmental Disabilities Code [Chapter 43, Article 1 NMSA 1978]; and

(4) if the defendant is receiving medication, information from the prescribing physician indicating the type, the dosage and the effect of the medication on the defendant's appearance, actions and demeanor.

C. If the district court finds the defendant to be competent, the district court shall set the matter for trial, provided that if the defendant is in need of continued care or treatment and the supervisor of the defendant's treatment agrees to continue to provide it, the district court may enter any order it deems appropriate for the continued care or treatment of the defendant by the facility or program pending the conclusion of the criminal proceedings.

D. If the district court finds that the defendant is still not competent to proceed in a criminal case but that he is making progress toward attaining competency, the district court may continue or modify its original treatment order entered pursuant to Section 31-9-1.2 NMSA 1978, provided that:

(1) the question of the defendant's competency shall be reviewed again not later than nine months from the original determination of incompetency to proceed in a criminal case; and

(2) the treatment supervisor shall submit a written progress report as specified in Subsection B of this section at least seven days prior to such hearing.

E. If the district court finds that the defendant is still not competent, that he is not making progress toward attaining competency and that there is not a substantial probability that he will attain competency within nine months from the date of the original finding of incompetency, the district court shall proceed pursuant to Section 3l-9-1.4 NMSA 1978. However, if the defendant is in need of continued care and treatment and the supervisor of the defendant's treatment agrees to continue to provide it, the district court may enter any order it deems appropriate for the continued care or treatment by the facility or program pending the conclusion of the proceedings.

History: 1978 Comp., § 31-9-1.3, enacted by Laws 1988, ch. 107, § 4 and by 1988, ch. 108, § 4; 1993, ch. 240, § 4; 1993, ch. 249, § 4; 1999, ch. 149, § 2.

ANNOTATIONS

Cross references. — As to rule of criminal procedure governing defenses of insanity, incompetency, and lack of capacity, see Rule 5-602 NMRA.

1993 amendments. — Identical amendments to this section were enacted by Laws 1993, ch. 240, § 4 and Laws 1993, ch. 249, § 4, both approved on April 6, 1993, and both effective June 18, 1993, which inserted "district" preceding "court" throughout the section; inserted "to proceed in a criminal case" in the introductory paragraph of Subsection D, and substituted "original determination of incompetency to proceed in a criminal case" for "first review hearing" in Subsection D(1). The section is set out above as amended by Laws 1993, ch. 249, § 4. See 12-1-8 NMSA 1978.

The 1999 amendment, effective June 18, 1999, substituted "nine months" for "one year" throughout the section; substituted "proceed in the criminal case" for "stand trial or to plead" in Subsection A(1); added Subsection A(3); added "whether there is a substantial probability that the defendant will attain competency within nine months from the date of the original finding of incompetency" in Subsection B(2); and added Subsection B(3), redesignating the remaining subsections accordingly.

Duplicate laws. — Both Laws 1988, ch. 107, § 4, approved March 8, 1988, and Laws 1988, ch. 108, § 4, also approved March 8, 1988, enacted an identical section 31-9-1.3 NMSA 1978.

31-9-1.4. Determination of competency; incompetent defendants.

If at any time the district court determines that there is not a substantial probability that the defendant will become competent to proceed in a criminal case within a reasonable period of time not to exceed nine months from the date of the original finding of incompetency, the district court may:

A. hear the matter pursuant to Section 31-9-1.5 NMSA 1978 within three months if the defendant is charged with a felony that involves the infliction of great bodily harm on another person; a felony that involves the use of a firearm; aggravated arson, as provided in Section 30-17-6 NMSA 1978; criminal sexual penetration, as provided in Section 30-9-11 NMSA 1978; or criminal sexual contact of a minor, as provided in Section 30-9-13 NMSA 1978;

B. release the defendant from custody and dismiss with prejudice the charges against him; or

C. dismiss the criminal case without prejudice in the interest of justice. If the treatment supervisor has issued a report finding that the defendant satisfies the criteria

for involuntary commitment contained in the Mental Health and Developmental Disabilities Code [Chapter 43, Article 1 NMSA 1978], the department of health shall commence proceedings pursuant to Chapter 43, Article 1 NMSA 1978, and the court may order the defendant confined for a maximum of seven days to facilitate preparation and initiation of a petition pursuant to the Mental Health and Developmental Disabilities Code. The district court may refer the defendant to the district attorney for possible initiation of proceedings under the Mental Health and Developmental Disabilities Code.

History: 1978 Comp., § 31-9-1.4, enacted by Laws 1988, ch. 107, § 5 and by 1988, ch. 108, § 5; 1993, ch. 240, § 5; 1993, ch. 249, § 5; 1999, ch. 149, § 3.

ANNOTATIONS

Cross references. — As to rule of criminal procedure governing defenses of insanity, incompetency, and lack of capacity, see Rule 5-602 NMRA.

1993 amendments. — Identical amendments to this section were enacted by Laws 1993, ch. 240, § 5 and Laws 1993, ch. 249, § 5, both approved on April 6, 1993, and both effective June 18, 1993, which rewrote the section to the extent that a detailed comparison is impracticable. The section is set out above as amended by Laws 1993, ch. 249, § 5. See 12-1-8 NMSA 1978.

The 1999 amendment, effective June 18, 1999, substituted "nine months" for "one year" in the introductory paragraph, rewrote Subsection A which read: "set the matter for hearing pursuant to Section 31-9-1.5 NMSA 1978", and added the second sentence in Subsection C.

Duplicate laws. — Both Laws 1988, ch. 107, § 5, approved March 8, 1988, and Laws 1988, ch. 108, § 5, also approved March 8, 1988, enacted an identical section 31-9-1.4 NMSA 1978.

31-9-1.5. Determination of competency; evidentiary hearing.

A. As provided for in Subsection A of Section 31-9-1.4 NMSA 1978, a hearing to determine the sufficiency of the evidence shall be held if the case is not dismissed and if the defendant is charged with a felony that involves the infliction of great bodily harm on another person; a felony that involves the use of a firearm; aggravated arson, as provided in Section 30-17-6 NMSA 1978; criminal sexual penetration, as provided in Section 30-9-11 NMSA 1978; or criminal sexual contact of a minor, as provided in Section 30-9-13 NMSA 1978. Such hearing shall be conducted by the district court without a jury. The state and the defendant may introduce evidence relevant to the question of the defendant's guilt of the crime charged. 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.

B. If the evidence does not establish by clear and convincing evidence that the defendant committed a felony that involves the infliction of great bodily harm on another person; a felony that involves the use of a firearm; aggravated arson, as provided in Section 30-17-6 NMSA 1978; criminal sexual penetration, as provided in Section 30-9-11 NMSA 1978; or criminal sexual contact of a minor, as provided in Section 30-9-13 NMSA 1978, the district court shall dismiss the criminal case with prejudice; however, nothing in this section shall prevent the state from initiating proceedings under the provisions of the Mental Health and Developmental Disabilities Code [Chapter 43, Article 1 NMSA 1978], and the court may order the defendant confined for a maximum of seven days to facilitate preparation and initiation of a petition pursuant to that code.

C. If the district court finds by clear and convincing evidence that the defendant committed a crime and has not made a finding of dangerousness, pursuant to Section 31-9-1.2 NMSA 1978, the district court shall dismiss the charges without prejudice. The state may initiate proceedings pursuant to the provisions of the Mental Health and Developmental Disabilities Code and the court may order the defendant confined for a maximum of seven days to facilitate preparation and initiation of a petition pursuant to that code.

D. If the district court finds by clear and convincing evidence that the defendant committed a felony that involves the infliction of great bodily harm on another person; a felony that involves the use of a firearm; aggravated arson, as provided in Section 30-17-6 NMSA 1978; criminal sexual penetration, as provided in Section 30-9-11 NMSA 1978; or criminal sexual contact of a minor, as provided in Section 30-9-13 NMSA 1978 and enters a finding that the defendant remains incompetent to proceed and remains dangerous pursuant to Section 31-9-1.2 NMSA 1978:

(1) the defendant shall be detained by the department of health in a secure, locked facility;

(2) the defendant shall not be released from that secure facility except pursuant to an order of the district court which committed him or upon expiration of the period of time equal to the maximum sentence to which the defendant would have been subject had the defendant been convicted in a criminal proceeding;

(3) significant changes in the defendant's condition, including but not limited to trial competency and dangerousness, shall be reported in writing to the district court, state and defense; and

(4) at least every two years, the district court shall conduct a hearing upon notice to the parties and the department of health charged with detaining the defendant. At the hearing, the court shall enter findings on the issues of trial competency and dangerousness:

(a) upon a finding that the defendant is competent to proceed in a criminal case, the court shall continue with the criminal proceeding;

(b) if the defendant continues to be incompetent to proceed in a criminal case and dangerous pursuant to Section 31-9-1.2 NMSA 1978, the court shall review the defendant's competency and dangerousness every two years until expiration of the period of commitment equal to the maximum sentence to which the defendant would have been subject had he or she been convicted in a criminal proceeding; provided, that if the treatment supervisor recommends that the defendant be committed pursuant to the Mental Health and Developmental Disabilities Code, the court may at any time proceed pursuant to Subsection C of Section 31-9-1.4 NMSA 1978; and

(c) if the defendant is not committed pursuant to Sections 31-9-1 through 31-9-1.5 NMSA 1978 or if the court finds upon its two-year review hearing that the defendant is no longer dangerous, as defined in Section 31-9-1.2 NMSA 1978, the defendant shall be released.

History: 1978 Comp., § 31-9-1.5, enacted by Laws 1988, ch. 107, § 6 and by 1988, ch. 108, § 6; 1993, ch. 240, § 6; 1993, ch. 249, § 6; 1999, ch. 149, § 4.

ANNOTATIONS

Cross references. — As to rule of criminal procedure governing defenses of insanity, incompetency, and lack of capacity, see Rule 5-602 NMRA.

1993 amendments. — Identical amendments to this section were enacted by Laws 1993, ch. 240, § 6 and Laws 1993, ch. 249, § 6, both approved on April 6, 1993, and both effective June 18, 1993, which rewrote the section to the extent that a detailed comparison is impracticable. The section is set out above as amended by Laws 1993, ch. 249, § 6. See 12-1-8 NMSA 1978.

The 1999 amendment, effective June 18, 1999, inserted "if the case is not dismissed and if the defendant is charged with a felony that involves the infliction of great bodily harm on another person; a felony that involves the use of a firearm; aggravated arson, as provided in Section 30-17-6 NMSA 1978; criminal sexual penetration, as provided in Section 30-19-11 NMSA 1978; or criminal sexual contact of a minor, as provided in Section 30-9-13 NMSA 1978" in Subsection A; in Subsections B and D substituted "a felony that involves the infliction of great bodily harm on another person; a felony that involves the use of a firearm; aggravated arson, as provided in Section 30-17-6 NMSA 1978; criminal sexual penetration, as provided in Section 30-19-11 NMSA 1978; or criminal sexual contact of a minor, as provided in Section 30-9-13 NMSA 1978" for "a crime"; inserted "and the court may order the defendant confined for a maximum of seven days to facilitate preparation and initiation of a petition pursuant to that code" in Subsections C and D; substituted "Section 31-9-1.2" for "Subsections B and C of Section 39-1-1.2" in Subsection C; substituted "enters" for "has previously made" and "remains incompetent to proceed and remains" for "is"; and deleted "Subsections B and C of" following "pursuant to" in Subsection D; inserted "and dangerous pursuant to Section 31-9-1.2 NMSA 1978", deleted "subject" following "convicted" and added the

proviso in Subsection D(4)(b), and deleted "Subsection G of" following "defined in" in Subsection D(4)(c).

Duplicate laws. — Both Laws 1988, ch. 107, § 6, approved March 8, 1988, and Laws 1988, ch. 108, § 6, also approved March 8, 1988, enacted an identical section 31-9-1.5 NMSA 1978.

Generally. — Commitment pursuant to this section is not punishment. State v. Spriggs-Gore, 2003-NMCA-046, N.M. , 64 P.3d 506, cert. denied, N.M. , 65 P.3d 1094 (2003).

Constitutionality. — This section does not unconstitutionally deprive defendants of due process. State v. Spriggs-Gore, 2003-NMCA-046, N.M. , 64 P.3d 506, cert. denied, N.M. , 65 P.3d 1094 (2003).

This section does not abrogate a defendant's constitutional rights. State v. Spriggs-Gore, 2003-NMCA-046, N.M. , 64 P.3d 506, cert. denied, N.M. , 65 P.3d 1094 (2003).

Suppression. — Suppression hearing is not a legal impossibility at a hearing pursuant to this section; the statute does not preclude a defendant's attorney from putting on a complete defense at such a hearing. State v. Spriggs-Gore, 2003-NMCA-046, N.M. , 64 P.3d 506, cert. denied, N.M. , 65 P.3d 1094 (2003).

Defendant, who was found incompetent to stand trial for first degree murder, was incompetent to knowingly and intelligently waive her constitutional rights; thus all of defendant's statements made after the first administration of her *Miranda* rights had to be suppressed. State v. Spriggs-Gore, 2003-NMCA-046, N.M. , 64 P.3d 506, cert. denied, N.M. , 65 P.3d 1094 (2003).

Proof of state of mind required. — In a case of first degree murder, the state has to prove a deliberate intention to kill, which "may be inferred from all of the facts and circumstances of the killing." At a hearing under this section, the defendant is equally entitled to marshal a factual case that disproves either direct or inferential evidence that he had formed, or had the opportunity to form, a deliberate intent to kill. State v. Taylor, 2000-NMCA-072, 129 N.M. 376, 8 P.3d 863.

Defenses not available at Subsection A hearing. — The defenses of insanity and inability to form a specific intent are not available at a hearing conducted pursuant to Subsection A. State v. Werner, 110 N.M. 389, 796 P.2d 610 (Ct. App. 1990).

Trial court may draw inference as to dangerousness. — When the trial court has found that a defendant has cruelly treated a two-year-old child by holding her foot in hot water for half a minute and has injured his brother with a knife in the course of a family argument, the trial court may properly draw an inference that defendant is dangerous. State v. Gallegos, 111 N.M. 110, 802 P.2d 15 (1990).

Finding of dangerousness as prerequisite to detention. — In the context of the competency statutes, the finding of dangerousness is a prerequisite to the applicability of the portions of the statute allowing defendant to be detained for a longer period of time. Thus, the court must make a finding of dangerousness prior to the detention authorized by this section, but it need not have made such a finding at a prior hearing. State v. Gallegos, 111 N.M. 110, 802 P.2d 15 (1990).

Enhancement of commitment term must relate to dangerousness. — A defendant cannot be criminally committed under a sentence enhancement unless the conduct invoking the enhancement is a specific marker of dangerousness as defined by statute. State v. Chorney, 2001-NMCA-050, 130 N.M. 638, 29 P.3d 538.

Habitual offender enhancement does not apply. — The habitual offender enhancement (31-18-17 NMSA 1978) does not apply to extend a defendant's criminal incompetency commitment. State v. Chorney, 2001-NMCA-050, 130 N.M. 638, 29 P.3d 538.

Defendant's attorney may act as advocate. — There is nothing in the statute on its face that precludes defendant's attorney from acting as an advocate at a hearing under this section. State v. Gallegos, 111 N.M. 110, 802 P.2d 15 (1990).

31-9-1.6. Hearing to determine mental retardation.

A. Upon motion of the defense requesting a ruling, the court shall hold a hearing to determine whether the defendant has mental retardation as defined in Subsection E of this section.

B. If the court finds by a preponderance of the evidence that the defendant has mental retardation and that there is not a substantial probability that the defendant will become competent to proceed in a criminal case within a reasonable period of time not to exceed nine months from the date of the original finding of incompetency, then no later than sixty days from notification to the secretary of health or his designee of the court's findings the department of health shall perform an evaluation to determine whether the defendant presents a likelihood of serious harm to himself or a likelihood of serious harm to others.

C. If the department of health 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 shall commence proceedings pursuant to Chapter 43, Article 1 NMSA 1978 if the defendant was charged with murder in the first degree, first degree criminal 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.

D. The criminal charges shall be dismissed without prejudice after the hearing pursuant to Chapter 43, Article 1 NMSA 1978 or upon expiration of fourteen months from the court's initial determination that the defendant is incompetent to proceed in a criminal case.

E. As used in this section, "mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior. An intelligence quotient of seventy or below on a reliably administered intelligence quotient test shall be presumptive evidence of mental retardation.

History: 1978 Comp., § 31-9-1.6, enacted by Laws 1997, ch. 153, § 1; 1999, ch. 149, § 5.

ANNOTATIONS

The 1999 amendment, effective June 18, 1999, substituted "to determine whether the defendant has mental retardation as defined in Subsection E of this section" for "prior to one year after a defendant was determined to be incompetent to stand trial" in Subsection A; substituted "has mental retardation and that there is not a substantial probability that the defendant will become competent to proceed in a criminal case within a reasonable period of time not to exceed nine months from the date of the original finding of incompetency, then no later than sixty days from notification to the secretary of health or his designee of the court's findings" for "is mentally retarded, then no later than one year from the court's initial determination that the defendant is incompetent to stand trial" in Subsection B; in Subsection C, inserted "murder in the" following "charged with", and deleted "homicide" preceding "first degree", inserted "criminal" following "first degree", and deleted former Paragraph (2), which read, "may commence proceedings pursuant to 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 proceeding from which he was referred pursuant to this section to the department"; substituted "proceed in a criminal case" for "stand trial" in Subsection D; and substituted "mental retardation" for "mentally retarded" in Subsection E.

31-9-2. Mental examination.

Upon motion of any defendant, the court shall order a mental examination of the defendant before making any determination of competency under Sections 41-13-3 [NMSA 1953] or 31-9-1 NMSA 1978. Where the defendant is determined to be indigent, the court shall pay for the costs of the examination from funds available to the court.

History: 1953 Comp., § 41-13-3.2, enacted by Laws 1967, ch. 231, § 3.

ANNOTATIONS

Compiler's notes. — Laws 1972, ch. 71, § 18, repeals 41-13-3, 1953 Comp., referred to in this section.

Entire act (article) should be read and considered together in arriving at a proper meaning or legislative intent. State v. Morales, 81 N.M. 333, 466 P.2d 899 (Ct. App.), cert. denied, 81 N.M. 305, 466 P.2d 871, cert. denied, 400 U.S. 842, 91 S. Ct. 84, 27 L. Ed. 2d 77 (1970).

Examination depends upon raising of competency issue. — The mental examination required by this section depends upon a "question" as to mental competency first being raised. A "question" on the issue of mental competency is raised only upon a showing of reasonable cause to believe that the defendant is not competent to stand trial. State v. Smith, 80 N.M. 742, 461 P.2d 157 (Ct. App. 1969).

Defendant's motion makes examination mandatory. — If a defendant moves for a mental examination, this section makes it mandatory for the trial court to order such an examination before determining defendant's competency and such an examination is not necessary unless ". . . there is a question as to the mental capacity of a defendant to stand trial . . .." State v. Hovey, 80 N.M. 373, 456 P.2d 206 (Ct. App. 1969).

Motion must include grounds for belief of lack of capacity. — A motion on behalf of an accused for a judicial determination of mental competency to stand trial shall set forth the ground for belief that such mental capacity is lacking. When the motion does not set forth grounds for reasonable cause to believe the defendant may be insane or mentally incompetent, the motion can be denied. "The statute requires such an examination only when it is shown that there is reasonable cause to believe that an accused may be presently insane or otherwise mentally incompetent." State v. Hovey, 80 N.M. 373, 456 P.2d 206 (Ct. App. 1969).

Otherwise, court not required to grant motion. — An examination is not necessary, nor is the court required to grant a motion seeking such examination unless there is a question as to the mental capacity of defendant. State v. Morales, 81 N.M. 333, 466 P.2d 899 (Ct. App.), cert. denied, 81 N.M. 305, 466 P.2d 871, cert. denied, 400 U.S. 842, 91 S. Ct. 84, 27 L. Ed. 2d 77 (1970).

Counsel's impressions of defendant's mental state insufficient. — "Wondering" about defendant's mental capacity which is based solely on counsel's impression was not reasonable cause for a belief that defendant was incompetent to stand trial. State v. Hovey, 80 N.M. 373, 456 P.2d 206 (Ct. App. 1969).

Medical records should be available to attorneys before trial. — Where there was no showing from the record that the disclosure of a psychiatric report to the prosecuting attorney in any way constituted a violation of defendant's fifth amendment rights, the court will not assume facts not supported by the record. A commitment to a public institution by court order is for essentially a public purpose, no matter who commenced it, and the medical records thereof should be available in advance of trial to both

prosecution and defense. State v. Lopez, 80 N.M. 599, 458 P.2d 851 (Ct. App.), cert. denied, 80 N.M. 607, 458 P.2d 859 (1969), cert. denied, 398 U.S. 942, 90 S. Ct. 1860, 26 L. Ed. 2d 279 (1970).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law § 109 et seq.

Validity and construction of statutes providing for psychiatric examination of accused to determine mental condition, 32 A.L.R.2d 434.

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.

Admissibility of results of computer analysis of defendant's mental state, 37 A.L.R.4th 510.

Right of indigent defendant in state criminal case to assistance of psychiatrist or psychologist, 85 A.L.R.4th 19.

Qualification of nonmedical psychologist to testify as to mental condition or competency, 72 A.L.R.5th 529.

31-9-3. Criminal trials; plea and verdict of guilty but mentally ill.

A. A person who at the time of the commission of a criminal offense was not insane but was suffering from a mental illness is not relieved of criminal responsibility for his conduct and may be found guilty but mentally ill. As used in this section, "mentally ill" means a substantial disorder of thought, mood or behavior which afflicted a person at the time of the commission of the offense and which impaired that person's judgment, but not to the extent that he did not know what he was doing or understand the consequences of his act or did not know that his act was wrong or could not prevent himself from committing the act.

B. A plea or finding of guilty but mentally ill is not an affirmative defense but an alternative plea or finding that may be accepted or made pursuant to appropriate evidence when the affirmative defense of insanity is raised or the plea of guilty but mentally ill is made.

C. A plea of guilty but mentally ill shall not be accepted until the defendant has undergone examination by a clinical psychologist or psychiatrist and the court has examined the psychological or psychiatric reports, held a hearing on the issue of the defendant's mental condition and is satisfied that there is a factual basis that the defendant was mentally ill at the time of the offense to which the plea is entered.

D. When a defendant has asserted a defense of insanity, the court may find the defendant guilty but mentally ill if after hearing all of the evidence the court finds beyond a reasonable doubt that the defendant:

(1) is guilty of the offense charged;

(2) was mentally ill at the time of the commission of the offense; and

(3) was not legally insane at the time of the commission of the offense.

E. When a defendant has asserted a defense of insanity, the court, where warranted by the evidence, shall provide the jury with a special verdict form of guilty but mentally ill and shall separately instruct the jury that a verdict of guilty but mentally ill may be returned instead of a verdict of guilty or not guilty, and that such a verdict requires a finding by the jury beyond a reasonable doubt that the defendant committed the offense charged and that the defendant was not legally insane at the time of the commission of the offense but that he was mentally ill at that time.

History: Laws 1982, ch. 55, § 1.

ANNOTATIONS

Constitutionality. — New Mexico statutory provisions authorizing a verdict of guilty but mentally ill do not impinge upon a defendant's right to a fair trial and do not violate the equal protection clauses of the United States and New Mexico Constitutions. State v. Neely, 112 N.M. 702, 819 P.2d 249 (1991).

New Mexico's guilty but mentally ill (GBMI) statute does not infringe on a defendant's right to a fair adjudication of her sanity so as to violate her right to a fair trial under the Fourteenth Amendment, nor is a mandatory life sentence for a capital crime committed by the defendant found to be cruel and unusual punishment in violation of the Eighth Amendment. Neely v. Newton, 149 F.3d 1074 (10th Cir. 1998), cert. denied, 525 U.S. 1107, 119 S. Ct. 877, 142 L. Ed. 2d 777 (1999).

Life sentence. — Imposition of a life sentence upon a murder defendant who was found guilty but mentally ill did not constitute cruel and inhuman punishment. State v. Neely, 112 N.M. 702, 819 P.2d 249 (1991).

"Guilty but mentally ill" instruction may be given when defendant asserts an inability to form specific intent. — Although this section specifies that the instruction on "guilty but mentally ill" shall be given when the defendant asserts the defense of insanity, the supreme court in approving UJI 14-5103 broadened the instances wherein such an instruction may be given to include instances where a defendant asserts the defense of an inability to form a specific intent. State v. Page, 100 N.M. 788, 676 P.2d 1353 (Ct. App. 1984).

Trial court committed no error in giving the uniform instruction prescribed in Rule 14-5103 and in not tracking the language of this section. State v. Pierce, 109 N.M. 596, 788 P.2d 352 (1990).

Law reviews. — For article, "The Guilty But Mentally Ill Verdict and Plea in New Mexico," see 13 N.M.L. Rev. 99 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 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.

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.

"Guilty but mentally ill" statutes: validity and construction, 71 A.L.R.4th 702.

Adequacy of defense counsel's representation of criminal client - issues of incompetency, 70 A.L.R.5th 1.

Adequacy of defense counsel's representation of criminal client - pretrial conduct or conduct at unspecified time regarding issues of insanity, 72 A.L.R.5th 109.

Pathological gambling as basis of defense of insanity in federal criminal case, 76 A.L.R. Fed. 749.

31-9-4. Sentence upon accepted plea or verdict of guilty but mentally ill.

The court may impose any sentence upon a defendant which could be imposed pursuant to law upon a defendant who has been convicted of the same offense without a finding of mental illness; provided that if a defendant is sentenced to the custody of the corrections department, the department shall examine the nature, extent, continuance and treatment of the defendant's mental illness and shall provide psychiatric, psychological and other counseling and treatment for the defendant as it deems necessary.

History: Laws 1982, ch. 55, § 2.

ANNOTATIONS

Constitutionality. — New Mexico statutory provisions authorizing a verdict of guilty but mentally ill do not impinge upon a defendant's right to a fair trial and do not violate the equal protection clauses of the United States and New Mexico Constitutions. State v. Neely, 112 N.M. 702, 819 P.2d 249 (1991).

Life sentence. — Imposition of a life sentence upon a murder defendant who was found guilty but mentally ill did not constitute cruel and inhuman punishment. State v. Neely, 112 N.M. 702, 819 P.2d 249 (1991).

Trial court may draw inference as to dangerousness. — When the trial court has found that a defendant has cruelly treated a two-year-old child by holding her foot in hot water for half a minute and has injured his brother with a knife in the course of a family argument, the trial court may properly draw an inference that defendant is dangerous. State v. Gallegos, 111 N.M. 110, 802 P.2d 15 (1990).

Corrections department determines mental treatment. — Section applies only to cases in which the sentencing court had the discretion to reduce, suspend or defer a sentence. Because defendant was convicted of first-degree murder, the trial court did not have the discretion to sentence her to a mental facility. A person convicted of a capital felony is to be sentenced to imprisonment in a corrections facility, thus leaving it up to the discretion of the corrections department to determine the defendant's appropriate mental treatment. State v. Neely, 117 N.M. 707, 876 P.2d 222 (1994).

Law reviews. — For article, "The Guilty But Mentally Ill Verdict and Plea in New Mexico," see 13 N.M.L. Rev. 99 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. — "Guilty but mentally ill" statutes: validity and construction, 71 A.L.R.4th 702.

Instructions in state criminal case in which defendant pleads insanity as to hospital confinement in event of acquittal, 81 A.L.R.4th 659.

ARTICLE 10
Commission of Crimes by Indians

(Repealed by Laws 1995, ch. 40, § 1.)

31-10-1 to 31-10-3. Repealed.

ANNOTATIONS

Repeals. — Laws 1995, ch. 40, § 1 repeals 31-10-1 through 31-10-3 NMSA 1978, as enacted by Laws 1864-1865, ch. 21, §§ 1 and 2 and Laws 1889, ch. 140, § 1, relating to commission of crimes by Indians, effective April 5, 1995.

ARTICLE 11
Appeals and Post-Conviction Remedies

31-11-1. Stay of execution; release.

A. All appeals and writs of error in criminal cases have the effect of a stay of execution of the sentence of the district court until the decision of the supreme court or court of appeals.

B. If a defendant is convicted of a capital or violent offense and is sentenced to death or a term of imprisonment not suspended in whole, he shall not be entitled to release pending appeal.

C. If a defendant is convicted of a noncapital offense other than a violent offense and is sentenced to a term of imprisonment not suspended in whole, he shall not be entitled to release pending appeal unless the court finds:

(1) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released; and

(2) that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in reversal or an order for a new trial.

D. As used in Subsections B and C of this section, "violent offense" means:

(1) kidnaping;

(2) criminal sexual penetration in the first or second degree;

(3) armed robbery;

(4) murder in the second degree;

(5) aggravated burglary;

(6) aggravated arson; or

(7) assault with intent to commit violent felony upon peace officer.

E. In all parole and probation revocation proceedings, where the alleged violation by the parolee or probationer of the conditions of release poses a threat to himself or others, the defendant shall not be entitled to be released on bail pending the decision on revocation. In those instances where the state has failed to conduct a preliminary parole revocation hearing on a parolee held for parole violations within sixty days of arrest, the parolee shall be eligible for bail. In all cases, the final parole revocation

hearing shall be scheduled for hearing within sixty days of the parolee's return to the penitentiary. In the case of probation violation, if the final probation revocation hearing is not brought before the court within sixty days, then the probationer shall be eligible for bail.

History: Laws 1917, ch. 43, § 58; 1927, ch. 93, § 10; C.S. 1929, § 105-2532; 1941 Comp., § 42-1502; 1953 Comp., § 41-15-2; Laws 1966, ch. 28, § 59; 1981, ch. 232, § 1; 1988, ch. 3, § 1.

ANNOTATIONS

Cross references. — As to rule of criminal procedure regarding release during trial, and release pending sentence, motion for new trial and appeal, see Rule 5-402 NMRA.

For similar appellate rule, see Rule 12-207 NMRA.

As to writs of error, see Rule 12-503 NMRA.

The 1988 amendment, effective February 12, 1988, rewrote former Subsection B and redesignated it as Subsection E, and added present Subsections B, C and D.

Applicability. — Laws 1988, ch. 3, § 2, effective February 12, 1988, provides that the provisions of the act apply only to persons convicted for crimes committed on or after its effective date.

Temporary provisions. — Laws 1927, ch. 93, § 12, provides that the act shall not apply to or affect cases pending in any court, at the date of approval of the act.

No federal constitutional violations by denial of waiver. — Defendant's waiver of supersedeas was properly denied where he agreed to serve time on his sentence pending appeal because he was unable to make appeal bond, and denial was not a violation of defendant's constitutional rights under the due process and equal protection clauses of U.S. Const., amend. XIV. State v. Ramirez, 76 N.M. 72, 412 P.2d 246 (1966).

Effect of writs of error at common law. — At common law, a writ of error was not a supersedeas so as to discharge custody, but in capital cases it operated to stay execution. Borrego v. Territory, 8 N.M. 446, 46 P. 349 (1896) (decided under former law).

Defendant not obligated to make restitution during appeal. — A defendant is under no legal duty, except moral, perhaps, to make any restitution during the pendency of his appeal. State v. Cordova, 100 N.M. 643, 674 P.2d 533 (Ct. App. 1983).

Waiver of supersedeas. — There is no provision under New Mexico law for a waiver of supersedeas. State v. Ramirez, 76 N.M. 72, 412 P.2d 246 (1966).

Pending appeal, safekeeping of prisoner sheriff's duty. — Pending appeal, the judge has no power to order one under sentence to be committed to penitentiary for safekeeping. The power of removal is in the hands of the sheriff, who is charged with safekeeping the prisoner. Parks v. Hughes, 24 N.M. 421, 174 P. 425 (1918).

State solely responsible for cost of maintenance of convict. — When convict under sentence of death is, under this statute, confined in state penitentiary, pending determination of his appeal, state has entire jurisdiction over such convict and cannot recover cost of his maintenance from county. State v. Board of Comm'rs, 43 N.M. 521, 96 P.2d 290 (1939).

District court abused its discretion in requiring corporate surety to the exclusion of individual sureties on a property bond. State v. Lucerno, 81 N.M. 578, 469 P.2d 727 (Ct. App. 1970).

Filing notice of appeal does not divest district court of jurisdiction to hold probation revocation hearing or revoke probation. State v. Rivera, 2004-NMSC-001, 134 N.M. 768, 82 P.3d 939.

Probationer's sentence runs during pendency of appeal. – Nowhere in this section has the legislature expressly prohibited a probationer's sentence from running during the pendency of his or her appeal; moreover, the primary goal of probation, defendant rehabilitation, could be defeated by delaying the commencement of a defendant's probationary sentence pending appeal. State v. Rivera, 2004-NMSC-001, 134 N.M. 768, 82 P.3d 939.

Section intended to function as appellate bail bond statute. – If the execution of a defendant's sentence was automatically stayed once he or she appealed, then the defendant would have had no need for a statutory right to post an appeal bond. State v. Rivera, 2004-NMSC-001, 134 N.M. 768, 82 P.3d 939.

If a defendant remains on probation during the pendency of his or her appeal, an appeal bond becomes unnecessary because the defendant is already submitting to the punishment that an appeal bond would be fashioned to prevent the defendant from attempting to evade; thus, one of the primary purposes of this section as a whole – preventing the defendant from avoiding the consequences of his or her conviction and sentence – is inapplicable once the defendant is placed on probation. State v. Rivera, 2004-NMSC-001, 134 N.M. 768, 82 P.3d 939.

Subsection C(2) is constitutional. — The appeal-bond statute does not unduly burden or interfere with the New Mexico's courts responsibilities, and thus, the statute is constitutional. State v. House, 1996-NMCA-052, 121 N.M. 784, 918 P.2d 370.

Meaning of "substantial question". — A "substantial question" under Subsection C(2) is a question that is more than not frivolous. State v. House, 1996-NMCA-052, 121 N.M. 784, 918 P.2d 370.

Test for post-conviction bail. — Bail pending appeal is appropriate if, assuming that the "substantial question" is determined favorably to defendant on appeal, that "substantial question" decision is likely to result in reversal or an order for a new trial on all counts on which imprisonment has been imposed. State v. House, 1996-NMCA-052, 121 N.M. 784, 918 P.2d 370.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 8 Am. Jur. 2d Bail and Recognizance § 15 et seq; 21 Am. Jur. 2d Criminal Law § 896 et seq.

Bail pending appeal from conviction, 19 A.L.R. 807, 45 A.L.R. 458, 77 A.L.R. 1235.

Supersedeas, stay on bail upon appeal in habeas corpus, 63 A.L.R. 1460, 143 A.L.R. 1354.

Mandamus to compel judge or other officer to grant accused bail or accept proffered sureties, 23 A.L.R.2d 803.

Effect of abolition of capital punishment on procedural rules governing crimes punishable by death-post-Furman decisions, 71 A.L.R.3d 453.

Right of defendant in state court to bail pending appeal from conviction - modern cases, 28 A.L.R.4th 227.

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.

Abatement effects of accused's death before appellate review of federal criminal conviction, 80 A.L.R. Fed. 446.

8 C.J.S. Bail; Release and Detention Pending Proceedings §§ 9, 24 to 30, 33 to 38.

31-11-2. [Appeal granted; defendant to be committed or recognized.]

If an appeal be granted, the district court shall order the defendant to be committed or recognized and the commitment or recognizance shall be to the same effect as when the defendant himself is appellant.

History: Laws 1917, ch. 43, § 51; C.S. 1929, § 105-2528; 1941 Comp., § 42-1504; 1953 Comp., § 41-15-4.

ANNOTATIONS

Cross references. — For rules for appeals, see Rules 12-201 to 12-2-203 NMRA.

For supersedeas and stay, see Rule 12-207 NMRA.

For writs of error, see Rule 12-503 NMRA.

Meaning of "appeal." — "Appeal," as used in this section, apparently refers to an appeal by the state.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 5 Am. Jur. 2d Appellate Review § 358 et seq.

31-11-3. Directions following review brought by defendant.

In any criminal case, if the supreme court or court of appeals affirms the judgment of the district court upon review brought by the defendant, it shall direct that the sentence pronounced be executed; and if the judgment is reversed, it shall direct a new trial or that the defendant be absolutely discharged according to the circumstances of the case.

History: Laws 1917, ch. 43, § 55; 1927, ch. 93, § 8; C.S. 1929, § 105-2529; 1941 Comp., § 42-1505; 1953 Comp., § 41-15-5; Laws 1966, ch. 28, § 60.

ANNOTATIONS

Cross references. — For similar appellate rule, see Rule 12-402 NMRA.

Supreme court's affirmance of execution not repealed by implication. — Statute providing that on affirmance of conviction, supreme court shall direct execution was not repealed by implication as to capital cases by statute providing for order of execution by district court. Woo Dak San v. State, 36 N.M. 53, 7 P.2d 940 (1931).

When supreme court affirms decision without further investigation. — Where brief for defendant upon appeal contained such an unwarranted attack upon the trial judge, his conduct, rulings, and instructions, as to amount to a scandalous and impertinent attack upon the judiciary, supreme court was warranted in striking the brief and argument from the files, and affirming the decision without further investigation. Tomlinson v. Territory, 7 N.M. 195, 33 P. 950 (1893) (decided under former law).

Notice not required as condition precedent to commitment order. — With the issuance of mandate by the appellate court, the district court is directed to issue a commitment order. Accordingly, the district court is not required to give notice to the defendant, his attorney, or his bondsmen as a condition precedent to the issuance of the commitment order. In re Martinez, 99 N.M. 198, 656 P.2d 861 (1982).

Remand for new sentence instead of new trial. — Appellate courts have the authority to remand a case for entry of judgment on the lesser included offense and resentencing rather than retrial when the evidence does not support the offense for which the defendant was convicted but does support a lesser included offense. The rationale for

this holding is that there is no need to retry a defendant for a lesser included offense when the elements of a lesser offense necessarily were proven to a jury beyond a reasonable doubt in the course of convicting the defendant of the greater offense. State v. Haynie, 116 N.M. 746, 867 P.2d 416 (1994).

Court of appeals lacks authority to modify contempt sentence. State v. Sanchez, 89 N.M. 673, 556 P.2d 359 (Ct. App. 1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 5 Am. Jur. 2d Appellate Review § 591 et seq.

Knowledge by defendant or his attorney, before return of verdict in criminal case, of misconduct in connection with jury after their retirement as affecting right to reversal, 96 A.L.R. 530.

Appeal by state of order granting new trial in criminal case, 95 A.L.R.3d 596.

Judgment favorable to convicted criminal defendant in subsequent civil action arising out of same offense as ground for reversal of conviction, 96 A.L.R.3d 1174.

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.

31-11-4. Directions following review brought by state.

In any criminal case, if the supreme court or court of appeals affirms the judgment of the district court upon review brought by the state, it shall direct that the defendant be discharged; and if the judgment is reversed, it shall direct the district court to enter judgment on the verdict rendered, or, when no judgment has been rendered, to proceed to trial on the indictment or information.

History: Laws 1917, ch. 43, § 56; 1927, ch. 93, § 9; C.S. 1929, § 105-2530; 1941 Comp., § 42-1506; 1953 Comp., § 41-15-6; Laws 1966, ch. 28, § 61.

ANNOTATIONS

Cross references. — For similar appellate rule, see Rule 12-402 NMRA.

Severability clauses. — Laws 1966, ch. 28, § 66, provides for the severability of the act if any part or application thereof is held invalid.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 5 Am. Jur. 2d Appellate Review § 591 et seq.

31-11-5. [New trial granted; procedure in district court.]

The district court to which any criminal cause shall be remanded for new trial shall proceed thereon in same manner as if said cause had not been theretofore tried.

History: Laws 1917, ch. 43, § 57; C.S. 1929, § 105-2531; 1941 Comp., § 42-1507; 1953 Comp., § 41-15-7.

ANNOTATIONS

Cross references. — For appellate rule, see Rule 12-402 NMRA.

Definition of "new trial". — The usual definition of a new trial, both common law and statutory, is that it is a reexamination of an issue of fact in the same court after a verdict by a jury. State v. Nelson, 65 N.M. 403, 338 P.2d 301, cert. denied, 361 U.S. 877, 80 S. Ct. 142, 4 L. Ed. 2d 115 (1959).

District court retries and reexamines all fact issues. — Since a vast majority of judicial pronouncements relative to a new trial state that it is a reexamination of an issue of fact in the same court, the legislature, by enacting this section, did not intend to provide that the trial judge who had presided over the original trial without objection could be ousted of jurisdiction to retry the case. Nor does this statutory provision contemplate a new information or indictment, rearrest or a new preliminary hearing. This section simply means that the district court to which any case is remanded for a new trial shall reexamine and retry all issues of fact. State v. Nelson, 65 N.M. 403, 338 P.2d 301, cert. denied, 361 U.S. 877, 80 S. Ct. 142, 4 L. Ed. 2d 115 (1959).

This section simply means that the district court to which any case is remanded for a new trial shall re-examine and re-try all issues of fact. Neither the wording nor the title of the act of which this section is a part suggests in any manner that it applies to the admissibility of evidence upon retrial. State v. De Santos, 91 N.M. 428, 575 P.2d 612 (Ct. App. 1978).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 58 Am. Jur. 2d New Trial §§ 587 to 590.

Right of indigent defendant in criminal case to aid of state as regards new trial, 55 A.L.R.2d 1072.

Conviction of lesser offense as bar to prosecution for greater offense on new trial, 61 A.L.R.2d 1141.

Propriety of increased punishment on new trial for same offense, 12 A.L.R.3d 978.

Appeal by state of order granting new trial in criminal case, 95 A.L.R.3d 596.

31-11-6. Post-conviction remedy.

A prisoner in custody under sentence of a court established by the laws of New Mexico claiming the right to be released upon the ground that the sentence was imposed in violation of the constitution of the United States, or of the constitution or laws 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, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A. A motion for such relief may be made at any time.

B. Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the district attorney of the judicial district in which such motion is pending, appoint local counsel if the prisoner is indigent, grant a prompt hearing therein, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law, or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him, or grant a new trial, or correct the sentence, as may appear appropriate.

C. A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

D. The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

E. An appeal may be taken from the order entered on the motion as from a final judgment in the manner and within the time provided in Section 21-2-1(5) New Mexico Statutes Annotated, 1953 Compilation.

F. An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section shall not be entertained if it appears that the applicant has failed to apply for relief by motion to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention, or that a habeas corpus proceeding is pending at the effective date of this section.

G. This section shall not apply to municipal or justice of the peace courts [magistrate courts].

History: 1953 Comp., § 41-15-8, enacted by Laws 1966, ch. 29, § 1.

ANNOTATIONS

Compiler's notes. — Section 21-2-1(5), 1953 Comp., referred to in Subsection E, was Rule 5 of the "Supreme Court Rules." The "Supreme Court Rules" were superseded by rules adopted by the supreme court in 1973, 1974 and 1975. For present, similar provisions, see Rule 12-201 NMRA. Rule 1-093 NMRA was superseded by Rule 5-802 NMRA as to all motions for post-conviction relief filed on or after September 1, 1975.

Preemption by Rule 5-802 NMRA. — This section has been preempted by Rule 5-802 NMRA, which governs the procedure for filing a writ of habeas corpus. State v. Peppers, 110 N.M. 393, 796 P.2d 614 (Ct. App. 1990).

Jurisdiction, etc., of justices of the peace transferred. — The office of justice of the peace has been abolished, and the jurisdiction, powers and duties have been transferred to the magistrate court. See 35-1-38 NMSA 1978.

Generally. — 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, 78 N.M. 418, 432 P.2d 262 (1967).

Sixth amendment right to counsel inapplicable. — Right to counsel provided by the U.S. Const., amend. VI does not apply to post-conviction relief proceedings. State v. Ramirez, 78 N.M. 418, 432 P.2d 262 (1967).

Absent constitutional requirement, appointment of counsel within court's discretion. State v. Ramirez, 78 N.M. 418, 432 P.2d 262 (1967).

Proceeding independent civil action before criminal procedure rules enacted. — Prior to enactment of criminal procedural rules, a Rule 1-093 NMRA or proceeding under this section was an independent civil action, and, therefore, Rule 1-052 NMRA, requiring the making of findings of fact, applied to such proceedings. State v. Hardy, 78 N.M. 374, 431 P.2d 752 (1967).

Definition of "conclusive". — The term "conclusive" means "beyond question," "beyond dispute," or "so irrefutable as to end all uncertainty or question." State v. Sanchez, 78 N.M. 25, 420 P.2d 786 (Ct. App. 1966).

Claims for relief must be specific. — Where defendant does not in any way specify or particularize claimed vital points, claimed errors or claimed discrepancies, a mere allegation of incompetence of attorney or inefficiency is not ground for relief. State v. Crouch, 77 N.M. 657, 427 P.2d 19 (1967).

Defendant must allege some factual basis for relief sought. — Vague conclusional charges do not raise an issue which demands an inquiry. State v. Sexton, 78 N.M. 694, 437 P.2d 155 (Ct. App. 1968); State v. Williams, 78 N.M. 431, 432 P.2d 396 (1967).

Denial or absence of counsel is issue raisable on collateral attack. State v. Hardy, 78 N.M. 374, 431 P.2d 752 (1967).

Motion to vacate sentence. — 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, 77 N.M. 612, 426 P.2d 588 (1967).

What motion to vacate includes. — 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, 78 N.M. 165, 429 P.2d 363 (1967).

No basis for relief where claim of entrapment. — A claim of entrapment does not state a basis for post-conviction relief. State v. Simien, 78 N.M. 709, 437 P.2d 708 (1968); State v. Apodaca, 78 N.M. 412, 432 P.2d 256 (1967).

Or where mere allegation of perjury. — A mere allegation of perjury does not entitle defendant to post-conviction relief. A charge of perjury, which neither names or identifies the witnesses who committed the perjury nor specifies the claimed false statements, is not sufficient basis for relief. State v. Crouch, 77 N.M. 657, 427 P.2d 19 (1967).

Or conclusion that due process denied. — A mere conclusion that due process was denied is not sufficient basis for relief. State v. Crouch, 77 N.M. 657, 427 P.2d 19 (1967).

Or credibility of witness. — Credibility of a witness does not provide a ground for post-conviction relief. State v. Williams, 78 N.M. 431, 432 P.2d 396 (1967).

Or general claim that attorney was pro forma rather than zealous and active does not provide a basis for post-conviction relief. State v. Apodaca, 78 N.M. 412, 432 P.2d 256 (1967).

Or where dissatisfaction with results obtained through the efforts of attorney does not provide a basis for post-conviction relief. State v. Apodaca, 78 N.M. 412, 432 P.2d 256 (1967).

Representation at preliminary hearing affords no basis for relief. — 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, 78 N.M. 412, 432 P.2d 256 (1967).

Or where record shows adequate representation. — Claim that defendant is unlearned, has little education and "did not fully understand everything that made up his trial" does not set forth a basis for relief, where the record on the trial and the direct appeal shows that his attorneys protected his rights. State v. Williams, 78 N.M. 431, 432 P.2d 396 (1967).

Or that counsel fails to advise defendant of potential appeal. — Where defendant's motion does not assert that any official in New Mexico's system of justice rejected a request for counsel or failed to take steps toward appointment of counsel after having knowledge of defendant's indigency and desire for counsel on appeal, nor does the motion assert that defendant made any request to be furnished appellate counsel, the claim that counsel did not advise defendant that he could appeal as an indigent does not set forth a basis for post-conviction relief. State v. Raines, 78 N.M. 579, 434 P.2d 698 (Ct. App. 1967).

Or complaint with attorney's trial tactics. — 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 as where the petitioner discussed a change of venue with his attorney because of certain publicity, and that after consideration, his counsel decided against seeking the change. He cannot now complain of that decision. State v. Selgado, 78 N.M. 165, 429 P.2d 363 (1967).

Claims concerning procedure afford no basis 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, 78 N.M. 579, 434 P.2d 698 (Ct. App. 1967).

No grounds for relief where factual questions already resolved. — Whether defendant was properly tried for first-degree murder rather than voluntary manslaughter are factual questions which the jury resolved by its verdict and present no grounds for relief. State v. Williams, 78 N.M. 431, 432 P.2d 396 (1967).

Time for appointing counsel. — Once, however, the prisoner alleges some factual basis raising a substantial issue, counsel must be appointed. State v. Ramirez, 78 N.M. 418, 432 P.2d 262 (1967).

No counsel appointed when motion groundless. — 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, 78 N.M. 418, 432 P.2d 262 (1967).

Or when prisoner explores possibility of motion. — 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, 78 N.M. 418, 432 P.2d 262 (1967).

Not enough to show indigency hampered employment of counsel. — 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 fourteenth amendment rights. 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, 78 N.M. 579, 434 P.2d 698 (Ct. App. 1967).

Where motion groundless, court under no duty to appoint counsel. — 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, 78 N.M. 25, 420 P.2d 786 (Ct. App. 1966).

Waiver of prior defects bars post-conviction relief. — Absent a showing of prejudice, the plea at arraignment waived prior defects in the proceedings. Here, while prejudice is claimed, it is not shown. Thus, defendant fails to set forth a basis for post-conviction relief. State v. Robinson, 78 N.M. 420, 432 P.2d 264 (1967).

Illegal arrest not ground for attacking judgment. — Claim of illegal arrest, in itself, is not a proper ground for attacking a judgment under post-conviction remedy. State v. Gibby, 78 N.M. 414, 432 P.2d 258 (1967).

Successive motions. — It is within the discretion of the trial court either to grant or deny successive motions. Lott v. State, 77 N.M. 612, 426 P.2d 588 (1967).

Subsequent application. — 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, 78 N.M. 429, 432 P.2d 394 (1967).

Burden on applicant to show need for redetermination. — The burden is on the applicant to show that, although the ground of the new application was determined against him on the merits of a prior application, the ends of justice would be served by a redetermination of the ground. State v. Canales, 78 N.M. 429, 432 P.2d 394 (1967).

No redetermination of trial issues. — 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, 78 N.M. 431, 432 P.2d 396 (1967).

Refusal of application. — 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, 78 N.M. 429, 432 P.2d 394 (1967).

Remedy not intended as substitute for appeal. — Post-conviction proceedings are not intended for, or to be utilized as a substitute for appeal as a means of correcting errors occurring during the course of a trial, or to get reconsideration of matters considered on appeal. State v. Williams, 78 N.M. 431, 432 P.2d 396 (1967).

Filing of notice of appeal jurisdictional. — The timely filing of a notice of appeal is jurisdictional and if it has not been complied with, in the absence of excusable neglect, the court is bound to act on its own motion and dismiss the appeal for lack of jurisdiction, even though the parties do not raise the question of jurisdiction. State v. Weddle, 77 N.M. 417, 423 P.2d 609 (1967).

Issues decided on appeal not relitigated. — 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, 78 N.M. 431, 432 P.2d 396 (1967).

Attack on district court's conclusion of law must fail. — Where there is conflict in 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, 78 N.M. 709, 437 P.2d 708 (1968).

Conflicts controlled by Rule 5-802 NMRA. — This section does not provide a post-conviction remedy to the extent that it conflicts with N.M.R. Crim. P. 57 (now Rule 5-802 NMRA). State v. Garcia, 101 N.M. 232, 680 P.2d 613 (Ct. App. 1984), cert. quashed, 101 N.M. 189, 679 P.2d 1287 (1984).

Law reviews. — For article, "Habeas Corpus in New Mexico," see 11 N.M.L. Rev. 291 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 18 Am. Jur. 2d Coram Nobis and Allied Statutory Remedies §§ 4, 5, 7, 17, 21, 44 to 48, 52 to 54, 56, 57, 59, 60.

Power of successor judge taking office during term-time to vacate, etc., judgment entered by his predecessor, 11 A.L.R.2d 1117.

Motion to vacate judgment on order as constituting general appearance, 31 A.L.R.2d 262.

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.

Post-conviction procedure for raising contention that enforcement of penal statute or law is unconstitutionally discriminatory, 4 A.L.R.3d 404.

When criminal case becomes moot so as to preclude review of or attack on conviction or sentence, 9 A.L.R.3d 462.

Right to a jury trial on motion to vacate judgment, 75 A.L.R.3d 894.

Coram nobis on ground of other's confession to crime, 46 A.L.R.4th 468.

Power of successor judge taking office during term time to vacate, set aside, or annul judgment entered by his or her predecessor, 51 A.L.R.5th 747.

24 C.J.S. Criminal Law §§ 1610 to 1618, 1620 to 1629, 1633 to 1637, 1742.

ARTICLE 12
Fines, Fees and Costs

31-12-1, 31-12-2. Repealed.

ANNOTATIONS

Repeals. — Laws 1983, ch. 51, § 1, repeals 31-12-1 and 31-12-2 NMSA 1978, relating to the reporting of fines by the county clerk and their credit to the state school fund, and the collection of fines by sheriff, respectively. For provisions of former sections, see 1978 Original Pamphlet.

31-12-3. Paying fines, fees or costs in installments; community service option.

A. Any person sentenced to pay a fine or to pay fees and costs in any criminal proceeding against him, either in addition to or without a term of imprisonment, may in the discretion of the court be allowed to pay such fine, fees or costs in installments of such amounts, at such times and upon such conditions as the court may fix. The defendant may also be required to serve a period of time in labor to be known as "community service" in lieu of all or part of the fine. If unable to pay the fees or costs, he may be granted permission to perform community service in lieu of them as well. The labor shall be meaningful, shall not be suspended or deferred and shall be of a type that benefits the public at large or any public, charitable or educational entity or institution and is consistent with Article 9, Section 14 of the constitution of New Mexico. Any person performing community service pursuant to court order shall be immune from civil liability arising out of the community service other than for gross negligence, shall not be entitled to wages or considered an employee for any purpose and shall not be entitled to workers' compensation, unemployment or any other benefits otherwise provided by law. Instead, a person who performs community service shall receive credit toward the fine, fees or costs at the rate of the prevailing federal hourly minimum wage. Unless otherwise provided, however, the total fine, fees and costs shall be payable forthwith.

B. The court may at any time revise, modify, reduce or enlarge the amount of the installment or the time and conditions fixed for payment of it.

C. When a defendant sentenced to pay a fine in installments or ordered to pay fees or costs defaults in payment, the court, upon motion of the prosecutor or upon its own motion, may require the defendant to show cause why his default should not be treated as contumacious and may issue a summons or a warrant of arrest for his appearance. It shall be a defense that the defendant did not willfully refuse to obey the order of the court or that he made a good faith effort to obtain the funds required for the payment. If the defendant's default was contumacious, the court may order him committed until the fine or a specified part of it or the fees or costs are paid. The maximum term of imprisonment for such contumacious nonpayment shall be specified in the order of commitment.

D. If it appears that a defendant's default in the payment of a fine, fees or costs is not contumacious, the court may allow the defendant additional time for payment, reduce the amount of the fine or of each installment, revoke the fine or the unpaid portion in whole or in part or require the defendant to perform community service in lieu of the fine, fees or costs.

History: 1953 Comp., § 41-21-8, enacted by Laws 1971, ch. 236, § 1; 1991, ch. 54, § 1; 1993, ch. 155, § 1.

ANNOTATIONS

The 1991 amendment, effective June 14, 1991, rewrote this section to the extent that a detailed comparison would be impracticable.

The 1993 amendment, effective July 1, 1993, substituted "shall be meaningful, shall not be suspended or deferred and shall" for "must" and changed the style of the constitutional reference in the fourth sentence of Subsection A.

Substantive limits on revocation of probation when unable to pay fine. — This section must be read together with the ruling of the United States Supreme Court in *Bearden v. Georgia,* 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983), which recognized substantive limits on the automatic revocation of probation where an indigent defendant is unable to pay a fine or restitution. Those substantive limits require that: (1) There must be an inquiry into the reasons for the failure to pay; (2) if the reasons for defendant's failure to pay are either not willful or indicate an inability to pay, the court must consider alternatives to incarceration; and (3) only if alternative measures do not meet the state's interests, then the court may order confinement. State v. Parsons, 104 N.M. 123, 717 P.2d 99 (Ct. App. 1986).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law § 944 et seq.

Indigency of offender as affecting validity of imprisonment as alternative to payment of fine, 31 A.L.R.3d 926.

Recovery under state law of attorney's fees by law pro se litigant, 14 A.L.R.5th 947.

36A C.J.S. Fines § 6.

31-12-4, 31-12-5. Repealed.

ANNOTATIONS

Repeals. — Laws 1983, ch. 51, § 1, repeals 31-12-4 and 31-12-5 NMSA 1978, relating to fees in criminal cases and the charging of illegal fees, respectively. For provisions of former sections, see 1978 Original Pamphlet.

31-12-6. Costs of conviction.

In every case wherein there is a conviction, the costs may be adjudged against the defendant.

History: Laws 1858-1859, p. 30; C.L. 1865, ch. 46, § 14; C.L. 1884, § 2506; C.L. 1897, § 3445; Code 1915, § 4450; C.S. 1929, § 105-2229; 1941 Comp., § 42-1304; 1953 Comp., § 41-13-4; Laws 1972, ch. 71, § 16.

ANNOTATIONS

Cross references. — For payment of fine or costs in installments, see 31-12-3 NMSA 1978.

Assessment of costs requires statutory authority. — The assessment of costs in criminal cases was unknown at common law and therefore requires statutory authority. State v. Valley Villa Nursing Center, Inc., 97 N.M. 161, 637 P.2d 843 (Ct. App. 1981); State v. Hudson, 2003-NMCA-139, 134 N.M. 564, 80 P.3d 501.

Which is to be strictly construed. — Since statutes authorizing costs in criminal cases are penal in nature, they must be strictly construed. State v. Valley Villa Nursing Center, Inc., 97 N.M. 161, 637 P.2d 843 (Ct. App. 1981).

Assessment of costs against state not authorized. – Neither this section nor any other statutory provision provides for the recovery of costs against the state in a criminal case; the legislature has made a conscious determination that only a convicted defendant will be liable for costs. State v. Hudson, 2003-NMCA-139, 134 N.M. 564, 80 P.3d 501.

"Defendant" excludes defense counsel. — Strict construction of the term "defendant" precludes requiring defendant's counsel from paying costs. State v. Rivera, 1998-NMSC-024, 125 N.M. 532, 964 P.2d 93.

Specific provision in 31-20-6 NMSA 1978 controls over this section. — Since the legislature made a specific provision for costs as a condition of probation in 31-20-6 NMSA 1978, that specific provision controls over the general provisions of this section. State v. Ayala, 95 N.M. 464, 623 P.2d 584 (Ct. App. 1981).

Jury and bailiff costs not assessable against defendant. — Jury and bailiff costs are part of the general expense of maintaining a system of courts and the administration of justice and may not be assessed against a defendant if they were assessed independently of any condition of probation. State v. Ayala, 95 N.M. 464, 623 P.2d 584 (Ct. App. 1981).

No grand jury expenses. — Although the expense of a grand jury investigation may be unusual and bears a direct relation to the defendant, this section does not authorize the assessment of grand jury expenses since they are costs incurred before a criminal case is commenced and not costs in a case wherein there is a conviction. State v. Valley Villa Nursing Center, Inc., 97 N.M. 161, 637 P.2d 843 (Ct. App. 1981).

Word "costs" undoubtedly means incidental costs, or those necessary costs spent by the state in the prosecution of the case. 1955-56 Op. Att'y Gen. No. 56-6554. But see State v. Ayala, 95 N.M. 464, 623 P.2d 584 (Ct. App. 1981).

"Costs" given broad coverage. — Concerning jury fees, jury mileage, jury meals, bailiffs' mileage and sheriffs' costs, the word "costs," in this section, is broad enough to cover all costs. In the absence of a specific statute detailing what are proper items of cost in New Mexico or in the absence of a New Mexico supreme court case saying that jury fees, jury mileage, bailiffs' mileage and sheriffs' costs are not proper items of costs, same can continue to be charged as proper items of court costs. 1955-56 Op. Att'y Gen. No. 56-6554. But see State v. Ayala, 95 N.M. 464, 623 P.2d 584 (Ct. App. 1981).

Includes collection of incidental fees. — Witness fees, witness mileage, docket fees and justice of the peace (now magistrate) fees are necessary and incidental costs that can be collected as court costs. 1955-56 Op. Att'y Gen. No. 56-6554. But see State v. Ayala, 95 N.M. 464, 623 P.2d 584 (Ct. App. 1981).

Section permits assessment of costs against defendant upon deferred sentence. — The authorization in this section that cost may be adjudged against the defendant, based on a conviction, permits assessment of costs against a defendant whose sentence is deferred. State v. Ayala, 95 N.M. 464, 623 P.2d 584 (Ct. App. 1981).

Effect of juvenile's conviction. — This section provides that costs may be assessed against a criminal defendant. If a juvenile were convicted of involuntary manslaughter, costs could be assessed against him, and if not paid he could be remanded to the

custody of the county sheriff and be lodged in the county jail if he would not or could not pay the costs assessed against him. 1957-58 Op. Att'y Gen. No. 57-95.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 20 Am. Jur. 2d Costs § 105 et seq.

Defendant in criminal prosecution, costs as chargeable to, 65 A.L.R.2d 854.

Validity of requirement that, as condition of probation, indigent defendant reimburse defense costs, 79 A.L.R.3d 1025.

Abatement of state criminal case by accused's death pending appeal of conviction - modern cases, 80 A.L.R.4th 189.

Recovery under state law of attorney's fees by law pro se litigant, 14 A.L.R.5th 947.

20 C.J.S. Costs § 51.

31-12-7. Motor vehicles; influence of intoxicating liquor or drugs; fee upon conviction.

Notwithstanding the provisions of Section 66-8-102 NMSA 1978 or any municipal ordinance that prohibits driving while under the influence of intoxicating liquor or drugs, a person convicted of a violation of Section 66-8-102 NMSA 1978 or a violation of a municipal ordinance that prohibits driving while under the influence of intoxicating liquor or drugs shall be assessed by the court, in addition to any other fee or fine:

A. a fee of sixty-five dollars ($65.00) to defray the costs of chemical and other tests used to determine the influence of liquor or drugs; and

B. a fee of seventy-five dollars ($75.00) to fund comprehensive community programs for the prevention of driving while under the influence of intoxicating liquor or drugs and for other traffic safety purposes.

History: Laws 1981, ch. 367, § 1; 1988, ch. 56, § 5; 1991, ch. 245, § 1; 1997, ch. 203, § 1.

ANNOTATIONS

Cross references. — As to the traffic offense of being under the influence of intoxicating liquor, see 66-8-102 NMSA 1978.

The 1988 amendment, effective July 1, 1988, substituted "Section 66-8-102 NMSA 1978" for "Section 66-8-110 NMSA 1978" near the beginning of the section, inserted provisions following the two section references, regarding violation of a municipal ordinance prohibiting driving while under the influence of intoxicating liquor or drugs,

inserted "by the court" near the end and substituted "thirty-five dollars ($35.00)" for "twenty-five dollars ($25.00)" also near the end.

The 1991 amendment, effective October 1, 1991, designated a formerly undesignated provision as Subsection A; added Subsection B; and made minor stylistic changes in the introductory paragraph.

The 1997 amendment, in Subsection A, substituted "sixty-five dollars ($65.00)" for "thirty-five dollars ($35.00)" and made a minor stylistic change. Laws 1997, ch. 203 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective June 20, 1997, 90 days after adjournment of the legislature. See Volume 14 NMSA 1978 for "Adjournment Dates of Sessions of Legislature" table.

31-12-8. Controlled substances; fee upon conviction; municipal ordinance requirement.

A. A person convicted of a violation of the provisions of the Controlled Substances Act [30-31-1 NMSA 1978] or a person convicted of distribution or possession of a controlled substance pursuant to municipal ordinance shall be assessed, in addition to any other fee or fine, a fee of seventy-five dollars ($75.00) to defray the costs of chemical and other analyses of controlled substances.

B. Every municipality which has enacted an ordinance making possession or distribution of a controlled substance unlawful shall enact an ordinance to require assessment of the fee pursuant to Subsection A of this section and to provide for transmittal of the money collected to the administrative office of the courts pursuant to Section 31-12-9 NMSA 1978, notwithstanding the provisions of Section 35-14-7 NMSA 1978. All fees collected under this section shall be subject to an audit by the state auditor.

History: Laws 1981, ch. 367, § 2; 1984, ch. 82, § 1; 1988, ch. 14, § 5.

ANNOTATIONS

The 1984 amendment added "municipal ordinance requirement" in the catchline, designated the previously undesignated provisions of the section as Subsection A, inserting "or a person convicted of distribution or possession of a controlled substance pursuant to municipal ordinance" therein, and added Subsection B.

The 1988 amendment, effective July 1, 1988, deleted "misdemeanor or a petty misdemeanor for a" preceding "violation" and substituted "seventy-five dollars ($75.00)" for "twenty-five dollars ($25.00)" in Subsection A.

Conditional discharge dismissal not "conviction". – A dismissal under the conditional discharge statute, 30-31-28 NMSA 1978, is not a "conviction" as

contemplated by this section, or for any other purpose. State v. Fairbanks, 2004-NMCA-005, 134 N.M. 783, 82 P.3d 954.

Crime lab fee cannot be imposed under conditional discharge. – Although the crime lab fee would be authorized if the defendant had entered his guilty plea and received a deferred or suspended probated sentence or if he violated the terms of his probation under the conditional discharge, because he successfully completed his probation and charges were dismissed, the district court did not have authority to impose the fee. State v. Fairbanks, 2004-NMCA-005, 134 N.M. 783, 82 P.3d 954.

31-12-9. Crime laboratory fund created; appropriation.

There is created in the state treasury the "crime laboratory fund". All fees collected pursuant to the provisions of Sections 31-12-7 and 31-12-8 NMSA 1978 shall be transmitted monthly to the administrative office of the courts for credit to the crime laboratory fund. All balances in the crime laboratory fund of fees collected pursuant to the provisions of Subsection A of Section 31-12-7 NMSA 1978 are appropriated to the administrative office of the courts for payment upon invoice to the scientific laboratory division of the health and environment department [department of health], the New Mexico state police crime laboratory division and the Albuquerque police crime laboratory for costs related to chemical and other tests and analyses described in those sections and incurred by these laboratories and local law enforcement agencies. Payments out of the crime laboratory fund of fees collected pursuant to the provisions of Subsection A of Section 31-12-7 NMSA 1978 shall be made on vouchers issued and signed by the director of the administrative office of the courts upon warrants drawn by the department of finance and administration. All balances in the crime laboratory fund of fees collected pursuant to the provisions of Subsection B of Section 31-12-7 NMSA 1978 are appropriated to the traffic safety bureau of the transportation program division of the state highway and transportation department to provide funds to approved comprehensive community programs for the prevention of driving while under the influence of alcohol or drugs and for other traffic safety purposes. Payment out of the crime laboratory fund of fees collected pursuant to the provisions of Subsection B of Section 31-12-7 NMSA 1978 shall be made on vouchers issued and signed by the chief of the traffic safety bureau upon warrants drawn by the department of finance and administration.

History: Laws 1981, ch. 367, § 3; 1989, ch. 324, § 22; 1991, ch. 245, § 2.

ANNOTATIONS

Bracketed material. — The bracketed reference to the department of health was inserted by the compiler, as Laws 1991, ch. 25, § 16 repeals former 9-7-4 NMSA 1978, relating to the health and environment department, and enacts a new 9-7-4 NMSA 1978, creating the department of health. The bracketed material was not enacted by the legislature and is not part of the law.

The 1989 amendment, effective April 7, 1989, substituted "Sections 31-12-7 and 31-12-8 NMSA 1978" for "Sections 1 and 2 of this act" in the second sentence, and "described in those sections" for "described in Sections 1 and 2 of this act" in the third sentence, and deleted the former last sentence which read "Any interest earned on the fund shall be credited to it".

The 1991 amendment, effective October 1, 1991, inserted "monthly" in the second sentence; inserted "of fees collected pursuant to the provisions of Subsection A of Section 31-12-7 NMSA 1978" in the third and fourth sentences; and added the final two sentences.

31-12-10. Repealed.

ANNOTATIONS

Repeals. — Laws 1990, ch. 104, § 3 repeals 31-12-10 NMSA 1978, as amended by Laws, 1990, ch. 104, § 1, relating to DWI fund, effective July 1, 1991. For provisions of former section, see 1990 Cumulative Supplement.

31-12-11. Court fees; deposit in the domestic violence offender treatment fund.

A. In addition to any other fees collected in the district court, metropolitan court and magistrate court, those courts shall assess and collect from a person convicted of a penalty assessment misdemeanor, traffic violation, petty misdemeanor, misdemeanor or felony offense a "domestic violence offender treatment fee" of five dollars ($5.00).

B. Domestic violence offender treatment fees shall be deposited in the domestic violence offender treatment fund.

History: Laws 2003, ch. 387, § 1.

ANNOTATIONS

Effective dates. — Laws 2003, ch. 387, § 3 makes the act effective on July 1, 2003.

31-12-12. Domestic violence offender treatment fund created; appropriation; program requirements.

A. The "domestic violence offender treatment fund" is created in the state treasury. All fees collected pursuant to the provisions of Section 1 [31-12-11 NMSA 1978] of this [act] shall be transmitted monthly to the department of finance and administration for credit to the domestic violence offender treatment fund.

B. Balances in the domestic violence offender treatment fund are appropriated to the children, youth and families department to provide funds to domestic violence offender treatment programs to defray the cost of providing treatment to domestic violence offenders. Unexpended or unencumbered balances remaining in the fund at the end of any fiscal year shall not revert to the general fund.

C. Payment out of the domestic violence offender treatment fund shall be made on vouchers issued and signed by the secretary of children, youth and families upon warrants drawn by the department of finance and administration.

D. In order to be eligible for money from the domestic violence offender treatment fund, a domestic violence offender treatment program shall include the following components in its program:

(1) an initial assessment to determine if a domestic violence offender will benefit from participation in the program;

(2) a written contract, which must be signed by the domestic violence offender, that sets forth:

(a) attendance and participation requirements;

(b) consequences for failure to attend or participate in the program; and

(c) a confidentiality clause that prohibits disclosure of information revealed during treatment sessions;

(3) strategies to hold domestic violence offenders accountable for their violent behavior;

(4) a requirement that group discussions are limited to members of the same gender;

(5) an education component that:

(a) defines physical, emotional, sexual, economic and verbal abuse and techniques for stopping those forms of abuse; and

(b) examines gender roles, socialization, the nature of violence, the dynamics of power and control and the effects of domestic violence on children;

(6) a requirement that a domestic violence offender not be under the influence of alcohol or drugs during a treatment session;

(7) a requirement that the program provide monthly written reports to the presiding judge or the domestic violence offender's probation or parole officer regarding:

(a) proof of the domestic violence offender's enrollment in the program;

(b) progress reports that address the domestic violence offender's attendance, fee payments and compliance with other program requirements; and

(c) evaluations of progress made by the domestic violence offender and recommendations as to whether or not to require the offender's further participation in the program; and

(8) a requirement that the term of the program be at least fifty-two weeks.

E. Counseling for couples shall not be a component of a domestic violence offender treatment program.

F. As used in this section, "domestic violence offender" means:

(1) a person convicted for an offense pursuant to the provisions of the Crimes Against Household Members Act [30-3-10 to 30-3-16 NMSA 1978]; or

(2) a person convicted for violating an order of protection granted by a court pursuant to the provisions of the Family Violence Protection Act [40-13-1 NMSA 1978].

History: Laws 2003, ch. 387, § 2.

ANNOTATIONS

Bracketed material. — The bracketed word "act" in Subsection A was inserted by the compiler; it was not enacted by the legislature, and it is not part of the law.

Effective dates. — Laws 2003, ch. 387, § 3 makes the act effective on July 1, 2003.

ARTICLE 13
Civil Rights and Pardons

31-13-1. Felony conviction; restoration of citizenship.

A. A person who has been convicted of a felony shall not be permitted to vote in any statewide, county, municipal or district election held pursuant to the provisions of the Election Code [1-1-1 NMSA 1978], unless the person:

(1) has completed the terms of a suspended or deferred sentence imposed by a court;

(2) was unconditionally discharged from a correctional facility under the jurisdiction of the corrections department or was conditionally discharged from a

correctional facility under the jurisdiction of the corrections department and has completed all conditions of probation or parole;

(3) was unconditionally discharged from a correctional facility under the jurisdiction of a federal corrections agency or was conditionally discharged from a correctional facility under the jurisdiction of a federal corrections agency and has completed all conditions of probation or parole; or

(4) has presented the governor with a certificate verifying the completion of the sentence and was granted a pardon or a certificate by the governor restoring the person's full rights of citizenship.

B. When a person has completed the terms of a suspended or deferred sentence imposed by a court for a felony conviction, the clerk of the district court shall notify the secretary of state. The secretary of state shall notify all county clerks that the person is eligible for registration.

C. A person who has served the entirety of a sentence imposed for a felony conviction, including a term of probation or parole shall be issued a certificate of completion by the corrections department. Upon issuance, the corrections department shall inform the person that the person is entitled to register to vote. The certificate of completion shall state that the person's voting rights are restored.

D. When the corrections department issues a person a certificate of completion, the corrections department shall notify the secretary of state that the person is entitled to register to vote. The secretary of state shall notify all county clerks that the person is eligible for registration. Additionally, a county clerk shall accept the following documents as proof that a person has served the entirety of the sentence for a felony conviction and is eligible for registration:

(1) a judgment and sentence from a court of this state, another state or the federal government, which shows on its face that the person has completed the entirety of the sentence;

(2) a certificate of completion from the corrections department; or

(3) a certificate of completion from another state or the federal government.

E. A person who has been convicted of a felony shall not be permitted to hold an office of public trust for the state, a county, a municipality or a district, unless the person has presented the governor with a certificate verifying the completion of the sentence and was granted a pardon or a certificate by the governor restoring the person's full rights of citizenship.

History: 1953 Comp., § 40A-29-14, enacted by Laws 1963, ch. 303, § 29-14; and recompiled as 1953 Comp., § 40A-29-38, by Laws 1977, ch. 216, § 16; 2001, ch. 46, § 2.; 2005, ch. 116, § 2.

ANNOTATIONS

Cross references. — For persons convicted of a felonious or infamous crime as not being qualified voters, see N.M. Const., art. VII, § 1 and 1-4-24 NMSA 1978.

For registration following conviction, see § 1-4-27.1 NMSA 1978.

For qualification of voters, see N.M. Const., art VII, § 1.

For governor's power to pardon, see N.M. Const., art V, § 6.

The 2001 amendment, effective July 1, 2001, substituted "Felony conviction" for "Effect of criminal conviction upon civil rights; governor may pardon or grant" in the section heading; rewrote Subsections A and B adding alternatives to the gubernatorial restoration of voting rights following a felony conviction; and rewrote Subsection C to relate only to the holding of public office after a felony conviction.

Recompilations. — Laws 1977, ch. 216, § 16 recompiles 40A-29-14, 1953 Comp., as 40A-29-38, 1953 Comp. effective July 1, 1979.

Applicability. — Laws 2001, ch. 46, § 5 makes the provisions of this section apply to a person convicted of a felony offense prior to, on, or after July 1, 2001.

The 2005 amendment, effective June 17, 2005, provides in Subsection B that when a person has completed the terms of a suspended or deferred sentence, the clerk of the district court shall notify the secretary of state and the secretary of state shall notify all county clerks that the person is eligible for registration; in Subsection C that upon the issuance of a certificate of completion of sentence, which shall state that the person’s voting rights are restored, the corrections department shall inform the person that the person is entitled to vote; in Subsection D that with the corrections department issues a certificate of completion, the corrections department shall notify the secretary of state, the secretary of state shall notify all county clerks that the person is eligible for registration and county clerks shall accept the certificate of completion as proof that the person is eligible for registration.

Definition of "pardon". — A "pardon" is a declaration on record by the chief magistrate of a state or country that a person named is relieved from the legal consequences of a specific crime, or an act of grace proceeding from the power entrusted with execution of laws, which exempt the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed. 1959-60 Op. Att'y Gen. No. 59-176.

Certificate of pardon operates to cover all convictions and sentences. 1970 Op. Att'y Gen. No. 70-85.

Governor's pardon removes only state, not federal, disabilities for convicted felon. — A pardon by the governor only removes the disabilities previously imposed on a convicted felon by this state, namely, the right to vote and to hold office, but does not remove any disabilities imposed by federal statute on the convicted felon, for example, the disability of not being allowed to receive a firearm involved in interstate commerce. United States v. Larranaga, 614 F.2d 239 (10th Cir. 1980).

Full pardon absolves one from all legal consequences of crime. — It was formerly doubted whether a pardon could do more than take away the punishment, leaving the crime and its disabling consequences unremoved, but, with certain exceptions hereinafter noted, it is now the accepted general doctrine that a full pardon absolves one from all legal consequences of his crime. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching; if granted after conviction it removes the penalties and disabilities which ordinarily follow from conviction, and, generally speaking, restores the offender to all his civil rights. 1959-60 Op. Att'y Gen. No. 59-176.

And restores citizenship rights. — A full pardon automatically restores such citizenship rights as were lost by the conviction. 1959-60 Op. Att'y Gen. No. 59-176.

Eligibility for elective office. — A convicted felon who was elected to the position of county commissioner became eligible to hold that office when, prior to taking the oath of office, she applied for and received a certificate of restoration of full rights of citizenship from the governor of New Mexico. Lopez v. Kase, 1999-NMSC-011, 126 N.M. 733, 975 P.2d 346.

But record not expunged. — There is no law in this state authorizing the expunging from records the fact of a felony conviction for which pardoned. 1959-60 Op. Att'y Gen. No. 59-176.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21A Am. Jur. 2d Criminal Law § 1311 et seq.

Executive clemency to remove disqualification for office, resulting from conviction of crime, as applicable in case of conviction in federal court or court of another state, 135 A.L.R. 1493.

Pardon as restoring license or other special privilege or office forfeited by conviction, 143 A.L.R. 172, 70 A.L.R.2d 268.

Offense under federal law or law of another state or country, conviction as vacating accused's holding of state or local office or as ground for removal, 20 A.L.R.2d 732.

Propriety of conditioning probation on suspended sentence or defendant's refraining from political activity, protest, or the like, 45 A.L.R.3d 1022.

Pardon as restoring public office on license or eligibility therefor, 58 A.L.R.3d 1191.

What constitutes conviction within statutory or constitutional provision making conviction of crime ground of disqualification for, removal from, or vacancy in, public office, 10 A.L.R.5th 139.

State pardon as affecting "convicted" status of one accused of violations of Gun Control Act of 1968 (18 USCS §§ 921 et seq.), 44 A.L.R. Fed. 692.

State restoration of federal felon's civil rights as nullification of conviction under 18 USCS § 921(a)(20) which defines conviction for purposes of penalizing possession of weapon by convicted felon pursuant to 18 USCS § 922(g)(1), 117 A.L.R. Fed. 247.

18 C.J.S. Convicts § 3 et seq.

ARTICLE 14
Execution of Death Sentence

31-14-1. Warrant of execution upon judgment of death; time of execution.

When judgment of death is rendered by any court of competent jurisdiction a warrant signed by the judge and attested by the clerk under the seal of the court must be drawn and delivered to the sheriff. It must state the conviction and judgment and appoint a day on which the judgment is to be executed, which must be not less than sixty nor more than ninety days from the date of judgment and must direct the sheriff to deliver the defendant, at a time specified in said order, not more than ten days from the date of judgment, to the warden of the state penitentiary at Santa Fe for execution.

History: Laws 1929, ch. 69, § 1; C.S. 1929, § 35-321; 1941 Comp., § 42-1401; 1953 Comp., § 41-14-1.

ANNOTATIONS

State solely responsible for cost of maintenance of convict. — Where convict under sentence of death is, under the statute, confined in state penitentiary pending determination of his appeal, state has entire jurisdiction of his appeal, state has entire jurisdiction over such convict, and cannot recover cost of his maintenance from county. State v. Board of Comm'rs, 43 N.M. 521, 96 P.2d 290 (1939).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 820, 956 et seq.

Effect of permitting day fixed for execution to pass without carrying out sentence, 34 A.L.R. 314.

Effect of abolition of capital punishment on procedural rules governing crimes punishable by death-post-Furman decisions, 71 A.L.R.3d 453.

Effect of delay in taking defendant into custody after conviction and sentence, 76 A.L.R.5th 485.

31-14-2. Judge to transmit statement of conviction.

The judge of the court at which a conviction is had, must, immediately after the conviction, transmit to the governor, by mail or otherwise, a statement of the conviction and judgment.

History: Laws 1929, ch. 69, § 2; C.S. 1929, § 35-322; 1941 Comp., § 42-1402; 1953 Comp., § 41-14-2.

31-14-3. Governor may suspend.

No judge, court or officer, other than the governor, can suspend the execution of a judgment of death, except the warden of the state prison to whom he is delivered for execution, in accordance with the provisions of the six succeeding sections [31-14-4 to 31-14-9 NMSA 1978], unless an appeal is taken.

History: Laws 1929, ch. 69, § 3; C.S. 1929, § 35-323; 1941 Comp., § 42-1403; 1953 Comp., § 41-14-3.

ANNOTATIONS

Effect of execution order on defendant's right to appeal. — That defendant's execution was ordered at a date which required him to take an appeal within 90 days of his conviction did not invalidate the judgment and sentence, under 31-14-1 NMSA 1978, since an appeal was taken in less than 60 days, and the judgment suspended, and he was not prejudiced. State v. Roy, 40 N.M. 397, 60 P.2d 646 (1936).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law § 901.

24 C.J.S. Criminal Law §§ 1551, 1553, 1555 to 1559, 1562, 1563, 1568.

31-14-4. Insanity of defendant; how determined.

If, after his delivery to the warden for execution, there is good reason to believe that a defendant, under judgment of death, has become insane, the warden must call such fact to the attention of the district attorney of the county in which the state penitentiary is situated, whose duty it is to immediately file in the district court of such county a petition,

stating the conviction and judgment, and the fact that the defendant is believed to be insane, and asking that the question of his sanity be inquired into. Thereupon it shall be the duty of said court to inquire into said question and render judgment thereon.

History: Laws 1929, ch. 69, § 4; C.S. 1929, § 35-324; 1941 Comp., § 42-1404; 1953 Comp., § 41-14-4.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — Insanity supervening after conviction and sentence of death, 49 A.L.R. 804.

24 C.J.S. Criminal Law § 1547.

31-14-5. Duty of district attorney upon hearing.

The district attorney must attend the hearing, and may produce witnesses before the court, for which purpose he may issue process in the same manner as for witnesses to attend before the grand jury, and disobedience thereto may be punished in like manner as disobedience to process issued by the court.

History: Laws 1929, ch. 69, § 5; C.S. 1929, § 35-325; 1941 Comp., § 42-1405; 1953 Comp., § 41-14-5.

31-14-6. Order of court committing insane person to hospital.

The court shall make and cause to be entered an order reciting the fact of such inquiry and the result thereof. When it is found that the defendant is insane, the order shall direct that the defendant be taken to the New Mexico behavioral health institute at Las Vegas, and there kept in safe confinement until his reason is restored.

History: Laws 1929, ch. 69, § 6; C.S. 1929, § 35-326; 1941 Comp., § 42-1406; 1953 Comp., § 41-14-6; 2005, ch. 313, § 8.

ANNOTATIONS

The 2005 amendment, effective June 17, 2005, changes the name of the state hospital for the insane to the New Mexico behavioral institute at Las Vegas.

Law reviews. — For note, "Statutory Proposals for Expanding Outpatient Treatment in New Mexico," see 2 Nat. Resources J. 153 (1962).

31-14-7. Defendant found to be sane; duty of warden; procedure when sanity is restored.

If it is found that the defendant is sane, the warden shall proceed to execute the judgment as specified in the warrant. If it is found that the defendant is insane, the warden shall suspend the execution and transmit a certified copy of the order mentioned in Section 31-14-6 NMSA 1978 to the governor, and deliver the defendant, together with a certified copy of such order, to the superintendent of the New Mexico behavioral health institute at Las Vegas. When the defendant recovers his reason, the superintendent of the institute shall certify that fact to the governor who shall thereupon issue to the warden his warrant, appointing a day for the execution of the judgment.

History: Laws 1929, ch. 69, § 7; C.S. 1929, § 35-327; 1941 Comp., § 42-1407; 1953 Comp., § 41-14-7; 2005, ch. 313, § 9.

ANNOTATIONS

Bracketed material. — The bracketed material in the catchline and section was added by the compiler; it was not enacted by the legislature, and it is not part of the law.

The 2005 amendment, effective June 17, 2005, changes the name of the state hospital for the insane to the New Mexico behavioral institute at Las Vegas.

State hospital for the insane. — Laws 1970, ch. 45, § 1, enacts 23-1-13 NMSA 1978 which changes the name of the state hospital for the insane to Las Vegas medical center.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Judicial declaration of sanity, made after alleged offense but before acquittal on ground of insanity at time of offense, as affecting duty of court to commit defendant to asylum for insane, 88 A.L.R. 1084.

24 C.J.S. Criminal Law §§ 1551, 1553, 1555 to 1559, 1562, 1563, 1568.

31-14-8. Proceedings when female is supposed to be pregnant.

If there is good reason to believe that a female against whom a judgment of death is rendered is pregnant, such proceedings must be had as are provided in Section 4 [31-14-4 NMSA 1978] of this act except that the court may summon three disinterested physicians, of good standing in their profession, to inquire into the supposed pregnancy, who shall, in the presence of the court, but with closed doors, if requested by the defendant, examine the defendant and hear any evidence that may be produced, and make a written finding and certificate of their conclusion, to be approved by the court and spread upon the minutes. The provisions of Section 5 [31-14-5 NMSA 1978] of this act apply to the proceedings upon such inquiry.

History: Laws 1929, ch. 69, § 8; C.S. 1929, § 35-328; 1941 Comp., § 42-1408; 1953 Comp., § 41-14-8.

31-14-9. If female is not pregnant.

If it is found that the female is not pregnant, the warden must execute the judgment; if it is found that she is pregnant the warden must suspend the execution of the judgment, and transmit a certified copy of the finding and certificate to the governor. When the governor receives from the warden a certificate that the defendant is no longer pregnant, he must issue to the warden his warrant appointing a day for the execution of the judgment.

History: Laws 1929, ch. 69, § 9; C.S. 1929, § 35-329; 1941 Comp., § 42-1409; 1953 Comp., § 41-14-9.

31-14-10. Judgment of death remaining in force, not executed; no appeal from order of court.

If for any reason a judgment of death has not been executed, and it remains in force, the court in which the conviction is had, on the application of the district attorney of the county in which the conviction is had, must order the defendant to be brought before it, or if he is at large, a warrant for his apprehension may be issued. Upon the defendant being brought before the court, it must inquire into the facts, and if no legal reason exists against the execution of the judgment, must make an order that the warden of the state penitentiary, to whom the sheriff is directed to deliver the defendant, execute the judgment at a specified time. The warden must execute the judgment accordingly. From an order directing and fixing the time for the execution of a judgment, as herein provided, there is no appeal.

History: Laws 1929, ch. 69, § 10; C.S. 1929, § 35-330; 1941 Comp., § 42-1410; 1953 Comp., § 41-14-10.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law § 611.

Effect of permitting day fixed for execution to pass without carrying out sentence, 34 A.L.R. 314.

31-14-11. Punishment of death; how inflicted.

The manner of inflicting punishment of death shall be by administration of a continuous, intravenous injection of a lethal quantity of an ultra-short-acting barbiturate in combination with a chemical paralytic agent.

History: 1953 Comp., § 41-14-11.1, enacted by Laws 1955, ch. 127, § 1; 1979, ch. 150, § 8.

ANNOTATIONS

Substitution of means of inflicting death. — Laws 1929, ch. 69, § 11, substituted electrocution for hanging as a mode of executing death penalty, and was applicable to those under sentence of hanging on effective date of the statute. Woo Dak San v. State, 36 N.M. 53, 7 P.2d 940 (1931) (decided under former law).

Caused no constitutional violation. — Laws 1929, ch. 69, § 11, substituting electrocution for hanging, and applicable to persons informed against before passage of the statute, was not violative of constitutional provision prohibiting legislation changing rights, remedies or rules of evidence or procedure in pending cases. Woo Dak San v. State, 36 N.M. 53, 7 P.2d 940 (1931) (decided under former law).

Law reviews. — For article, "Constitutionality of the New Mexico Capital Punishment Statute," see 11 N.M.L. Rev. 269 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law § 961 et seq.

Manner of inflicting death sentence as cruel or unusual punishment, 30 A.L.R. 1452.

24 C.J.S. Criminal Law § 1592.

31-14-12. Place of execution; direction of warden.

The warden of the penitentiary of New Mexico shall provide a suitable and efficient room or place enclosed from public view, within the walls of the state penitentiary, and therein provide all necessary appliances requisite for carrying into execution the death penalty. The punishment of death shall, in each individual case of death sentence pronounced in this state, be inflicted under the direction of the warden in the room or place so provided for that purpose.

History: 1978 Comp., § 31-14-12, enacted by Laws 1979, ch. 150, § 9.

ANNOTATIONS

Repeals and reenactments. — Laws 1979, ch. 150, § 9, repeals former 31-14-12 NMSA 1978, relating to place of execution, appliances for carrying into execution the death penalty and supervision by the superintendent of the penitentiary, and enacts the above section.

Law reviews. — For article, "Constitutionality of the New Mexico Capital Punishment Statute," see 11 N.M.L. Rev. 269 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law § 610.

24 C.J.S. Criminal Law § 1592.

31-14-13. [Applicability of act.]

The provision of this act [31-14-11 to 31-14-14 NMSA 1978] shall apply only to capital offenses committed after the effective date of this act, and nothing contained in the provisions of this act shall be construed to alter in any manner the execution of a sentence of death imposed on account of any crime or crimes committed prior to the effective date of this act.

History: 1953 Comp., § 41-14-11.3, enacted by Laws 1955, ch. 127, § 3.

31-14-14. Statutory references to execution.

All references in the laws of the state of New Mexico relating to execution by electrocution or by lethal gas shall, insofar as such provisions are applicable, apply to, and mean, execution by means of injection, except as to capital offenses already committed.

History: 1953 Comp., § 41-14-11.4, enacted by Laws 1955, ch. 127, § 4; 1979, ch. 150, § 10.

ANNOTATIONS

Law reviews. — For article, "Constitutionality of the New Mexico Capital Punishment Statute," see 11 N.M.L. Rev. 269 (1981).

31-14-15. Where judgment must be executed; who may be present.

A judgment of death must be executed within the walls of the state penitentiary at Santa Fe, and such execution shall be under the supervision and direction of the warden of said institution. The warden of the state penitentiary must be present at the execution and must invite the presence of a physician, the attorney general of the state and at least twelve reputable citizens, to be selected by him; and he shall, at the request of the defendant, permit such ministers of the gospel, not exceeding two, as the defendant may name, and any person, relatives or friends, not to exceed five, to be present at the execution, together with such peace officers as he may think expedient, to witness the execution. But no other persons than those mentioned in this section can be present at the execution, nor can any person under age be allowed to witness the same.

History: Laws 1929, ch. 69, § 12; C.S. 1929, § 35-332; 1941 Comp., § 42-1412; 1953 Comp., § 41-14-12.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — Validity of rules and regulations concerning viewing of execution of death penalty, 107 A.L.R.5th 291.

31-14-16. Return of warden.

After the execution, the warden must make a return upon the death warrant to the court by which the judgment was rendered, showing the time, mode and manner in which it was executed.

History: Laws 1929, ch. 69, § 13; C.S. 1929, § 35-333; 1941 Comp., § 42-1413; 1953 Comp., § 41-14-13.

ARTICLE 15
Public Defenders

31-15-1. Short title.

This act [31-15-1 to 31-15-12 NMSA 1978] may be cited as the "Public Defender Act."

History: 1953 Comp., § 41-22A-1, enacted by Laws 1973, ch. 156, § 1.

ANNOTATIONS

Cross references. — For Indigent Defense Act, see 31-16-1 NMSA 1978 et seq.

Multiple representation. — While it is incontestable that a criminal defendant is entitled to representation, there is no support for the argument that more than one attorney must be appointed to represent an indigent defendant based merely on the claim that a case is complex and a conviction would carry serious consequences to the defendant. State v. Chamberlain, 112 N.M. 723, 819 P.2d 673 (1991).

Immunity extends to attorneys under contract to public defender. — The Public Defender Act (this article) does not contain any language about immunity or lack of immunity, but reading the Public Defender Act and the Judgment Defense Act in pari materia, the legislature intended the immunity granted in this section to attorneys appointed under the Indigent Defense Act to apply also to those appointed because they are under contract to the public defender. Herrera v. Sedillo, 106 N.M. 206, 740 P.2d 1190 (Ct. App. 1987).

Legal representation of juveniles. — The public defender department has the responsibility of providing legal representation for indigent juveniles. 1973 Op. Att'y Gen. No. 73-58.

Law reviews. — 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. — Construction and effect of statutes providing for office of public defender, 36 A.L.R.3d 1403.

Public defender's immunity from liability for malpractice, 6 A.L.R.4th 774.

31-15-2. Definitions.

As used in the Public Defender Act [31-15-1 to 31-15-12 NMSA 1978]:

A. "court" means the district courts and magistrate courts of this state;

B. "department" means the public defender department;

C. "district" means the public defender district;

D. "judge" means judge of the district court or magistrate; and

E. "chief" means the chief public defender.

History: 1953 Comp., § 41-22A-3, enacted by Laws 1973, ch. 156, § 3; 1985, ch. 32, § 1.

ANNOTATIONS

The 1985 amendment deleted former Subsection A, defining "board," and redesignated former Subsections B, C, D, E, and F as present Subsections A, B, C, D, and E, respectively.

31-15-3. Repealed.

ANNOTATIONS

Repeals. — Laws 1985, ch. 32, § 4 repeals 31-15-3 NMSA 1978, as enacted by Laws 1973, ch. 156, § 3, relating to the "public defender board". For provisions of former section, see 1984 Replacement Pamphlet.

Laws 1985, ch. 32 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on June 14, 1985.

31-15-4. Chief public defender; qualifications.

A. The governor shall appoint the chief who shall be the administrative head of the department. Any vacancy in the office of the chief shall be filled by appointment of the governor.

B. The governor shall appoint as chief only a person with the following qualifications:

(1) an attorney licensed to practice law in the highest court of this state;

(2) an attorney whose practice of law has been continuously active for at least five years immediately preceding the date of this appointment; and

(3) an attorney whose practice of law has clearly demonstrated experience in defense or prosecution of persons accused of crime in this state.

C. The chief shall serve at the pleasure of the governor.

History: 1953 Comp., § 41-22A-4, enacted by Laws 1973, ch. 156, § 4; 1977, ch. 257, § 58; 1985, ch. 32, § 2.

ANNOTATIONS

The 1985 amendment substituted the present catchline for "Duties of the public defender board" in the catchline and deleted former Subsection D, relating to the public defender board's advisory capacity.

31-15-5. Public defender department; creation; administration; finance.

A. There is created the public defender department. The headquarters of the department shall be maintained at Santa Fe. The chief shall be the administrative head of the department. The department is administratively attached to the criminal justice department.

B. All salaries and other expenses of the department shall be paid by warrants of the secretary of finance and administration, supported by vouchers signed by the chief or his authorized representative and in accordance with budgets approved by the budget division of the department of finance and administration.

History: 1953 Comp., § 41-22A-5, enacted by Laws 1978, ch. 14, § 1.

ANNOTATIONS

Cross references. — As to administrative attachment to the criminal justice department, see 9-3-11 NMSA 1978.

Repeals and reenactments. — Laws 1978, ch. 14, § 1, repeals 41-22A-5, 1953 Comp. (former 31-15-5 NMSA 1978), relating to the creation, administration and finance of the public defender department, and enacts the above section.

Appropriations. — Laws 1999 (1st S.S.), ch. 4, § 5A(3), effective May 21, 1999, appropriates $106,500 from the general fund to the public defender department for expenditure in fiscal year 2000 to provide salaries and benefits and furniture, supplies and office equipment for an additional public defender and support staff. Any unexpended or unencumbered balance remaining at the end of fiscal year 2000 shall revert to the general fund.

Laws 1999 (1st S.S.), ch. 4, § 5B(3), effective May 21, 1999, appropriates $83,600 from the general fund to the public defender department for expenditure in fiscal year 2000 to provide salaries and benefits and furniture, supplies and office equipment for an additional public defender and support staff. Any unexpended or unencumbered balance remaining at the end of fiscal year 2000 shall revert to the general fund.

Laws 1999 (1st S.S.), ch. 4, § 5C(3), effective May 21, 1999, appropriates $83,600 from the general fund to the public defender department for expenditure in fiscal year 2000 to provide salaries and benefits and furniture, supplies and office equipment for an additional public defender and support staff. Any unexpended or unencumbered balance remaining at the end of fiscal year 2000 shall revert to the general fund.

Laws 2000 (2nd S.S.), ch. 10, § 2F appropriates $25,000 from the general fund to the public defender department for costs associated with grand jury re-indictments in Bernalillo county.

Laws 2001, ch. 306, § 4, appropriates $87,000 from the general fund to the public defender department for fiscal year 2002 to provide salary, benefits, furniture, supplies, equipment and in-state travel for an additional public defender attorney and support staff and to provide for costs of contract and conflict counsel due to increased workload in the Dona Ana magistrate district and provides that any unexpended or unencumbered balance remaining at the end of the fiscal year shall revert to the general fund.

31-15-5.1. Public defender automation fund created; administration; distribution.

A. The "public defender automation fund" is created in the state treasury. The fund shall be administered by the public defender department. The public defender department shall report on the status of the fund to the legislative finance committee during each legislative interim.

B. All balances in the public defender automation fund are appropriated to the public defender department for the purchase and maintenance of automation systems for the public defender department.

C. Payments from the public defender automation fund shall be made upon vouchers issued and signed by the chief public defender upon warrants drawn by the secretary of finance and administration. Any purchase or lease purchase agreement

entered into pursuant to this section shall be entered into in accordance with the Procurement Code [13-1-28 NMSA].

History: Laws 1993, ch. 79, § 2.

31-15-6. Public defender department; powers.

The department may receive on behalf of the state any gifts, grants-in-aid, donations or bequests from any source to be used in carrying out the purposes of the Public Defender Act [31-15-1 to 31-15-12 NMSA 1978].

History: 1953 Comp., § 41-22A-6, enacted by Laws 1973, ch. 156, § 6.

31-15-7. Chief public defender; general duties and powers.

A. The chief is responsible to the governor for the operation of the department. It is his duty to manage all operations of the department and to:

(1) administer and carry out the provisions of the Public Defender Act [31-15-1 to 31-15-12 NMSA 1978] with which he is charged; and

(2) exercise authority over and provide general supervision of employees of the department.

B. To perform his duties, the chief has every power implied as necessary for that purpose, those powers expressly enumerated in the Public Defender Act or other laws and full power and authority to:

(1) exercise general supervisory authority over all employees of the department subject to the Personnel Act [10-9-1 NMSA 1978];

(2) delegate authority to subordinates as he deems necessary and appropriate;

(3) within the limitations of applicable appropriations and applicable laws, employ and fix the compensation of those persons necessary to discharge his duties;

(4) organize the department into those units he deems necessary and appropriate to carry out his duties;

(5) conduct research and studies that will improve the operation of the department and the administration of the Public Defender Act [31-15-1 to 31-15-12 NMSA 1978];

(6) provide courses of instruction and practical training for employees of the department that will improve the operation of the department and the administration of the Public Defender Act;

(7) purchase or lease personal property and lease real property for the use of the department;

(8) maintain records and statistical data that reflect the operation and administration of the department;

(9) submit an annual report covering the operation of the department together with appropriate recommendations to the governor, secretary of corrections and legislature;

(10) serve as defense counsel under the Public Defender Act [31-15-1 to 31-15-12 NMSA 1978] as necessary and appropriate;

(11) formulate a fee schedule for attorneys who are not employees of the department who serve as counsel for indigent persons under the Public Defender Act;

(12) adopt a standard to determine indigency;

(13) provide for the collection of reimbursement from each person who has received legal representation or another benefit under the Public Defender Act [31-15-1 to 31-15-12 NMSA 1978] after a determination is made that he was not indigent according to the standard for indigency adopted by the department. Any amounts recovered shall be paid to the state treasurer for credit to the general fund;

(14) require each person who desires legal representation or another benefit under the Public Defender Act to enter into a contract with the department agreeing to reimburse the department if a determination is made that he was not indigent according to the standard for indigency adopted by the department; and

(15) certify contracts and expenditures for litigation expenses, including contracts and expenditures for professional and nonprofessional experts, investigators and witness fees, but not including attorney contracts, pursuant to the provisions of the Procurement Code, Section 13-1-98 NMSA 1978.

History: 1953 Comp., § 41-22A-7, enacted by Laws 1973, ch. 156, § 7; 1977, ch. 257, § 60; 1985, ch. 32, § 3; 1987, ch. 20, § 1; 2001, ch. 34, § 1.

ANNOTATIONS

Cross references. — Defense of indigents, see §§ 31-16-1 to 31-16-10 NMSA 1978.

The 1985 amendment deleted former Subsection A(3), relating to the chief's duty to advise the public defender board on matters relating to the administration of the department.

The 1987 amendment, effective June 19, 1987, in Subsection B(9), substituted "corrections and" for "the criminal justice department and the" and added Subsections B(12) through (14).

The 2001 amendment, effective July 1, 2001, inserted Paragraph B(15), which gives the chief the power to certify certain contracts and expenditures for litigation expenses.

31-15-8. Duty of chief public defender to establish appellate division; duty of appellate division.

A. The chief shall establish within the department an appellate division.

B. The appellate division shall assist the chief and district public defenders by providing representation before the court of appeals and the supreme court in appellate, review and postconviction proceedings involving persons represented under the Public Defender Act [31-15-1 to 31-15-12 NMSA 1978].

C. The appellate division shall assist private counsel not employed under the Public Defender Act in any appellate, review or postconviction remedy proceeding by providing representation for persons entitled to representation under the Indigent Defense Act [31-16-1 to 31-16-10 NMSA 1978].

History: 1953 Comp., § 41-22A-8, enacted by Laws 1973, ch. 156, § 8.

ANNOTATIONS

Temporary provisions. — Laws 1973, ch. 156, § 13, provides for the chief public defender to establish an appellate division during the sixty-second fiscal year, to handle all appellate proceedings under the act.

31-15-9. Duty of chief public defender to establish district public defender office; appointment of district public defender.

A. The chief shall designate one or more public defender districts having boundaries coextensive with the boundaries of one or more judicial districts of this state. The chief shall consider the demand for legal services provided under the Public Defender Act [31-15-1 to 31-15-12 NMSA 1978], criminal case load statistics, population, geographical characteristics and any other relevant factor in the designation of public defender districts.

B. The chief may review the designation of districts at any time. The review shall be based on the same factors enumerated in Subsection A of this section. On the basis of the review the chief may change the designation of any district so long as the new designation has boundaries coextensive with the boundaries of one or more judicial districts of this state.

C. The chief shall appoint a district public defender in each district. The district public defender shall administer the operation of the district and shall serve at the pleasure of the chief. Each district public defender shall be an attorney licensed to practice law in the highest courts of this state and a resident of this state.

History: 1953 Comp., § 41-22A-9, enacted by Laws 1973, ch. 156, § 9.

ANNOTATIONS

Temporary provisions. — Laws 1973, ch. 156, § 13, provides for the limitation of the chief public defender to designated districts and to appoint district public defenders during the sixty-second fiscal year to establish pilot programs.

31-15-10. Duties of district public defender.

A. Under the supervision and control of the chief, each district public defender shall administer the operation of the department office within his district.

B. The district public defender or the chief may authorize the representation of a person who is without counsel and who is financially unable to obtain counsel when that person is under investigation for allegedly committing murder or any other felony criminal offense.

C. The district public defender shall represent every person without counsel who is financially unable to obtain counsel and who is charged in any court within the district with any crime that carries a possible sentence of imprisonment. The representation shall begin not later than the time of the initial appearance of the person before any court and shall continue throughout all stages of the proceedings against him, including any appeal, as directed by the chief.

D. The district public defender shall represent any person within the district who is without counsel and who is financially unable to obtain counsel in any state postconviction proceeding.

E. The district public defender shall notify the chief if, for any reason, he is unable to represent a person entitled to his representation, and the chief shall make provision for representation.

F. The district public defender may confer with any person who is not represented by counsel and who is being forcibly detained.

History: 1953 Comp., § 41-22A-10, enacted by Laws 1973, ch. 156, § 10; 2001, ch. 34, § 2.

ANNOTATIONS

The 2001 amendment, effective July 1, 2001, inserted Subsection B and redesignated the remaining subsections accordingly.

No per se conflict of interest exists when Post Conviction Conflict Division of Public Defender Department represents individual arguing ineffective assistance of counsel by attorney from Department=s Trial Division, but each potential conflict must be reviewed on case-by-case basis, and individual may waive any such conflict by knowingly and intelligently signing waiver after proper advisement. Morales v. Bridgforth, 2004-NMSC-034, 136 N.M.511, 100 P.3d 668.

Construction with Indigent Defense Act. — The legislature, understanding that courts determine indigence under the Indigent Defense Act (IDA), enacted this section of the Public Defender Act (PDA) intending "every person without counsel who is financially unable to obtain counsel" to include all persons who courts determine are "needy" under the IDA. Therefore, under the administrative system of the PDA and IDA, when a court determines that a defendant is "needy," the defendant is "financially unable to obtain counsel" under the PDA, and the Department "shall represent" the defendant pursuant to this section, assuming the defendant is charged with a crime carrying a possible sentence of imprisonment. State ex rel. Quintana v. Schnedar, 115 N.M. 573, 855 P.2d 562 (1993).

Standards for Determining Indigency. — The Indigent Defense Act and the Public Defender Act are consistent as amended: The IDA obligates courts to determine indigence, the PDA directs the department to adopt standards for determining indigence, and other statutes instruct courts to employ those standards. State ex rel. Quintana v. Schnedar, 115 N.M. 573, 855 P.2d 562 (1993).

Municipality not required to provide representation. — Although a defendant is entitled to be represented by counsel on the appeal of his conviction to the court of appeals, a municipality is not required to provide for such legal representation because the legislature has set forth a comprehensive plan to furnish counsel to qualified criminal defendants and municipal budgetary restrictions preclude expenditures for items not budgeted. 1981 Op. Att'y Gen. No. 81-4.

Duty to represent indigents in metropolitan court. — The public defender department's scope of representation is limited statutorily to the magistrate and district courts; the legislature has designated the Albuquerque metropolitan court as a magistrate court. Therefore, the public defender department is obligated to represent all indigents in the Albuquerque metropolitan court who are charged with any violation that carries a possible penalty of imprisonment, including city code violations. 1987 Op. Att'y Gen. No. 87-43.

Judicial procedure upon claim of conflict of interest by public defender. — If a conflict of interest or other disqualification is claimed to exist under Subsection D (now Subsection E), the court shall: (1) Determine whether a conflict of interest or other disqualification of the office of public defender in fact exists, (2) determine whether the conflict or disqualification is local or statewide, (3) if the conflict or disqualification is local, direct the chief public defender to provide a staff attorney or contract attorney from another county or district to represent the indigent, and (4) if the conflict or disqualification extends beyond the county or district, then the court may appoint counsel for the indigent defendant. Richards v. Clow, 103 N.M. 14, 702 P.2d 4 (1985).

Children allowed counsel prior to court appearance. — Subsection E (now Subsection F) can be used to provide children in detention with counsel at a stage prior to any court appearance and therefore before an attorney can be appointed. 1973 Op. Att'y Gen. No. 73-58.

No statutory right to counsel in grand jury proceedings. — Neither the Grand Jury Act nor the Public Defender Act provides a target witness testifying before a grand jury with a right to counsel such that an indictment must be dismissed if counsel is not present and there is no express voluntary, knowing, and intelligent waiver of counsel's presence. State v. Tisthammer, 1998-NMCA-115, 126 N.M. 52, 966 P.2d 760, cert. denied, 126 N.M. 107, 967 P.2d 447 (1998).

No blanket authorization to confer with all forcibly detained indigents. — Subsection E (now Subsection F) is not a blanket authorization to confer with all indigent persons who are forcibly detained, but rather authorizes the public defender to confer with a person detained only (1) when that person has evinced a desire to consult with an attorney or have one present during questioning in response to Miranda warnings and law enforcement personnel have asked the defender to do so; (2) when the defender is conducting inquiries into whether the initial appearance has been unnecessarily delayed or attempting to have the person detained brought before the court for such an appearance, and the district court has authorized him to do so; (3) when authorized or directed in other circumstances by a district judge or (4) when defending a criminal charge following the initial appearance. State v. Rascon, 89 N.M. 254, 550 P.2d 266 (1976).

Information obtained by district public defender's staff must be imputed to him. State v. Valdez, 95 N.M. 70, 618 P.2d 1234 (1980).

Law reviews. — For annual survey of New Mexico law relating to evidence, see 12 N.M.L. Rev. 379 (1982).

31-15-11. Compensation; private practice of law by attorneys employed by the department prohibited.

A. For the purposes of the exempt-salaries plan prepared pursuant to Section 10-9-5 NMSA 1978, each district public defender shall be considered an assistant in the offices of the chief public defender.

B. All employees of the department other than the chief public defender and district public defenders shall be subject to the provisions of the Personnel Act [10-9-1 NMSA 1978].

C. No chief, district public defender or attorney hired on a full-time basis as an assistant to the chief or to a district public defender, while he holds that office or is employed in that capacity, shall engage in the private practice of law. Attorneys who serve as counsel for indigent persons under contract with the department may engage in the private practice of law.

History: 1953 Comp., § 41-22A-11, enacted by Laws 1973, ch. 156, § 11; 1977, ch. 257, § 61.

31-15-12. Explanation of rights; waiver of counsel; application fee; indigency determination.

A. If any person charged with any crime or a delinquent act that carries a possible sentence of imprisonment appears in any court without counsel, the judge shall inform him of his right:

(1) to confer with the district public defender; and

(2) if he is financially unable to obtain counsel, to be represented by the district public defender at all stages of the proceedings against him.

B. Following notification of any person under Subsection A of this section, the judge shall notify the district public defender and continue the proceedings until the person has applied with the district public defender.

C. A person shall pay a non-refundable application fee of ten dollars ($10.00) at the time the person applies with the public defender for representation. The fee shall be deposited in the public defender automation fund. The public defender shall determine if the person is indigent and unable to pay the fee, subject to review by the court. When the person remains in custody and is unable to pay the fee, the court may waive payment of the fee.

D. Peace officers shall notify the district public defender of any person not represented by counsel who is being forcibly detained and who is charged with, or under suspicion of, the commission of any crime that carries a possible sentence of imprisonment, unless the person has previously appeared in court upon that charge.

E. Any person entitled to representation by the district public defender may intelligently waive his right to representation. The waiver may be for all or any part of the proceedings. The waiver shall be in writing and countersigned by a district public defender.

History: 1953 Comp., § 41-22A-12, enacted by Laws 1973, ch. 156, § 12; 1993, ch. 79, § 1.

ANNOTATIONS

Cross references. — As to explanation of rights, opportunity to call attorney, see Rule 6-501A NMRA.

The 1993 amendment, effective July 1, 1993, inserted "application fee; indigency determination" in the catchline; inserted "or a delinquent act" in the introductory paragraph of Subsection A; substituted "applied" for "conferred" near the end of Subsection B; added present Subsection C; redesignated former Subsections C and D as present Subsections D and E; and substituted "shall" for "must" in the second sentence of Subsection D.

Import of Subsection B. — Inasmuch as the benefits of the Public Defender Act accrue only to those who are "financially unable to obtain counsel" and who are charged with certain crimes, obviously a determination of indigency is required. Inquiry into this feature is accomplished by the court, and the public defender is assigned to the case where indigency appears. State v. Rascon, 89 N.M. 254, 550 P.2d 266 (1976).

Defendant must make showing of indigence. — Although trial court failed to advise pro se defendant of his rights under the public defender laws, such failure was harmless error where defendant made no showing of indigence, but instead chose to represent himself, even after trial judge notified him of his constitutional right to counsel. 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 (1998).

Purpose of Subsection D. — Subsection D does not expand upon or extend the constitutional rights of a person forcibly detained, under the constitutions of the United States or New Mexico. Rather, its prime purpose is to protect and implement the right of persons detained to be brought before a court without unnecessary delay. State v. Rascon, 89 N.M. 254, 550 P.2d 266 (1976).

Public defender to make inquiries about forcibly detained persons. — Subsection D is intended to advise the public defender of the names and whereabouts of persons who are being forcibly detained so that if they are not brought before a court for an initial appearance without unnecessary delay, the public defender may make inquiries, with demands upon the state to bring forth the prisoner if appropriate and with application to a court if necessary. State v. Rascon, 89 N.M. 254, 550 P.2d 266 (1976).

Failure of police to comply with Subsection D did not infringe upon defendant's rights against self-incrimination where defendant was advised of those rights both at time of arrest and booking, voluntarily acknowledged that he understood them and signed waiver of rights form. State v. Rascon, 89 N.M. 254, 550 P.2d 266 (1976).

Counsel need not be notified before defendant questioned about unrelated offense. — Where an accused has been charged with one offense and is represented by counsel with respect to that offense, police need not notify that counsel before questioning defendant about another unrelated offense. State v. Seward, 104 N.M. 548, 724 P.2d 756 (Ct. App. 1986).

Lack of a countersignature on defendant's waiver of counsel form does not of itself make that waiver invalid for the purpose of enhancing later convictions. State v. Pino, 1997-NMCA-001, 122 N.M. 789, 932 P.2d 13.

No waiver where defendant was unaware of possibility of jail. — There was no voluntary, knowing, and intelligent waiver of counsel where the defendant, who pled guilty, was not advised, and was not aware, of the possibility of jail when he waived his right to an attorney. Smith v. Maldonado, 103 N.M. 570, 711 P.2d 15 (1985).

Lack of countersignature not considered on appeal. — The fact that defendant's waiver form was not countersigned by a district public defender as required by Subsection E was not raised below nor briefed and supported by authority on appeal, and would not be considered by the appellate court. State v. Ramirez, 89 N.M. 635, 556 P.2d 43 (Ct. App. 1976), overruled on other grounds, City of Albuquerque v. Haywood, 1998-NMCA-029, 124 N.M. 661, 954 P.2d 93, cert. denied, 124 N.M. 589, 953 P.2d 1087 (1998).

Law reviews. — For article, "Fathers Behind Bars: The Right to Counsel in Civil Contempt Proceedings," see 14 N.M.L. Rev. 275 (1984).

ARTICLE 16
Defense of Indigents

31-16-1. Short title.

Sections 58 through 68 [31-16-1 to 31-16-10 NMSA 1978] of this act may be cited as the "Indigent Defense Act."

History: 1953 Comp., § 41-22-1, enacted by Laws 1968, ch. 69, § 58.

ANNOTATIONS

Cross references. — For public defender's duties relating to indigents, see 31-15-7 NMSA 1978.

For juvenile court indigency standard, fee schedule and reimbursement, see 32A-2-30 NMSA 1978.

For district court indigency standard, fee schedule and reimbursement, see 34-6-46 NMSA 1978.

For metropolitan court indigency standard, fee schedule and reimbursement, see 34-8A-11 NMSA 1978.

For magistrate court indigency standard, fee schedule and reimbursement, see 35-5-8 NMSA 1978.

Legislative intent. — The legislature does not, in the Indigent Defense Act, provide that the state is to furnish free counsel for persons pursuing civil damage claims. Orrs v. Rodriguez, 84 N.M. 355, 503 P.2d 335 (Ct. App. 1972).

Multiple representation. — While it is incontestable that a criminal defendant is entitled to representation, there is no support for the argument that more than one attorney must be appointed to represent an indigent defendant based merely on the claim that a case is complex and a conviction would carry serious consequences to the defendant. State v. Chamberlain, 112 N.M. 723, 819 P.2d 673 (1991).

Counsel need not be notified before defendant questioned about unrelated offense. — Where an accused has been charged with one offense and is represented by counsel with respect to that offense, police need not notify that counsel before questioning defendant about another unrelated offense. State v. Seward, 104 N.M. 548, 724 P.2d 756 (Ct. App. 1986).

Where conflict in procedure, rule controls. — If Rule 1-092 NMRA and the Indigent Defense Act are in conflict on a procedural matter, the rule must control. State ex rel. Peters v. McIntosh, 80 N.M. 496, 458 P.2d 222 (1969).

Law reviews. — 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. — 21A Am. Jur. 2d Criminal Law § 1197 et seq.

Ineffective assistance of counsel: misrepresentation, or failure to advise, of immigration consequences of guilty plea - state cases, 65 A.L.R.4th 719.

Right of indigent defendant in state criminal case to assistance of investigators, 81 A.L.R.4th 259.

22 C.J.S. Criminal Law §§ 277, 278, 292.

31-16-2. Definitions.

As used in the Indigent Defense Act [31-16-1 to 31-16-10 NMSA 1978]:

A. "detain" means to have in custody or otherwise deprive of freedom of action;

B. "expenses," when used with reference to representation, includes the expenses of investigation, other preparation and trial;

C. "needy person" means a person who, at the time his need is determined by the court, is unable, without undue hardship, to provide for all or a part of the expenses of legal representation from available present income and assets; and

D. "serious crime" includes a felony and any misdemeanor or offense which carries a possible penalty of confinement for more than six months.

History: 1953 Comp., § 41-22-2, enacted by Laws 1968, ch. 69, § 59; 1973, ch. 210, § 1.

31-16-3. Right to representation.

A. A needy person who is being detained by a law enforcement officer, or who is under formal charge of having committed, or is being detained under a conviction of, a serious crime, is entitled to be represented by an attorney to the same extent as a person having his own counsel and to be provided with the necessary services and facilities of representation, including investigation and other preparation. The attorney, services and facilities and expenses and court costs shall be provided at public expense for needy persons.

B. A needy person entitled to representation by an attorney under Subsection A is entitled to be:

(1) counseled and defended at all stages of the matter beginning with the earliest time when a person providing his own counsel would be entitled to be represented by an attorney;

(2) represented in any appeal or review proceedings; and

(3) represented in any other postconviction proceeding that the attorney or the needy person considers appropriate 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.

C. A needy person's right to a benefit under this section is unaffected by his having provided a similar benefit at his own expense, or by his having waived it, at an earlier stage.

History: 1953 Comp., § 41-22-3, enacted by Laws 1968, ch. 69, § 60.

ANNOTATIONS

Legislative intent. — The legislature did not intend current implementation of the Indigent Defense Act to come from any other source of funds than the Public Defender Department. State v. Brown, 2004-NMCA-037, 135 N.M. 291, 87 P.3d 1073, cert. granted, ___N.M.___, ___P.3d____.

Constitution grants accused right to representation. — New Mexico Const., art. II, § 14, gives the accused the right to be defended by counsel. When the offense with which the defendant is charged is punishable by imprisonment in the penitentiary, the court is required to assign counsel "if the prisoner has not the financial means to procure counsel." State v. Anaya, 76 N.M. 572, 417 P.2d 58 (1966) (decided under former law).

Absent waiver, pauper charged with crime entitled to counsel. — Absent competent and intelligent waiver, a person charged with crime in a state court who is a pauper and unable to employ counsel is entitled to have an attorney appointed to defend him. State v. Dalrymple, 75 N.M. 514, 407 P.2d 356 (1965).

However, showing of indigency required. — A showing of an accused's indigency is a prerequisite to the right of court-appointed counsel. State v. Powers, 75 N.M. 141, 401 P.2d 775 (1965) (decided under former law).

And court entitled to make defendant show need. — A showing of an accused's indigency is a prerequisite to the right of a court-appointed counsel and it is proper for the trial court to require the defendant to make a reasonable showing that he is unable to employ counsel. State ex rel. Peters v. McIntosh, 80 N.M. 496, 458 P.2d 222 (1969).

It must make sufficient inquiry. — When defendant makes a reasonable showing of indigency in support of his request for court-appointed counsel, the trial court has a duty to inquire into the facts claimed by defendant. This does not require an independent inquiry by the court. It does require sufficient questioning by the court to enable the court either to decide the question of indigency at that time or to direct that defendant is to report further to the court on the question of obtaining counsel. State v. Anaya, 76 N.M. 572, 417 P.2d 58 (1966).

When a defendant makes a reasonable showing of indigency, the trial court has a duty to inquire into the facts relied upon by the defendant. State v. Watchman, 111 N.M. 727, 809 P.2d 641 (Ct. App. 1991), overruled in part on other grounds, State v. Hosteen, 1996-NMCA-084, 122 N.M. 228, 923 P.2d 595.

Burden of proceeding rests first upon defendant. — It is proper for the trial court to require defendant to make a reasonable showing that he is unable to employ counsel. Depending on the facts, more than one inquiry may be necessary. State v. Anaya, 76 N.M. 572, 417 P.2d 58 (1966).

Doubts resolved in accused's favor. — Although the courts recognize the relative concepts of indigency and that this determination should be made at the trial court level, the opinions indicate that doubts as to indigency should be resolved in favor of the accused. State ex rel. Peters v. McIntosh, 80 N.M. 496, 458 P.2d 222 (1969).

Effect of refusal to fill out certificate of indigency. — Defendant was not entitled to any appointed counsel because he refused to fill out, under oath, a certificate of indigency showing his income, and thus there was no showing that he was a needy person. State v. Pina, 90 N.M. 181, 561 P.2d 43 (Ct. App. 1977).

No counsel provided prior to claim of indigency. — Defendant does have a right to be represented by counsel, but the trial court has no obligation to provide defendant with counsel prior to any claim of indigency. State v. Deats, 82 N.M. 711, 487 P.2d 139 (Ct. App. 1971).

But attorney provided before preliminary hearing. — This section would provide an attorney for a needy person who is being detained by a law enforcement officer, and this could be before the preliminary hearing. State ex rel. Peters v. McIntosh, 80 N.M. 496, 458 P.2d 222 (1969).

Absent waiver, preliminary hearing without counsel present invalid. — 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, 80 N.M. 496, 458 P.2d 222 (1969).

Claim of inadequate representation by court-appointed counsel requires a showing that the proceedings leading to his conviction were a sham, farce or mockery. State v. Salazar, 81 N.M. 512, 469 P.2d 157 (Ct. App. 1970).

Representation must be more than pro forma appearance. — The representation to which a defendant is entitled is something more than a pro forma appearance. State v. Dalrymple, 75 N.M. 514, 407 P.2d 356 (1965).

Appointment of counsel lies within court's discretion. — An indigent defendant may not compel the court to appoint such counsel as defendant may choose. Such appointment lies within the sound discretion of the trial court. Likewise, whether the dissatisfaction of an indigent accused with his court-appointed counsel warrants discharge of that counsel and appointment of new counsel is for the trial court, in its discretion, to decide. State v. Salazar, 81 N.M. 512, 469 P.2d 157 (Ct. App. 1970).

Appointment of additional attorneys. — Where two or more defendants were jointly charged with a felony, the language of former 41-11-2, 1953 Comp., did not require any construction denying to a court the power to appoint attorneys for each jointly charged indigent defendant as the circumstances should appear. Indeed, if a prejudicial conflict of interest arose or if the number of defendants being represented and divergence in defenses would reduce the attorneys' effectiveness the court was required to appoint additional attorneys. 1966 Op. Att'y Gen. No. 66-27 (opinion rendered under former law).

Indigent Defense Act does not provide for payment of advances. State v. Frazier, 85 N.M. 545, 514 P.2d 302 (Ct. App. 1973).

And motion for advancement of funds for investigator properly denied. — Defendant's motion for a prior advancement of funds for a professional investigator was properly denied as an expenditure is clearly not required in every case and need not be provided unless the necessity is shown. State v. Frazier, 85 N.M. 545, 514 P.2d 302 (Ct. App. 1973).

Free polygraph examination refused to "indigent". — Where defendant sought by motion an order committing the state to pay for a polygraph examination before the examination was conducted, alleging that defendant was indigent, thus presumably invoking the provisions of the Indigent Defense Act, but although trial counsel was court-appointed the only reference to indigency was in defendant's various motions, not in orders of the court, and also appearing in defendant's motions were allegations that defendant had employment and could return to that employment if released on bail, the record did not support the claim that defendant was indigent when he sought a free polygraph examination and thus this subsection did not apply. State v. Carrillo, 88 N.M. 236, 539 P.2d 626 (Ct. App. 1975).

Uncontested motion for determination of indigency. — When a defendant's motion for determination of indigency is uncontested, the better procedure in such cases is for the trial court to either grant the motion or to expressly indicate the basis for its denial. State v. Watchman, 111 N.M. 727, 809 P.2d 641 (Ct. App. 1991), overruled in part on other grounds, State v. Hosteen, 1996-NMCA-084, 122 N.M. 228, 923 P.2d 595.

State must afford indigents record of proceedings. — It is not a requirement that a certified copy of a court reporter's notes of the proceedings be always furnished but that the state must afford indigents a record of sufficient completeness to permit proper consideration of their claims and a tape recording of preliminary examination proceedings in a magistrate's court is sufficient. State ex rel. Moreno v. Floyd, 85 N.M. 699, 516 P.2d 670 (1973).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 7 Am. Jur. 2d Attorneys § 228; 20 Am. Jur. 2d Courts § 44 et seq.; 21A Am. Jur. 2d Criminal Law § 1197 et seq.

Constitutional guaranty of right to appear by counsel as applicable to misdemeanor case, 42 A.L.R. 1157.

Brevity of time between assignment of counsel and trial as affecting question whether accused is denied right to assistance of counsel, 84 A.L.R. 544.

Right of indigent defendant in criminal case to aid of state as regards new trial or appeal, 100 A.L.R. 321, 55 A.L.R.2d 1072.

Relief in habeas corpus for violation of accused's right to assistance of counsel, 146 A.L.R. 369.

Duty of court when appointing counsel for defendant to name attorney other than one employed by, or appointed for, a codefendant, 148 A.L.R. 183.

Plea of guilty without advice of counsel, 149 A.L.R. 1403.

Right of defendant in criminal case to discharge of, or substitution of other counsel for, attorney appointed by court to represent him, 157 A.L.R. 1225.

Right to aid of counsel in application or hearing for habeas corpus, 162 A.L.R. 922.

Right to notice and hearing before revocation of suspension of sentence, parole, conditional pardon, or probation, 29 A.L.R.2d 1074.

Validity and construction of statutes providing for psychiatric examination of accused to determine mental condition, 32 A.L.R.2d 434.

New trial or appeal, right of indigent defendant in criminal case to aid of state as regards, 55 A.L.R.2d 1072.

Counsel's right in criminal prosecution to argue law or to read lawbooks to the jury, 67 A.L.R.2d 245.

Psychiatrist, psychologist, hypnotist or similar practitioner, counsel's right, in consulting with accused as client, to be accompanied by, 72 A.L.R.2d 1120.

Calling accused's counsel as a prosecution witness as improper deprivation of right to counsel, 88 A.L.R.2d 796.

Constitutionally protected right of indigent accused to appointment of counsel in state court prosecution, 93 A.L.R.2d 747.

Accused's right to assistance of counsel at or prior to arraignment, 5 A.L.R.3d 1269.

Scope and extent, and remedy or sanctions for infringement, of accused's right to communicate with his attorney, 5 A.L.R.3d 1360.

Propriety and prejudicial effect of counsel's representing defendant in criminal case notwithstanding counsel's representation or former representation of prosecution witness, 27 A.L.R.3d 1431.

Circumstance giving rise to conflict of interest between or among criminal codefendants precluding representation by same counsel, 34 A.L.R.3d 470.

Attorney's refusal to accept appointment to defend indigent, or to proceed in such defense, as contempt, 36 A.L.R.3d 1221.

Right to assistance of counsel at proceedings to revoke probation, 44 A.L.R.3d 306.

Right to counsel in contempt proceedings, 52 A.L.R.3d 1002.

Accused's right to choose particular counsel appointed to assist him, 66 A.L.R.3d 996.

Right of indigent criminal defendant to polygraph test at public expense, 11 A.L.R.4th 733.

Relief available for violation of right to counsel at sentencing in state criminal trial, 65 A.L.R.4th 183.

Right of indigent defendant in state criminal case to assistance of ballistics experts, 71 A.L.R.4th 638.

Right of indigent defendant in state criminal case to assistance of fingerprint expert, 72 A.L.R.4th 874.

Right of indigent defendant in state criminal case to assistance of expert in social attitudes, 74 A.L.R.4th 330.

Right of indigent defendant in state criminal case to assistance of chemist, toxicologist, technician, narcotics expert, or similar nonmedical specialist in substance analysis, 74 A.L.R.4th 388.

Criminal defendant's representation by person not licensed to practice law as violation of right to counsel, 19 A.L.R.5th 351.

Right to appointment of counsel in contempt proceedings, 32 A.L.R.5th 31.

Right of indigent defendant in state criminal prosecution to ex parte in camera hearing on request for state-funded expert witness, 83 A.L.R.5th 541.

Accused's right, under 28 USCS § 1654, and similar predecessor statutes, to represent himself in federal criminal proceeding, 27 A.L.R. Fed. 485.

What constitutes assertion of right to counsel following Miranda warnings - federal cases, 80 A.L.R. Fed. 622.

22 C.J.S. Criminal Law §§ 277, 278, 292.

31-16-4. Notice of right to representation.

A. If a person who is being detained by a law enforcement officer, or who is under formal charge of having committed, or is being detained under a conviction of, a serious crime, is not represented by an attorney under conditions in which a person having his own counsel would be entitled to be so represented, the law enforcement officers concerned, upon commencement of detention, or the court, upon formal charge, as the case may be, shall clearly inform him of the right of a needy person to be represented by an attorney at public expense and, if the person detained or charged does not have an attorney, notify the district court concerned that he is not so represented.

B. Upon commencement of any later judicial proceeding relating to the same matter, the presiding officer shall clearly inform the person so detained or charged of the right of a needy person to be represented by an attorney at public expense.

C. If the district court determines that the person is entitled to be represented by an attorney at public expense, it shall promptly assign an attorney who shall represent the person in accordance with the terms of his assignment.

History: 1953 Comp., § 41-22-4, enacted by Laws 1968, ch. 69, § 61.

ANNOTATIONS

Legislative intent. — The legislature did not, in the Indigent Defense Act, provide that the state was to furnish free counsel for persons pursuing civil damage claims. Orrs v. Rodriguez, 84 N.M. 355, 503 P.2d 335 (Ct. App. 1972).

Act not violated. — There being no claim of indigency at the trial level, this section was the only portion of the act applicable to defendant's contention that he was denied counsel at arraignment, and where the record at arraignment disclosed defendant after pleading not guilty was advised that if he could not employ counsel within a week the court would appoint counsel, the act (Indigent Defense Act) was not violated. State v. Torres, 81 N.M. 521, 469 P.2d 166 (Ct. App.), cert. denied, 81 N.M. 506, 469 P.2d 151 (1970).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21A Am. Jur. 2d Criminal Law § 1197.

Duty to advise accused as to right to assistance of counsel, 3 A.L.R.2d 1003.

Duty of court to inform accused who is not represented by counsel of his right not to testify, 79 A.L.R.2d 643.

Right of motorist stopped by police officers for traffic offense to be informed at that time of his federal constitutional rights under Miranda v. Arizona, 25 A.L.R.3d 1076.

What constitutes "custodial interrogation" within rule of Miranda v. Arizona requiring that suspect be informed of his federal constitutional rights before custodial interrogation, 31 A.L.R.3d 565.

What constitutes assertion of right to counsel following Miranda warnings - federal cases, 80 A.L.R. Fed. 622.

What circumstances fall within public safety exception to general requirement, pursuant to or as aid in enforcement of federal Constitution's Fifth Amendment privilege against self-incrimination, to give Miranda warnings before conducting custodial interrogation - post-Quarles cases, 142 A.L.R. Fed. 229.

31-16-5. Determination of indigency.

A. The determination of whether a person covered by Section 60 [31-16-3 NMSA 1978] of the Indigent Defense Act is a needy person shall be deferred until his first appearance in court or in a suit for payment or reimbursement under Section 66 [31-16-9 NMSA 1978] of the Indigent Defense Act, whichever occurs earlier. Thereafter, the court concerned shall determine, with respect to each proceeding, whether he is a needy person.

B. In determining whether a person is a needy person and the extent of his inability to pay, the court concerned may consider such factors as income, property owned, outstanding obligations and the number and ages of his dependents. Release on bail does not necessarily prevent him from being a needy person. In each case, the person shall, subject to the penalties for perjury, certify in writing or by other record material factors relating to his ability to pay as the court prescribes.

C. To the extent that a person covered by Section 60 of the Indigent Defense Act is able to provide for an attorney, the other necessary services and facilities of representation and court costs, the court may order him to provide for their payment.

History: 1953 Comp., § 41-22-5, enacted by Laws 1968, ch. 69, § 62.

ANNOTATIONS

Cross references. — For jury and witness fee fund, see 34-9-11 NMSA 1978.

Determination fails to meet constitutional mandate. — The limited determination of indigency under the standard of pauperism does not conform to constitutional mandate. Anaya v. Baker, 427 F.2d 73 (10th Cir. 1970) (decided under former law).

Section provides no adequate definition of "poor" people for class action purposes, since it lists a number of considerations for a judge to take into account in determining if a person is indigent, but it does not delineate when a person is indigent. Lopez Tijerina v. Henry, 48 F.R.D. 274 (D.N.M. 1969), appeal dismissed, 398 U.S. 922, 90 S. Ct. 1718, 26 L. Ed. 2d 86 (1970).

Proper to require defendant to make reasonable showing of indigency. — A showing of an accused's indigency is a prerequisite to the right of a court-appointed counsel, and it is proper for the trial court to require the defendant to make a reasonable showing that he is unable to employ counsel. State ex rel. Peters v. McIntosh, 80 N.M. 496, 458 P.2d 222 (1969).

But doubts resolved in favor of accused. — Although the courts recognize the relative concepts of indigency and that this determination should be made at the trial court level, doubts as to indigency should be resolved in favor of the accused. State ex rel. Peters v. McIntosh, 80 N.M. 496, 458 P.2d 222 (1969).

Right of district court to determine indigency. — Although this rule makes it the duty of the district court to appoint counsel for the indigent person immediately upon receipt of a certificate of indigency from the committing magistrate, we do not construe this as depriving the district court of its right to determine whether such person is in fact indigent. State ex rel. Peters v. McIntosh, 80 N.M. 496, 458 P.2d 222 (1969).

Court must make adequate inquiry into whether person needy. — Whether defendant has the financial means to procure counsel is a factual question. This factual question cannot be resolved without an adequate inquiry into the facts. State v. Anaya, 76 N.M. 572, 417 P.2d 58 (1966) (decided under former law).

When a defendant makes a reasonable showing of indigency, the trial court has a duty to inquire into the facts relied upon by the defendant. State v. Watchman, 111 N.M. 727, 809 P.2d 641 (Ct. App. 1991), overruled in part on other grounds, State v. Hosteen, 1996-NMCA-084, 122 N.M. 228, 923 P.2d 595.

Determination must be made before district court appearance. — 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, 80 N.M. 496, 458 P.2d 222 (1969).

Court determination obligates public defender. — The legislature, understanding that courts determine indigence under the Indigent Defense Act (IDA), enacted 31-15-

10 NMSA 1978 of the Public Defender Act (PDA) intending "every person without counsel who is financially unable to obtain counsel" to include all persons who courts determine are "needy" under the 31-16-5 NMSA 1978 of the IDA. Therefore, under the administrative system of the PDA and IDA, when a court determines that a defendant is "needy," the defendant is "financially unable to obtain counsel" under the PDA, and the Department "shall represent" the defendant pursuant to 31-15-10 NMSA 1978, assuming the defendant is charged with a crime carrying a possible sentence of imprisonment. State ex rel. Quintana v. Schnedar, 115 N.M. 573, 855 P.2d 562 (1993).

Construction with Public Defender Act. — The Indigent Defense Act and the Public Defender Act are consistent as amended: The IDA obligates courts to determine indigence, the PDA directs the department to adopt standards for determining indigence, and other statutes instruct courts to employ those standards. State ex rel. Quintana v. Schnedar, 115 N.M. 573, 855 P.2d 562 (1993).

Claim of indigency in letter form sufficient. — If in fact defendant was indigent at time of filing notice of appeal, he was entitled to be represented by court-appointed counsel on his appeal; his letter stating he cannot pay costs is a sufficient claim of indigency. Barela v. State, 81 N.M. 433, 467 P.2d 1005 (Ct. App. 1970).

Effect of refusal to fill out certificate of indigency. — Defendant was not entitled to any appointed counsel because he refused to fill out, under oath, a certificate of indigency showing his income, and thus there was no showing that he was a needy person. State v. Pina, 90 N.M. 181, 561 P.2d 43 (Ct. App. 1977).

Borrowing ability one factor in determining financial means. — Neither the ability nor the inability to borrow money is the sole criterion. The question is whether defendant has the financial means to employ counsel. Borrowing ability is only one aspect of the defendant's "financial means." State v. Anaya, 76 N.M. 572, 417 P.2d 58 (1966) (decided under former law).

As well as property interest and employment. — The fact that defendant had an undefined interest in three items of property and the fact that he was employed prior to his arrest is insufficient to determine the question of defendant's financial ability to obtain counsel. State v. Anaya, 76 N.M. 572, 417 P.2d 58 (1966) (decided under former law).

Represented by employed counsel, but still indigent. — A defendant may be represented by employed counsel and still be indigent in connection with other matters pertaining to defense of the case. State v. Apodaca, 80 N.M. 244, 453 P.2d 764 (Ct. App. 1969).

Mandamus is not available to control judicial discretion unless there is a clear abuse of that discretion, or unless such action would prevent the doing of useless things. State ex rel. Peters v. McIntosh, 80 N.M. 496, 458 P.2d 222 (1969).

Uncontested motion for determination of indigency. — When a defendant's motion for determination of indigency is uncontested, the better procedure in such cases is for the trial court to either grant the motion or to expressly indicate the basis for its denial. State v. Watchman, 111 N.M. 727, 809 P.2d 641 (Ct. App. 1991), overruled in part on other grounds, State v. Hosteen, 1996-NMCA-084, 122 N.M. 228, 923 P.2d 595.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21A Am. Jur. 2d Criminal Law § 1199 et seq.

Determination of indigency of accused entitling him to appointment of counsel, 51 A.L.R.3d 1108.

Determination of indigency entitling accused in state criminal case to appointment of counsel on appeal, 26 A.L.R.5th 765.

31-16-6. Waiver of right to representation.

A person who has been appropriately informed under Section 61 [31-16-4 NMSA 1978] of the Indigent Defense Act may waive in writing or by other record any right provided by the Indigent Defense Act if the court authorized to appoint counsel, at the time of or after waiver, finds of record that he has acted with full awareness of his rights and of the consequences of a waiver and if the waiver is otherwise according to law. The court shall consider such factors as the person's age, education and familiarity with English and the complexity of the crime involved.

History: 1953 Comp., § 41-22-6, enacted by Laws 1968, ch. 69, § 63.

ANNOTATIONS

Effective waiver of right to counsel. — Where both the justice of the peace and the district court advised defendant that, if indigent, counsel would be appointed to represent him, where defendant affirmatively waived counsel in both courts and where 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, then 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, 80 N.M. 531, 458 P.2d 606 (Ct. App. 1969).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21A Am. Jur. 2d Criminal Law § 1237 et seq.

Validity and efficacy of minor's waiver of right to counsel, 25 A.L.R.4th 1072.

22 C.J.S. Criminal Law § 292.

31-16-7. Recovery from defendant.

A. The district attorney may, on behalf of the state, recover payment or reimbursement, as the case may be, from each person who has received legal assistance or another benefit under the Indigent Defense Act [31-16-1 to 31-16-10 NMSA 1978]:

(1) to which he was not entitled;

(2) with respect to which he was not a needy person when he received it; or

(3) with respect to which he has failed to make the certificate required by Section 62 B [31-16-5 B NMSA 1978] of the Indigent Defense Act and for which he refuses to pay. Suit must be brought within six years after the date on which the aid was received.

B. The district attorney may, on behalf of the state, recover payment or reimbursement, as the case may be, from each person other than a person covered by Subsection A who has received legal assistance under the Indigent Defense Act and who, on the date on which suit is brought, is financially able to pay or reimburse the state for it according to the standards of ability to pay applicable under the Indigent Defense Act but refuses to do so. Suit must be brought within three years after the date on which the benefit was received.

C. Amounts recovered under this section shall be paid to the state treasurer for credit to the state general fund.

History: 1953 Comp., § 41-22-7, enacted by Laws 1968, ch. 69, § 64.

ANNOTATIONS

Cross references. — For jury and witness fee fund, see 34-9-11 NMSA 1978.

Legislative intent. — The legislature did not, in the Indigent Defense Act, provide that the state was to furnish free counsel for persons pursuing civil damage claims. Orrs v. Rodriguez, 84 N.M. 355, 503 P.2d 335 (Ct. App. 1972).

Defendant's financial means. — In resolving the factual question as to defendant's financial means, the defendant's answers should be under oath. The factual question is not whether defendant ought to be able to employ counsel, but whether he is able to do so. State v. Anaya, 76 N.M. 572, 417 P.2d 58 (1966) (decided under former law).

31-16-8. Payment of costs, expenses and attorney fees.

A. Payments of costs, expenses and attorney fees under the Indigent Defense Act [31-16-1 to 31-16-10 NMSA 1978] shall be made from:

(1) funds appropriated to the supreme court with respect to habeas corpus matters initiated in that court; and

(2) funds appropriated to the district court with respect to all stages of proceedings initiated in the district court.

B. The court assigning counsel under the Indigent Defense Act shall pay costs, including the costs of transcripts where appropriate, shall reimburse counsel for direct expenses the court determines to have been properly incurred by him and shall pay to counsel fees:

(1) for services in magistrate courts and district courts where the proceedings are terminated prior to trial in the district court, a sum fixed by the court at not less than one dollar ($1.00) nor more than three hundred dollars ($300);

(2) for services in magistrate courts and district courts which include trial in the district court and, where appropriate, filing notice of appeal, a sum fixed by the court at not less than one dollar ($1.00) nor more than four hundred dollars ($400);

(3) for services in postconviction remedy proceedings in the district court, a sum fixed by the court at not less than one dollar ($1.00) nor more than one hundred fifty dollars ($150);

(4) for services in prosecuting any appeal or review in the court of appeals or the supreme court, a sum fixed by the court at not less than one dollar ($1.00) nor more than five hundred dollars ($500);

(5) for services in habeas corpus proceedings in the supreme court, a sum fixed by the court at not less than one dollar ($1.00) nor more than one hundred fifty dollars ($150); and

(6) for services in any case involving a capital offense, a sum fixed by the court.

History: 1953 Comp., § 41-22-8, enacted by Laws 1968, ch. 69, § 65.

ANNOTATIONS

Statutory fee not violative of constitutional rights. — Defendant's argument that the statutory attorney fee limitation of $400 in defense of indigent criminal cases was a denial of equal protection and due process was without merit where there was no claim that the defendant was poorly represented, nor were there any facts indicating how the statutory fee limitation so deprived the defendant. State v. Silver, 83 N.M. 1, 487 P.2d 910 (Ct. App. 1971).

Legislature may appropriate additional funds. — Language in Subsection A (2) providing that expenses under the Indigent Defense Act are to be paid from "funds appropriated to the district court with respect to all stages of proceedings initiated in the district court" does not prevent the legislature from appropriating additional funds for expenses in indigent cases. State v. Duran, 91 N.M. 35, 570 P.2d 36 (Ct. App.), cert. denied, 91 N.M. 3, 569 P.2d 413 (1977), 435 U.S. 972, 98 S. Ct. 1615, 56 L. Ed. 2d 65 (1978).

Indigent Defense Act does not provide for payment of advances. State v. Frazier, 85 N.M. 545, 514 P.2d 302 (Ct. App. 1973).

And motion for advancement of funds for investigator properly denied. — Defendant's motion for a prior advancement of funds for a professional investigator was properly denied as an expenditure is clearly not required in every case and need not be provided unless the necessity is shown. State v. Frazier, 85 N.M. 545, 514 P.2d 302 (Ct. App. 1973).

Attorney fees for jointly charged defendants. — The court may pay the appointed attorney for the defense of each jointly charged defendant, jointly tried the same as though a severance had been effected and separate trials had. 1966 Op. Att'y Gen. No. 66-27 (opinion rendered under former law).

Transcript for habeas corpus petitioner. — The laws of this state and the holdings of the supreme court of the United States do not require more being furnished than is necessary to effectively pursue the remedy sought, and one copy of the transcript, furnished to either the habeas corpus petitioner or his attorney, is adequate for this purpose. 1964 Op. Att'y Gen. No. 64-66 (opinion rendered under former law).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Construction of state statutes providing for compensation of attorney for services under appointment by court in defending indigent accused, 18 A.L.R.3d 1074.

Right of attorney appointed by court for indigent accused to, and court's power to award, compensation by public, in absence of statute or court rule, 21 A.L.R.3d 819.

Validity and construction of state statute or court rule fixing maximum fees for attorney appointed to represent indigent, 3 A.L.R.4th 576.

Right of indigent criminal defendant to polygraph test at public expense, 11 A.L.R.4th 733.

31-16-9. Contractual services of counsel.

In order to facilitate representation in matters arising before appearance in any court in matters covered by the Indigent Defense Act [31-16-1 to 31-16-10 NMSA 1978], the director of the administrative office of the courts may, upon direction of the supreme

court with respect to habeas corpus proceedings initiated in the supreme court, or upon request of a district court, enter into contracts with attorneys designated by these courts whereby the attorney shall undertake to perform the services of assigned counsel in all or any specified portion of the cases originating within the judicial district. All contracts shall be approved by the chief justice of the supreme court and all payments provided therein shall be made by the supreme court or in the appropriate district court requesting the contract, but in no instance shall contract payments exceed the maximums set out in Section 65 [31-16-8 NMSA 1978] of the Indigent Defense Act.

History: 1953 Comp., § 41-22-9, enacted by Laws 1968, ch. 69, § 66.

31-16-10. Counsel not subject to liability.

No attorney assigned or contracted with to perform services under the Indigent Defense Act [31-16-1 to 31-16-10 NMSA 1978] shall be held liable in any civil action respecting his performance or nonperformance of such services.

History: 1953 Comp., § 41-22-10, enacted by Laws 1968, ch. 69, § 67.

ANNOTATIONS

Immunity extends to those under contract to public defender. — The Public Defender Act (31-15-1 to 31-15-12) does not contain any language about immunity or lack of immunity, but reading the Public Defender Act and the Judgment Defense Act in pari materia, the legislature intended the immunity granted in this section to attorneys appointed under the Indigent Defense Act to apply also to those appointed because they are under contract to the public defender. Herrera v. Sedillo, 106 N.M. 206, 740 P.2d 1190 (Ct. App. 1987).

Immunity not violation of equal protection. — Public defenders, whether regular employees of the public defender's office or performing as contractors, are immune from malpractice claims, and statutes providing such immunity did not violate the equal protection rights of a former prisoner. Coyazo v. State, 120 N.M. 47, 897 P.2d 234 (Ct. App. 1995).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Incompetency, negligence, illness or the like of counsel as ground for new trial or reversal in criminal case, 24 A.L.R. 1025, 64 A.L.R. 436.

Attorney's refusal to accept appointment to defend indigent, or to proceed in such defense, as contempt, 36 A.L.R.3d 1221.

Court-appointed attorney as subject to liability under 42 U.S.C.S. § 1983, 36 A.L.R. Fed. 594.

ARTICLE 16A
Preprosecution Diversion

31-16A-1. Short title.

This act [31-16A-1 to 31-16A-8 NMSA 1978] may be cited as the "Preprosecution Diversion Act."

History: Laws 1981, ch. 33, § 1.

31-16A-2. Purpose.

The purposes of the Preprosecution Diversion Act [31-16A-1 to 31-16A-8 NMSA 1978] are to remove those persons from the criminal justice system who are most amenable to rehabilitation and least likely to commit future offenses, to provide those persons with services designed to assist them in avoiding future criminal activity, to conserve community and criminal justice resources, to provide standard guidelines and to evaluate preprosecution programs.

History: Laws 1981, ch. 33, § 2.

31-16A-3. Program establishment.

Each district attorney shall establish a preprosecution diversion program in his judicial district in accordance with the provisions of the Preprosecution Diversion Act [31-16A-1 to 31-16A-8 NMSA 1978] to the extent public or private funds permit.

History: Laws 1981, ch. 33, § 3.

31-16A-4. Eligibility.

A. A defendant must meet the following minimum criteria to be eligible for a preprosecution diversion program:

(1) the defendant must have no prior felony convictions for a violent crime and no prior felony convictions for any crime for the previous ten years;

(2) the crime alleged to have been committed by the defendant is nonviolent in nature, with the exception of domestic disputes not involving a minor;

(3) if the defendant was on probation previously, his probation must not have been revoked or unsatisfactorily discharged;

(4) the defendant has not been admitted into a similar program for the previous ten years;

(5) the defendant is willing to participate in the program and submit to all program requirements;

(6) the crime alleged to have been committed by the defendant does not involve substantial sale or possession of controlled substances; and

(7) a person meeting all of the above criteria and any additional criteria established by the district attorney may be entered into the preprosecution diversion program. The district attorney may elect to not divert a person to the preprosecution diversion program even though that person meets the minimum criteria herein set forth. A decision by the district attorney to not divert to the preprosecution diversion program is not subject to appeal and may not be raised as a defense to any prosecution or habitual offender proceeding.

B. A district attorney may set additional criteria.

History: Laws 1981, ch. 33, § 4.

31-16A-5. Program functions and responsibilities.

The preprosecution diversion program in each judicial district shall include:

A. individual counseling and guidance for all participants;

B. required victim restitution where applicable to the extent practical. In addition to monetary restitution, a program may require public service restitution; and

C. referral resources where clients may be sent for treatment and rehabilitation.

History: Laws 1981, ch. 33, § 5.

ANNOTATIONS

Termination of preprosecution agreement by state. — The state may terminate a preprosecution diversion agreement, even if the sole ground is the defendant's nonwilful failure to make restitution, but only if there are no adequate alternatives to termination which will meet the state's legitimate penological interests. State v. Jimenez, 111 N.M. 782, 810 P.2d 801 (1991).

31-16A-6. Waivers; suspension of criminal proceedings.

A. A defendant must secure or be appointed defense counsel to be present at a preprosecution diversion screening interview prior to applying for acceptance into a preprosecution diversion program, and, upon applying, the defendant shall waive his constitutional right to a preliminary hearing as set forth in Rule 15(d) of the Rules of Criminal Procedure for the Magistrate Courts [Rule 6-202D NMRA].

B. If a defendant is certified eligible by the district attorney and by the preprosecution diversion program, the defendant shall also waive his constitutional right to a speedy trial and any rights as provided by Rule 37(b) of the Rules of Criminal Procedure for the District Court [Courts] [Rule 5-604B NMRA]. Upon entry of this waiver, the district attorney shall divert the defendant into the preprosecution diversion program and criminal proceedings against the defendant shall be suspended. Participating defendants shall also waive any confidentiality provided by the Arrest Record Information Act [29-10-1 to 29-10-8 NMSA 1978] to permit scrutiny of records; provided that the publication of the personal information, except the name of the defendant, gathered while a defendant is participating in a program shall not be a public record.

History: Laws 1981, ch. 33, § 6.

ANNOTATIONS

Bracketed material. — The bracketed material in this section was added by the compiler for clarity; it was not enacted by the legislature, and it is not part of the law.

31-16A-7. Program participation; costs; termination.

A. A defendant may be diverted to a preprosecution diversion program for no less than six months and no longer than two years. A district attorney may extend the diversion period for a defendant as a disciplinary measure or to allow adequate time for restitution, provided that the extension coupled with the original period does not exceed two years. A district attorney may require as a program requirement that a defendant agree to such reasonable conditions as the district attorney deems necessary to ensure that the defendant will observe the laws of the United States and the various states and the ordinances of any municipality and shall require the defendant to pay to his office the costs related to his participation in the program not exceeding one thousand twenty dollars ($1,020) annually to be paid in monthly installments of not less than fifteen dollars ($15.00) and not more than eighty-five dollars ($85.00), subject to modification by the district attorney on the basis of changed financial circumstances. All costs collected by a district attorney pursuant to this subsection shall be transmitted to the administrative office of the district attorneys for credit to the district attorney fund.

B. If a defendant does not comply with the terms, conditions and requirements of a preprosecution diversion program, his participation in the program shall be terminated, and the district attorney may proceed with the suspended criminal prosecution of the defendant.

C. If the participation of a defendant in a preprosecution diversion program is terminated, the district attorney shall state in writing the specific reasons for the termination, which reasons shall be available for review by the defendant and his counsel.

History: Laws 1981, ch. 33, § 7; 1984, ch. 110, § 5.

ANNOTATIONS

Cross references. — As to creation of district attorney fund, see 36-1-28 NMSA 1978.

The 1984 amendment added the third and fourth sentences in Subsection A.

Prosecutor's unilateral termination limited. — The prosecutor's authority to unilaterally terminate a diversion program is limited to a termination on the basis of defendant's noncompliance with the program. State v. Trammel, 100 N.M. 547, 673 P.2d 827 (Ct. App. 1983).

A trial court may require a prosecutor to keep his end of a diversion program agreement and may determine whether the prosecutor has terminated the preprosecution diversion agreement in violation of his statutory authority. State v. Trammel, 100 N.M. 547, 673 P.2d 827 (Ct. App. 1983).

Termination of preprosecution agreement by state. — The state may terminate a preprosecution diversion agreement, even if the sole ground is the defendant's nonwilful failure to make restitution, but only if there are no adequate alternatives to termination which will meet the state's legitimate penological interests. State v. Jimenez, 111 N.M. 782, 810 P.2d 801 (1991).

Court review of reasons for failure to pay. — In proceedings to terminate a preprosecution diversion agreement for failure to pay restitution, the court reviewing the termination must first inquire into the reasons for the failure to pay. State v. Jimenez, 111 N.M. 782, 810 P.2d 801 (1991).

If a defendant has wilfully refused to pay or has failed to make sufficient bona fide efforts legally to acquire the resources to pay, the state may revoke a preprosecution diversion agreement and begin prosecution of the alleged crime or crimes. If, however, the court determines that the defendant has not been at fault in failing to make restitution, then the court must consider whether there are alternatives to termination which will meet the state's legitimate penal interests. State v. Jimenez, 111 N.M. 782, 810 P.2d 801 (1991).

Only if a court determines that alternative measures are not adequate to meet the state's interests may that court uphold termination of a preprosecution diversion agreement when the defendant has made sufficient bona fide efforts to pay. State v. Jimenez, 111 N.M. 782, 810 P.2d 801 (1991).

Wrongful termination of agreement as defense. — 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, 100 N.M. 547, 673 P.2d 827 (Ct. App. 1983).

Six-month trial period starts when arraignment waived. — 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 (5-604B NMRA) 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, where 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 Rule 5-604B(6) NMRA. State v. Altherr, 117 N.M. 403, 872 P.2d 376 (Ct. App. 1994).

31-16A-8. Record keeping.

A. Each district attorney shall maintain an accurate record of each individual accepted into a preprosecution diversion program for the purpose of complying with the requirements of Paragraph (4) of Subsection A of Section 4 [31-16A-4A(4) NMSA 1978] of the Preprosecution Diversion Act.

B. Each district attorney shall be required to forward to the state police accurate records of acceptance, successful termination or unsuccessful termination of each individual accepted into the program. The state police shall be required to maintain accurate records of all information forwarded to them by each respective district attorney concerning acceptance, successful termination or unsuccessful termination of all preprosecution diversion programs.

History: Laws 1981, ch. 33, § 8.

ARTICLE 17
Victim Restitution

31-17-1. Victim restitution.

A. It is the policy of this state that restitution be made by each violator of the Criminal Code [30-1-1 NMSA 1978] to the victims of his criminal activities to the extent that the defendant is reasonably able to do so. This section shall be interpreted and administered to effectuate this policy. As used in this section, unless the context otherwise requires:

(1) "victim" means any person who has suffered actual damages as a result of the defendant's criminal activities;

(2) "actual damages" means all damages which a victim could recover against the defendant in a civil action arising out of the same facts or event, except punitive damages and damages for pain, suffering, mental anguish and loss of consortium. Without limitation, "actual damages" includes damages for wrongful death;

(3) "criminal activities" includes any crime for which there is a plea of guilty or verdict of guilty, upon which a judgment may be rendered and any other crime committed after July 1, 1977 which is admitted or not contested by the defendant; and

(4) "restitution" means full or partial payment of actual damages to a victim.

B. If the trial court exercises either of the sentencing options under Section 31-20-6 NMSA 1978, the court shall require as a condition of probation or parole that the defendant, in cooperation with the probation or parole officer assigned to the defendant, promptly prepare a plan of restitution, including a specific amount of restitution to each victim and a schedule of restitution payments. If the defendant is currently unable to make any restitution but there is a reasonable possibility that the defendant may be able to do so at some time during his probation or parole period, the plan of restitution shall also state the conditions under which or the event after which the defendant will make restitution. If the defendant believes that he will not be able to make any restitution, he shall so state and shall specify the reasons. If the defendant believes that no person suffered actual damages as a result of the defendant's criminal activities, he shall so state.

C. The defendant's plan of restitution and the recommendations of his probation or parole officer shall be submitted promptly to the court. The court shall promptly enter an order approving, disapproving or modifying the plan, taking into account the factors enumerated in Subsection D of this section. Compliance with the plan of restitution as approved or modified by the court shall be a condition of the defendant's probation or parole. Restitution payments shall be made to the clerk of the court unless otherwise directed by the court. The court thereafter may modify the plan at any time upon the defendant's request or upon the court's own motion. If the plan as approved or modified does not require full payment of actual damages to all victims or if the court determines that the defendant is not able and will not be able to make any restitution at any time during his probation or parole period or that no person suffered actual damages as a result of the defendant's criminal activities, the court shall file a specific written statement of its reasons for and the facts supporting its action or determination.

D. An order requiring an offender to pay restitution, validly entered pursuant to this section, constitutes a judgment and lien against all property of a defendant for the amount the defendant is obligated to pay under the order and may be recorded in any office for the filing of liens against real or personal property, or for garnishment. A judgment of restitution may be enforced by the state, a victim entitled under the order to

receive restitution, a deceased victim's estate or any other beneficiary of the judgment in the same manner as a civil judgment. An order of restitution is enforceable, if valid, pursuant to this section, the Victims of Crime Act [31-26-1 NMSA 1978] or Article 2, Section 24 of the constitution of New Mexico. Nothing in this section shall be construed to limit the ability of a victim to pursue full civil legal remedies.

E. The probation or parole officer, when assisting the defendant in preparing the plan of restitution, and the court, before approving, disapproving or modifying the plan of restitution, shall consider the physical and mental health and condition of the defendant; the defendant's age, education, employment circumstances, potential for employment and vocational training, family circumstances and financial condition; the number of victims; the actual damages of each victim; what plan of restitution will most effectively aid the rehabilitation of the defendant; and such other factors as shall be appropriate. The probation or parole officer shall attempt to determine the name and address of each victim and the amount of pecuniary damages of each victim.

F. The clerk of the court shall mail to each known victim a copy of the court's order approving or modifying the plan of restitution, including the court's statement, if any, pursuant to the provisions of Subsection C of this section.

G. At any time during the probation or parole period, the defendant or the victim may request and the court shall grant a hearing on any matter related to the plan of restitution.

H. Failure of the defendant to comply with Subsection B of this section or to comply with the plan of restitution as approved or modified by the court may constitute a violation of the conditions of probation or parole. Without limitation, the court may modify the plan of restitution or extend the period of time for restitution, but not beyond the maximum probation or parole period specified in Section 31-21-10 NMSA 1978.

I. This section and proceedings pursuant to this section shall not limit or impair the rights of victims to recover damages from the defendant in a civil action.

J. The rightful owner of any stolen property is the individual from whom the property was stolen. When recovering his property, the rightful owner of the stolen property shall not be civilly liable to any subsequent holder, possessor or retainer of the property for the purchase or sale price of the property or for any other costs or expenses associated with the property. Any subsequent holder, possessor or retainer of returned stolen property shall return the property to the rightful owner. The subsequent holder, possessor or retainer shall have a cause of action against the person from whom he obtained the property for actual damages.

History: 1953 Comp., § 40A-29-18.1, enacted by Laws 1977, ch. 217, § 2; 1989, ch. 101, § 1; 1993, ch. 221, § 1; 2005, ch. 282, § 1.

ANNOTATIONS

I. GENERAL CONSIDERATION.

The 1989 amendment, effective June 16, 1989, in Subsection B substituted "Section 31-20-6 NMSA 1978" for "Section 40A-29-18 NMSA 1953" in the first sentence and substituted "make" for "made" near the beginning of the second sentence; in Subsection G substituted "Section 31-21-10 NMSA 1978" for "section 41-17-24 NMSA 1953" in the second sentence; and added Subsection I.

The 1993 amendment, effective June 18, 1993, deleted "of New Mexico" following "Criminal Code" in the first sentence of Subsection A; and deleted the former last two sentences of Subsection H, which provided for set off of restitution payments against certain judgments, and limited the admissibility as evidence of the fact that restitution was required or made, respectively.

The 2005 amendment, effective June 17, 2005, adds Subsection D to provide that an order requiring an offender to pay restitution is a judgment and lien against all property of the defendant and may be recorded in any office for the filing of liens against real or personal property or for garnishment and to provide for the enforcement of the order of restitution.

Purpose of section. — This section is declarative of the public policy to: (1) Make whole the victim of the crime to the extent possible; and (2) to remind the defendant of his wrongdoing and to require him to repay the costs society has incurred as a result of his misconduct. State v. Taylor, 104 N.M. 88, 717 P.2d 64 (Ct. App.), cert. denied, 103 N.M. 798, 715 P.2d 71 (1986).

Public policy to make crime victim whole. — This section is declarative of public policy to make whole the victim of the crime to the extent possible. State v. Lack, 98 N.M. 500, 650 P.2d 22 (Ct. App. 1982).

Consecutive sentencing does not violate the public policy of making the victim whole, even though it may prevent the defendant from earning the money necessary to compensate his or her victims, where such sentencing is imposed as part of a comprehensive rehabilitative plan necessary to instill in the defendant the wrongness of his or her actions. State v. Jensen, 1998-NMCA-034, 124 N.M. 726, 955 P.2d 195.

Law reviews. — For comment, "Definitive Sentencing in New Mexico: The 1977 Criminal Sentencing Act," see 9 N.M.L. Rev. 131 (1978-79).

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

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. — 21A Am. Jur. 2d Criminal Law § 1321 et seq.; 79 Am. Jur. 2d Welfare Laws § 46.

Propriety of condition of probation which requires defendant convicted of crime of violence to make reparation to injured victim, 79 A.L.R.3d 976.

Statutes providing for governmental compensation for victims of crime, 20 A.L.R.4th 63.

Jurisdiction or power of juvenile court to order parent of juvenile to make restitution for juvenile's offense, 66 A.L.R.4th 985.

Measure and elements of restitution to which victim is entitled under state criminal statute, 15 A.L.R.5th 391.

Apportionment of liability between landowners and assailants for injuries to crime victims, 54 A.L.R.5th 379.

Persons or entities entitled to restitution as "victim" under state criminal restitution statute, 92 A.L.R.5th 35.

Restitutional sentencing under Victim and Witness Protection Act § 5 (18 USCS §§ 3579, 3580), 79 A.L.R. Fed. 724, 108 A.L.R. Fed. 828.

Deductibility, as nonbusiness loss under 26 USC § 165(c)(2), of restitution payments made pursuant to sentencing order, 112 A.L.R. Fed. 289.

II. PROCEDURAL MATTERS.

Commencement of obligation. — A defendant's obligation to make restitution may commence upon sentencing or incarceration and need not be delayed until the defendant is placed on probation or parole. State v. Palmer, 1998-NMCA-052, 125 N.M. 86, 957 P.2d 71, cert. denied, 125 N.M. 146, 958 P.2d 104 (1998), .

When restitution award is improper. — Awarding restitution to the victim is improper where a defendant does not admit liability for the crime, was not convicted of the crime, or does not plead guilty to the crime. State v. Madril, 105 N.M. 396, 733 P.2d 365 (Ct. App. 1987).

Notice to defendant required. — When the state intends to seek restitution based on charges that have been dismissed under a plea and disposition agreement, the defendant must be placed on notice that he will be subject to the payment of restitution, and should be advised at the time of the entry of his plea of the amount of restitution sought by the state. State v. Lozano, 1996-NMCA-075, 122 N.M. 120, 921 P.2d 316.

Relationship necessary between criminal activity and damage to victim. — A direct, causal relationship is required between the criminal activities of a defendant and the damages which the victim suffers. Restitution must be limited by and directly related to those criminal activities. State v. Madril, 105 N.M. 396, 733 P.2d 365 (Ct. App. 1987).

In determining whether a direct or causal relationship exists between a defendant's criminal activities and the damage suffered by a victim of those activities, an adequate evidentiary basis must be presented. Mere speculation or supposition as to that relationship will not suffice. State v. Madril, 105 N.M. 396, 733 P.2d 365 (Ct. App. 1987).

Police department as "victim". — In a prosecution involving the theft of drugs by an undercover narcotics officer, the police department was a "victim" for purposes of this section. State v. Ellis, 120 N.M. 709, 905 P.2d 747 (Ct. App. 1995).

Restitution for unlicensed work not required. — Bad-check defendant was not required to make restitution for any amounts owed to interior design company for work done without the requisite New Mexico contractor's license. State v. Platt, 114 N.M. 721, 845 P.2d 815 (Ct. App. 1992).

Victim restitution policy not limited to cases where sentence suspended or deferred. — Subsection B contains no qualifying language limiting the application of the policy of victim restitution only to those cases in which a sentence is suspended or deferred. State v. Gross, 98 N.M. 309, 648 P.2d 348 (Ct. App. 1982).

Mandatory probationary period may include restitution condition. — Subsection B does not limit or restrict the application of restitution only to those cases in which sentence is suspended or deferred. A mandatory probationary period may be included in the defendant's sentence with the condition to make restitution to the victim. State v. Ennis, 99 N.M. 117, 654 P.2d 570 (Ct. App. 1982).

Restitution mandatory where sentence suspended or deferred. — Subsection B makes it mandatory to require victim restitution when a sentence is deferred or suspended; the court has no discretion in such instances. State v. Gross, 98 N.M. 309, 648 P.2d 348 (Ct. App. 1982).

Where a defendant agreed to plead guilty to nine counts of attempt to evade gross receipts tax, and the state and the defendant agreed that incarceration, if imposed, would not exceed nine years and that sentencing would be postponed to enable defendant to fulfill restitution requirements; and where the defendant, after 11 months failed to pay any restitution, it was not error for the trial court to impose a sentence of incarceration pursuant to the plea and disposition agreement. State v. Bowie, 110 N.M. 283, 795 P.2d 88 (Ct. App. 1990).

Agreements not to prosecute in exchange for restitution. — The practice by attorneys or their agents involving the payment of money as privately-negotiated restitution to an alleged victim in exchange for that person's execution of any sworn statement not to prosecute constitutes conduct prejudicial to the administration of justice in violation of Subsection D, and adversely reflects on an attorney's fitness to practice law in violation of Subsection H. In re Steere, 110 N.M. 405, 796 P.2d 1101 (1990).

Insurance company as victim. — The trial court had the authority under this section to order the embezzling defendant to pay restitution to an insurance company that had paid a claim resulting from the defendant's criminal activities. State v. Brooks, 116 N.M. 309, 862 P.2d 57 (Ct. App. 1993), rev'd on other grounds, 117 N.M. 751, 877 P.2d 557 (1994).

Termination of preprosecution agreement by state. — The state may terminate a preprosecution diversion agreement, even if the sole ground is the defendant's nonwilful failure to make restitution, but only if there are no adequate alternatives to termination which will meet the state's legitimate penological interests. State v. Jimenez, 111 N.M. 782, 810 P.2d 801 (1991).

Trial court must consider defendant's ability to pay 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, 110 N.M. 486, 797 P.2d 275 (Ct. App. 1990).

Full evidentiary hearing not contemplated. — A full evidentiary hearing tantamount to a civil trial adjudicating liability is not contemplated as a prerequisite for a criminal trial judge to require restitution to the victim. State v. Lack, 98 N.M. 500, 650 P.2d 22 (Ct. App. 1982).

Notice to defendant, with opportunity to dispute amount of restitution, required. — Implicit in the provisions of this section is the giving of notice to the defendant of the amount of restitution claimed, the opportunity to dispute the amount thereof and an inquiry into the defendant's ability to pay restitution. State v. Lack, 98 N.M. 500, 650 P.2d 22 (Ct. App. 1982).

Failure to prepare restitution plan not error where presentence report provides notice. — Where no plan of restitution is ever prepared by the defendant in cooperation with the probation or parole officials as required by this section, the failure to comply with this requirement is not error where data is supplied by the defendant which supports the court's determination of the defendant's ability to pay restitution, the presentence report gives the defendant prior notice concerning the amounts of restitution detailed in the presentence report and he is adequately accorded an opportunity to contest the amounts ordered by the court. State v. Lack, 98 N.M. 500, 650 P.2d 22 (Ct. App. 1982).

Restitution order void where not condition of probation. — The district court's order that defendant make restitution to the New Mexico state police contingency fund in the amount of $130 (the amount an undercover police officer spent to purchase cocaine from defendant) was void, where the court did not order the payment as a condition of

probation; and, thus, it was not authorized by this section. State v. Dean, 105 N.M. 5, 727 P.2d 944 (Ct. App. 1986).

Showing of actual damage insufficient to require victim restitution. — See State v. Griffin, 100 N.M. 75, 665 P.2d 1166 (Ct. App. 1983).

Lien on defendant's property not authorized. — A lien ordered on defendant's property to the extent of restitution is not authorized. State v. Steele, 100 N.M. 492, 672 P.2d 665 (Ct. App. 1983).

Magistrate court may order restitution. — The magistrate court may, as part of its sentencing power, order a Criminal Code or Motor Vehicle Code violator to make restitution. 1979 Op. Att'y Gen. No. 79-18.

III. AMOUNT.

Amount of restitution and time of payment must be set by the court and may not be left to the discretion of probation authorities. State v. Lack, 98 N.M. 500, 650 P.2d 22 (Ct. App. 1982); State v. Carrasco, 1997-NMCA-123, 124 N.M. 320, 950 P.2d 293.

Trial court is to exercise discretion in ordering the amount defendant is "reasonably able" to pay. State v. Steele, 100 N.M. 492, 672 P.2d 665 (Ct. App. 1983).

Restitution for full value of stolen merchandise. — The trial court did not err in ordering defendants to pay restitution for the full value of recovered stolen property that was donated to charity by the victim. State v. Lucero, 1999-NMCA-102, 127 N.M. 672, 986 P.2d 468, cert. denied, 128 N.M. 149, 990 P.2d 823 (1999).

Quantum of restitution need not be proven by a preponderance of the evidence as though the sum were being established in a civil action for damages. State v. Lack, 98 N.M. 500, 650 P.2d 22 (Ct. App. 1982).

Earnings are properly includable within "actual damages" to be awarded crime victims, as contemplated by Subsection A(2). State v. Lack, 98 N.M. 500, 650 P.2d 22 (Ct. App. 1982).

Payments for victim's counseling. — An order requiring a defendant convicted of criminal sexual penetration, incest, and contributing to the delinquency of a minor to pay a monthly sum towards the cost of the victim's counseling was reasonably related to the defendant's rehabilitation and valid under this section. State v. Palmer, 1998-NMCA-052, 125 N.M. 86, 957 P.2d 71, cert. denied, 125 N.M. 146, 958 P.2d 104 (1998).

Audit expenses properly included in restitution order. — In a fraud case, an audit was an appropriate element of restitution. So long as the audit was a reasonable attempt to determine the nature and extent of losses caused by the wrongdoer, rather than an expense of trial preparation, the district court acted properly in including the

expense of the audit as "actual damages" to be considered in ordering restitution. State v. Whitaker, 110 N.M. 486, 797 P.2d 275 (Ct. App. 1990).

Losses qualifying as damages. — In a prosecution involving the theft of drugs by an undercover narcotics officer, the police department's losses, including the officer's salary, expense money, and money spent for the purchase of drugs, qualified as damages under this section. State v. Ellis, 120 N.M. 709, 905 P.2d 747 (Ct. App. 1995).

Damages for conspiracy. — The trial court, pursuant to this section, may order a defendant to make restitution to the victim of a criminal conspiracy for losses resulting from such conspiracy. State v. Lozano, 1996-NMCA-075, 122 N.M. 120, 921 P.2d 316.

ARTICLE 18
Sentencing of Offenders

31-18-1 to 31-18-11. Repealed.

ANNOTATIONS

Repeals. — Laws 1977, ch. 216, § 17, repeals 40A-29-1 to 40A-29-3.1, 40A-29-5 to 49A-29-11, 1953 Comp. (31-18-1 to 31-18-11 NMSA 1978), relating to sentencing of offenders.

31-18-12. Short title.

Chapter 31, Article 18 NMSA 1978 may be cited as the "Criminal Sentencing Act".

History: 1953 Comp., § 40A-29-26, enacted by Laws 1977, ch. 216, § 1; 1994, ch. 24, § 1.

ANNOTATIONS

The 1994 amendment, effective July 1, 1994, substituted "Chapter 31, Article 18 NMSA 1978" for "The provisions of Sections 40A-29-26 through 40A-29-34 NMSA 1953".

Law reviews. — For comment, "Definitive Sentencing in New Mexico: The 1977 Criminal Sentencing Act," see 9 N.M.L. Rev. 131 (1978-79).

For article, "Survey of New Mexico Law, 1982-83: Criminal Law," see 14 N.M.L. Rev. 89 (1984).

31-18-13. Sentencing authority; all crimes.

A. Unless otherwise provided in this section, all persons convicted of a crime under the laws of New Mexico shall be sentenced in accordance with the provisions of the

Criminal Sentencing Act [Chapter 31, Article 18 NMSA 1978]; provided, that a person sentenced as a serious youthful offender or as a youthful offender may be sentenced to less than the basic or mandatory sentence prescribed by the Criminal Sentencing Act.

B. Whenever a defendant is convicted of a crime under the constitution of New Mexico, or a statute not contained in the Criminal Code [30-1-1 NMSA 1978], which specifies the penalty to be imposed on conviction, the court shall set as a definite term of imprisonment the minimum term prescribed by the statute or constitutional provision and may impose the fine prescribed by the statute or constitutional provision for the particular crime for which the person was convicted; provided, that a person sentenced as a serious youthful offender or as a youthful offender may be sentenced to less than the minimum term of imprisonment prescribed by the statute or the constitutional provision.

C. A crime declared to be a felony by the constitution or a statute not contained in the Criminal Code [30-1-1 NMSA 1978], without specification of the sentence or fine to be imposed on conviction, shall constitute a fourth degree felony as prescribed under the Criminal Code [30-1-1 NMSA 1978] for the purpose of the sentence, and the defendant shall be so sentenced.

D. Any other crime for which the sentence to be imposed upon conviction is not specified shall constitute, for the purpose of the sentence, a petty misdemeanor.

History: 1953 Comp., § 40A-29-27, enacted by Laws 1977, ch. 216, § 2; 1993, ch. 77, § 4.

ANNOTATIONS

I. GENERAL CONSIDERATION.

The 1993 amendment, effective July 1, 1993, added the provisos at the end of Subsections A and B, and made minor stylistic changes.

Criminal sentences must be imposed as prescribed by statute. State v. Baros, 78 N.M. 623, 435 P.2d 1005 (1968).

Sentence otherwise imposed void. — Sentences must be imposed as prescribed by statute, and a sentence otherwise imposed was not merely irregular, but was null and void, and a void sentence may be vacated even though it has been partially served. State v. Peters, 69 N.M. 302, 366 P.2d 148 (1961), cert. denied, 369 U.S. 831, 82 S. Ct. 849, 7 L. Ed. 2d 796 (1962).

Sentences which are unauthorized by law are null and void. Sneed v. Cox, 74 N.M. 659, 397 P.2d 308 (1964).

Fixing of penalties is legislative function, and what constitutes an adequate punishment is a matter for legislative judgment, and the question of whether the punishment for a given crime is too severe and disproportionate to the offense is for the legislature to determine. State v. Peters, 78 N.M. 224, 430 P.2d 382 (1967).

For crimes committed prior to July 1, 1979, the sentencing provision in effect at the time of the commission of the crime controls. State v. Hargrove, 108 N.M. 233, 771 P.2d 166 (1989).

Subsection B controls over DWI statute. — Statute 66-8-102E NMSA 1978, which provides that where the conviction is for a second or subsequent DWI, the offense is punishable by imprisonment for not less than ninety days or more than one year, does not control over Subsection B of this section which provides the method for establishing the applicable determinate sentence for offenses not contained in the Criminal Code. State v. Greyeyes, 105 N.M. 549, 734 P.2d 789 (Ct. App. 1987).

Motor Vehicle Code violation petty misdemeanor. — Section 66-8-7B NMSA 1978 (Motor Vehicle Code violation) is governed by the provisions of Subsection D of this section. The violation is not declared to be a felony. Since it is not declared to be a felony and is not punishable by a specified sentence, Subsection D applies. State v. Mendoza, 115 N.M. 772, 858 P.2d 860 (Ct. App.), cert. denied, 115 N.M. 359, 857 P.2d 481 (1993).

Section does not apply to contempt sentence. — Contempt is not a "crime" under § 34-1-2 NMSA 1978, and therefore, this section does not apply to a contempt sentence. State v. Case, 103 N.M. 574, 711 P.2d 19 (Ct. App. 1985).

Effect of acquittal on one count of indictment. — The mere fact that the jury saw fit to acquit the defendant on one count of the indictment cannot be construed as effectuating a determination of the factual issues under another count, even though the same evidence is offered in support of both counts of the indictment; as the reason for the acquittals is speculative, the acquittals, even though irreconcilable with the conviction, do not require the conviction to be set aside as a matter of law. State v. Rogers, 80 N.M. 230, 453 P.2d 593 (Ct. App. 1969).

Effective date of resentence is the date when the initial sentence commenced. State v. Dalrymple, 77 N.M. 4, 419 P.2d 218 (1966).

Effect of sentence in excess of that permitted by law. — Where a court has jurisdiction of the person and the offense, the imposition of a sentence in excess of what the law permits does not render the legal or authorized portion of the sentence void, but only leaves such portion in excess open to question and attack. A sentence is legal so far as it is within the provisions of law and the jurisdiction of the court over the person and the offense, and only void as to the excess, when such excess is separable and may be dealt with without disturbing the valid portion of the sentence. Sneed v. Cox, 74 N.M. 659, 397 P.2d 308 (1964).

Legal or authorized portion valid. — The imposition of a sentence in excess of what the law permits does not render the legal or authorized portion of the sentence void, but only leaves such portion in excess open to attack, unless such portion is inseparable and cannot be dealt with without disturbing the valid portion of the sentence. State v. Baros, 78 N.M. 623, 435 P.2d 1005 (1968).

When probationary part of sentence void. — Where the court ordered defendant placed on probation without deferring or suspending any of his sentences, this action is not within the bounds prescribed by law, and therefore, the probationary part of the defendant's sentence is void. State v. Holan, 93 N.M. 472, 601 P.2d 442 (Ct. App.), cert. denied, 93 N.M. 683, 604 P.2d 821 (1979).

Law reviews. — For symposium, "The Impact of the Equal Rights Amendment on the New Mexico Criminal Code," see 3 N.M.L. Rev. 106 (1973).

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, "Definitive Sentencing in New Mexico: The 1977 Criminal Sentencing Act," see 9 N.M.L. Rev. 131 (1978-79).

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).

For annual survey of New Mexico criminal law, see 16 N.M.L. Rev. 9 (1986).

For annual survey of criminal procedure in New Mexico, see 18 N.M.L. Rev. 345 (1988).

For annual survey of New Mexico criminal law and procedure, 19 N.M.L. Rev. 655 (1990).

For survey of 1990-91 criminal procedure and evidence, see 22 N.M.L. Rev. 713 (1992).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law § 825.

Right to credit on state sentence for time served under sentence of court of separate jurisdiction where state court fails to specify in that regard, 90 A.L.R.3d 408.

Loss of jurisdiction by delay in imposing sentence, 98 A.L.R.3d 605.

Power of state court, during same term, to increase severity of lawful sentence - modern status, 26 A.L.R.4th 905.

Power of court to increase severity of unlawful sentence - modern status, 28 A.L.R.4th 147.

Propriety of sentencing judge's consideration of defendant's perjury or lying in pleas or testimony in present trial, 34 A.L.R.4th 888.

Admissibility of expert testimony as to appropriate punishment for convicted defendant, 47 A.L.R.4th 1069.

When does delay in imposing sentence violate speedy trial provision, 86 A.L.R.4th 340.

Transmission or risk of transmission of human immunodeficiency virus (HIV) or acquired immunodeficiency syndrome (AIDS) as basis for prosecution or sentencing in criminal or military discipline case, 13 A.L.R.5th 628.

II. JUDICIAL DISCRETION.

Court may impose statutory sentence notwithstanding jury's recommendation for clemency. — Trial court did not err in refusing to grant appellant's motion to vacate for the reason that, despite the jury's recommendation for clemency, minor was sentenced for armed robbery to the maximum term permitted by law. State v. Henry, 78 N.M. 573, 434 P.2d 692 (1967)(decided under former law).

Statutory sentence notwithstanding recommendation in diagnostic report. — Where the sentence was in accordance with law, an appellate court cannot say it was unjust or improper in the circumstances because recommendations in a diagnostic report for a more lenient sentence were not followed or because the statutory sentence is imposed on a 17-year old first offender. State v. Madrigal, 85 N.M. 496, 513 P.2d 1278 (Ct. App.), cert. denied, 85 N.M. 483, 513 P.2d 1265 (1973).

Court need not impose identical sentences on joint defendants. — There is no requirement in criminal procedure that a court impose identical sentences upon persons jointly guilty of a crime. State v. Holly, 79 N.M. 516, 445 P.2d 393 (Ct. App. 1968).

Court statutorily limited in sentencing authority. — The district court's authority to sentence is only that which has been provided by statute. State v. Sparks, 102 N.M. 317, 694 P.2d 1382 (Ct. App. 1985).

Suspended or deferred sentence within discretion of trial court. — Of the sentencing alternatives available, a suspended or deferred sentence is within the discretion of the trial court. State v. Madrigal, 85 N.M. 496, 513 P.2d 1278 (Ct. App.), cert. denied, 85 N.M. 483, 513 P.2d 1265 (1973) (decided under former law).

Sentencing judge has discretion in determining whether sentences are to run consecutively or concurrently. His discretion in this area will not be interfered with unless he has violated one of the sentencing statutes. State v. Deats, 82 N.M. 711, 487 P.2d 139 (Ct. App. 1971)(decided under former law).

Court should not fix date when sentence to commence. — It is improper for a trial court to fix a date when the sentence should commence. Sneed v. Cox, 74 N.M. 659, 397 P.2d 308 (1964)(decided under former law).

Jurisdiction of trial court to sentence is not exhausted until sentence pronounced, and will carry over from term to term. Pavlich v. State, 79 N.M. 473, 444 P.2d 984 (1968).

Sentences cannot be increased after first commitment has begun. Deats v. State, 84 N.M. 405, 503 P.2d 1183 (Ct. App. 1972).

Magistrate court may order restitution. — The magistrate court may, as part of its sentencing power, order a Criminal Code or Motor Vehicle Code violator to make restitution. 1979 Op. Att'y Gen. No. 79-18.

Credit where prisoner has served part of void sentence. — It is proper to allow credit where a prisoner is resentenced without a new trial after serving part of a void sentence. Sneed v. Cox, 74 N.M. 659, 397 P.2d 308 (1964).

III. SPECIFIC SENTENCES.

Life sentence is not mandatory for a second conviction of trafficking in heroin and the court has the authority to suspend or defer the sentence imposed. State v. Sanchez, 97 N.M. 521, 641 P.2d 1068 (1982)(decided before 1980 amendment of 30-31-20 NMSA 1978).

Proper to enhance sentence under both habitual offender and firearm enhancement provisions. — It is not improper to enhance a sentence under the general habitual offender statute if it has already been enhanced under the firearm enhancement statute. State v. Reaves, 99 N.M. 73, 653 P.2d 904 (Ct. App. 1982).

Validity of consecutive sentences. — Where 1969 sentences were expressly made consecutive to 1967 sentences, and eight sentences in 1969 were also expressly made consecutive, these nine consecutive sentences were validly imposed. Deats v. State, 84 N.M. 405, 503 P.2d 1183 (Ct. App. 1972)(decided under former law).

31-18-14. Sentencing authority; capital felonies.

A. When a defendant has been convicted of a capital felony, he shall be punished by life imprisonment or death. The punishment shall be imposed after a sentencing hearing separate from the trial or guilty plea proceeding. However, if the defendant has not reached the age of majority at the time of the commission of the capital felony for which he was convicted, he may be sentenced to life imprisonment but shall not be punished by death.

B. In the event the death penalty in a capital felony case is held to be unconstitutional or otherwise invalidated by the supreme court of the state of New Mexico or the supreme court of the United States, the person previously sentenced to death for a capital felony shall be sentenced to life imprisonment.

History: 1978 Comp., § 31-18-14, enacted by Laws 1979, ch. 150, § 1; 1993, ch. 77, § 5.

ANNOTATIONS

Cross references. — For capital felony sentencing procedure, see 31-20A-1 to 31-20A-6 NMSA 1978.

Repeals and reenactments. — Laws 1979, ch. 150, § 1, repealed former 31-18-14 NMSA 1978 (40A-29-27.1, 1953 Comp.), relating to life imprisonment for conviction of a capital felony, and enacted the above section.

The 1993 amendment, effective July 1, 1993, substituted "may be sentenced" for "shall be sentenced" in the last sentence of Subsection A and added "but shall not be punished by death" at the end thereof.

New Mexico's death penalty is unconstitutional, and the penalty to be imposed for a conviction of first-degree murder is life imprisonment. State v. Noble, 90 N.M. 360, 563 P.2d 1153 (1977) (decided under former law).

This section, which provided, upon conviction of a capital crime, for mandatory sentence of death, and leaves neither judge nor jury discretion to impose a lesser sentence, violates state and federal constitutional provisions against cruel and unusual punishment and is void. This action revives previous 40A-29-2, 1953 Comp., as it existed before its amendment in 1973, but that section was likewise unconstitutional and void in that it left recommendation of death or life imprisonment to the unbridled discretion of the jury. Therefore, maximum penalty available for defendants convicted of murder is life imprisonment. State v. Rondeau, 89 N.M. 408, 553 P.2d 688 (1976) (decided under former law).

Life imprisonment proper penalty for serious felonies. — The imposition of the death penalty for felony-murder, rape, aggravated sodomy and kidnapping was unconstitutional; the proper penalty to be imposed was life imprisonment. State v. Melton, 90 N.M. 188, 561 P.2d 461 (1977) (decided under former law).

Life sentence for mentally ill offender constitutional. — Mandatory life sentence for a capital crime committed by a defendant found to be guilty but mentally ill did not constitute cruel and unusual punishment in violation of the Eighth Amendment. Neely v. Newton, 149 F.3d 1074 (10th Cir. 1998), cert. denied, 525 U.S. 1107, 119 S. Ct. 877, 142 L. Ed. 2d 777 (1999).

Mandatory nature of section. — The court did not have discretion not to sentence the defendant, a minor, to a life term after a conviction of a first degree capital felony. State v. Taylor, 107 N.M. 66, 752 P.2d 781 (1988) (decided prior to 1993 amendment).

Death qualification of a jury, properly conducted, is not grounds for reversal. State v. Gilbert, 100 N.M. 392, 671 P.2d 640 (1983), cert. denied, 465 U.S. 1073, 104 S. Ct. 1429, 79 L. Ed. 2d 753 (1984).

Law reviews. — For article, "The Proposed New Mexico Criminal Code," see 1 Nat. Resources J. 122 (1961).

For comment, "Definitive Sentencing in New Mexico: The 1977 Criminal Sentencing Act," see 9 N.M.L. Rev. 131 (1978-79).

For article, "Constitutionality of the New Mexico Capital Punishment Statute," see 11 N.M.L. Rev. 269 (1981).

For article, "Sufficiency of Provocation for Voluntary Manslaughter in New Mexico: Problems in Theory and Practice," see 12 N.M.L. Rev. 747 (1982).

For annual survey of New Mexico law relating to criminal procedure, see 13 N.M.L. Rev. 341 (1983).

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).

For comment, "An Equal Protection Challenge to First Degree Depraved Mind Murder Under the New Mexico Constitution", see 19 N.M.L. Rev. 511 (1989).

For article, "Unintentional homicides caused by risk-creating conduct: Problems in distinguishing between depraved mind murder, second degree murder, involuntary manslaughter, and noncriminal homicide in New Mexico," 20 N.M.L. Rev. 55 (1990).

For note on Imposing the Death Penalty upon Juvenile Offenders, see 21 N.M.L. Rev. 373 (1991).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 942 et seq.; 956 to 960, 965 to 970, 972, 973.

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.

Application of death penalty to nonhomicide cases, 62 A.L.R.5th 121.

Propriety, under Federal Constitution, of evidence or argument concerning deterrent effect of death penalty, 78 A.L.R. Fed. 553.

24 C.J.S. Criminal Law §§ 1593, 1596, 1597, 1604, 1609.

31-18-14.1. Capital felony case heard by a jury; sentencing hearing; explanation by court to the jury.

At the beginning of a sentencing hearing for a capital felony case, subsequent to a verdict by the jury that the defendant is guilty of a capital felony, the court shall explain to the jury that a sentence of life imprisonment means that the defendant shall serve thirty years of his sentence before he becomes eligible for a parole hearing, as provided in Section 31-21-10 NMSA 1978.

History: 1978 Comp., § 31-18-14.1, enacted by Laws 2001, ch. 128, § 1.

ANNOTATIONS

Effective dates. — Laws 2001, ch 128, § 3 makes the act effective July 1, 2001.

Applicability. — Laws 2001, ch. 128, § 2 makes the provisions of this section applicable to persons convicted of a capital felony offense committed on or after July 1, 2001.

31-18-15. Sentencing authority; noncapital felonies; basic sentences and fines; parole authority; meritorious deductions.

A. If a person is convicted of a noncapital felony, the basic sentence of imprisonment is as follows:

(1) for a first degree felony resulting in the death of a child, life imprisonment;

(2) for a first degree felony, eighteen years imprisonment;

(3) for a second degree felony resulting in the death of a human being, fifteen years imprisonment;

(4) for a second degree felony for a sexual offense against a child, fifteen years imprisonment;

(5) for a second degree felony, nine years imprisonment;

(6) for a third degree felony resulting in the death of a human being, six years imprisonment;

(7) for a third degree felony for a sexual offense against a child, six years imprisonment;

(8) for a third degree felony, three years imprisonment; or

(9) for a fourth degree felony, eighteen months imprisonment.

B. The appropriate basic sentence of imprisonment shall be imposed upon a person convicted and sentenced pursuant to Subsection A of this section, unless the court alters the sentence pursuant to the provisions of Section 31-18-15.1, 31-18-16, 31-18-16.1 or 31-18-17 NMSA 1978.

C. The court shall include in the judgment and sentence of each person convicted and sentenced to imprisonment in a corrections facility designated by the corrections department authority for a period of parole to be served in accordance with the provisions of Section 31-21-10 NMSA 1978 after the completion of any actual time of imprisonment and authority to require, as a condition of parole, the payment of the costs of parole services and reimbursement to a law enforcement agency or local crime stopper program in accordance with the provisions of that section. The period of parole shall be deemed to be part of the sentence of the convicted person in addition to the basic sentence imposed pursuant to Subsection A of this section together with alterations, if any, pursuant to the provisions of Section 31-18-15.1, 31-18-16, 31-18-16.1 or 31-18-17 NMSA 1978.

D. When a court imposes a sentence of imprisonment pursuant to the provisions of Section 31-18-15.1, 31-18-16, 31-18-16.1 or 31-18-17 NMSA 1978 and suspends or defers the basic sentence of imprisonment provided pursuant to the provisions of Subsection A of this section, the period of parole shall be served in accordance with the provisions of Section 31-21-10 NMSA 1978 for the degree of felony for the basic sentence for which the inmate was convicted. For the purpose of designating a period of parole, a court shall not consider that the basic sentence of imprisonment was suspended or deferred and that the inmate served a period of imprisonment pursuant to the provisions of Section 31-18-15.1, 31-18-16, 31-18-16.1 or 31-18-17 NMSA 1978.

E. The court may, in addition to the imposition of a basic sentence of imprisonment, impose a fine not to exceed:

(1) for a first degree felony resulting in the death of a child, seventeen thousand five hundred dollars ($17,500);

(2) for a first degree felony, fifteen thousand dollars ($15,000);

(3) for a second degree felony resulting in the death of a human being, twelve thousand five hundred dollars ($12,500);

(4) for a second degree felony for a sexual offense against a child, twelve thousand five hundred dollars ($12,500);

(5) for a second degree felony, ten thousand dollars ($10,000);

(6) for a third degree felony resulting in the death of a human being, five thousand dollars ($5,000);

(7) for a third degree felony for a sexual offense against a child, five thousand dollars ($5,000); or

(8) for a third or fourth degree felony, five thousand dollars ($5,000).

F. When the court imposes a sentence of imprisonment for a felony offense, the court shall indicate whether or not the offense is a serious violent offense, as defined in Section 33-2-34 NMSA 1978. The court shall inform an offender that the offender's sentence of imprisonment is subject to the provisions of Sections 33-2-34, 33-2-36, 33-2-37 and 33-2-38 NMSA 1978. If the court fails to inform an offender that the offender's sentence is subject to those provisions or if the court provides the offender with erroneous information regarding those provisions, the failure to inform or the error shall not provide a basis for a writ of habeas corpus.

G. No later than October 31 of each year, the New Mexico sentencing commission shall provide a written report to the secretary of corrections, all New Mexico criminal court judges, the administrative office of the district attorneys and the chief public defender. The report shall specify the average reduction in the sentence of imprisonment for serious violent offenses and nonviolent offenses, as defined in Section 33-2-34 NMSA 1978, due to meritorious deductions earned by prisoners during the previous fiscal year pursuant to the provisions of Sections 33-2-34, 33-2-36, 33-2-37 and 33-2-38 NMSA 1978. The corrections department shall allow the commission access to documents used by the department to determine earned meritorious deductions for prisoners.

History: 1953 Comp., § 40A-29-28, enacted by Laws 1977, ch. 216, § 4; 1979, ch. 152, § 1; 1980, ch. 38, § 1; 1981, ch. 285, § 1; 1987, ch. 139, § 3; 1993, ch. 38, § 1; 1993, ch. 182, § 1; 1994, ch. 23, § 3; 1999, ch. 238, § 5; 2003, ch. 75, § 4; 2003 (1st S.S.), ch. 1, § 5; 2005, ch. 59, § 2.

ANNOTATIONS

I. GENERAL CONSIDERATION.

1993 amendments. — Laws 1993, ch. 38, § 1, effective July 1, 1993, in Subsection D, substituting "one hundred thousand dollars ($100,000)" for "fifteen thousand dollars ($15,000)" in Paragraph (1) and "fifty thousand dollars ($50,000)" for "ten thousand dollars ($10,000) in Paragraph (2), deleting "or fourth" preceding "degree" and substituting "twenty-five thousand dollars ($25,000)" for "five thousand dollars ($5,000)" in Paragraph (3), and adding a Paragraph (4), relating to fourth degree felony, was approved on March 17, 1993. However, Laws 1993, ch. 182, § 1, effective July 1, 1993, inserting present Subsection D, and redesignating former Subsection D as present

Subsection E, was approved on April 3, 1993. The section is set out as amended by Laws 1993, ch. 182, § 1. See 12-1-8 NMSA 1978.

The 1994 amendment, effective July 1, 1994, in Subsection A, inserted Paragraphs (2) and (4) and redesignated former Paragraphs (2) to (4) as Paragraphs (3), (5) and (6), and deleted "or" at the end of Paragraph (5); inserted "or a second, third or fourth degree felony resulting in the death of a human being" in Subsection B and in the first sentence in Subsection C; and, in Subsection E, inserted Paragraphs (2) and (4) and redesignated former Paragraphs (2) and (4) as Paragraphs (3) and (5).

The 1999 amendment, effective July 1, 1999, added "meritorious deductions" to the section heading and added Subsections F and G.

The 2003 amendment, effective July 1, 2003 in Subsection G substituted "New Mexico sentencing commission" for "criminal and juvenile justice coordinating council" near the beginning; and substituted "commission" for "coordinating council" near the end.

The 2003 (1st S.S.) amendment, effective February 3, 2004, inserted present Paragraphs (3) and (6) and redesignated former Paragraphs (3) through (6) accordingly in Subsection A, substituted “and sentenced pursuant to Subsection A of this section, unless the court alters the” for “of a first, second, third or fourth degree felony or a second or third degree felony resulting in the death of a human being, unless the court alters such” in Subsection B, deleted “of a first, second, third or fourth degree felony or a second or third degree felony resulting in the death of a human being” following “convicted” near the beginning of the first sentence in Subsection C, and inserted present Paragraphs (3) and (6) and redesignated former Paragraphs (3) through (5) accordingly in Subsection E.

The 2005 amendment, effective June 17, 2005, added Subsection A(1) to impose a life sentence for the conviction of a first degree felony resulting in the death of a child and Subsection E(1) to impose a fine of seventeen thousand five hundred dollars for a first degree felony resulting in the death of a child.

Applicability. — Laws 1994, ch. 23, § 4 makes the provisions of the act applicable only to persons sentenced for crimes committed on or after the effective date of the act.

Laws 1999, ch. 238, § 8, provides that the provisions of §§ 1 to 5 and § 7 of the act are applicable to persons convicted of a criminal offense committed on or after July 1, 1999; and further provides that as to persons convicted of a criminal offense committed prior to July 1, 1999, the laws with respect to meritorious deductions in effect at the time the offense was committed shall apply.

Temporary provisions. — Laws 2003, ch. 75, § 5, effective on July 1, 2003, provides that contingent upon the availability of funding, in fiscal years 2004 and 2005, using the expertise of a national or state organization with experience in sentencing reform, the

New Mexico sentencing commission shall develop sentencing reforms for the state and present recommended reforms to the legislature.

State v. Wilson, 2001-NMCA-032, 130 N.M.319, 24 P.3d 351 can no longer be considered controlling authority regarding sentencing enhancements of basic sentences. State v. Frawley, 2005-NMCA-017, ___N.M.____, 106 P.3d 580, cert. denied, ____N.M.___, ___P.3d____(Nov. 3); cert. granted (Nov. 8).

Fixing of penalties is legislative function. — See State v. Hovey, 87 N.M. 398, 534 P.2d 777 (Ct. App. 1975); State v. Crespin, 96 N.M. 640, 633 P.2d 1238 (Ct. App. 1981).

The legislature establishes criminal penalties; the trial court's authority to sentence is that which has been provided by law. State v. Wilson, 97 N.M. 534, 641 P.2d 1081 (Ct. App. 1982).

Mandatory sentencing does not violate the doctrine of separation of powers contained in N.M. Const., art. III, § 1. State v. Mabry, 96 N.M. 317, 630 P.2d 269 (1981).

Correction of omission of mandatory provision. — Where a sentence lacks a statutorily-mandated provision, the trial court retains jurisdiction to correct the sentence by adding the omitted term. State v. Abril, 2003-NMCA-111, 134 N.M. 326, 76 P.3d 644, cert. denied, 134 N.M. 320, 76 P.3d 638.

Factual finding of whether crime resulted "in the death of a human being" is for the jury and not the judge to make, under Apprendi v. New Jersey, 530 U.S. 466 (2000). State v. McDonald, 2003-NMCA-123, 134 N.M. 486, 79 P.3d 830, cert. granted, 2003-NMCERT-001, 134 N.M. 612, 81 P.3d 555.

Conspiracy to commit murder. — Conspiracy to commit murder is a felony "resulting in the death of a human being" within the meaning of this section. State v. Shije, 1998-NMCA-102, 125 N.M. 581, 964 P.2d 142.

"Serious violent offense" finding mandatory. — The omission of any finding does not satisfy the statutory requirement of Subsection F of this section of an affirmative finding as to whether or not the defendant committed a serious violent offense. State v. Abril, 2003-NMCA-111, 134 N.M. 326, 76 P.3d 644, cert. denied, 134 N.M. 320, 76 P.3d 638.

Defendant must be afforded opportunity to speak before sentence pronounced. — Section 31-18-15.1 NMSA 1978 extends the common-law doctrine of allocutus to noncapital felonies, as enumerated in this section, and the trial judge must give the defendant an opportunity to speak before he pronounces sentence; failure to do so renders the sentence invalid. Tomlinson v. State, 98 N.M. 213, 647 P.2d 415 (1982).

Victim restitution policy not limited to cases where sentences suspended or deferred. — Section 31-17-1B NMSA 1978 contains no qualifying language limiting the application of the policy of victim restitution only to those cases in which a sentence is suspended or deferred. State v. Gross, 98 N.M. 309, 648 P.2d 348 (Ct. App. 1982).

Mandatory probationary period may include restitution condition. — Section 31-17-1B NMSA 1978 does not limit or restrict the application of restitution only to those cases in which sentence is suspended or deferred. A mandatory probationary period may be included in the defendant's sentence with the condition to make restitution to the victim. State v. Ennis, 99 N.M. 117, 654 P.2d 570 (Ct. App. 1982).

Restitution mandatory when sentence suspended or deferred. — Section 31-17-1B NMSA 1978 makes it mandatory to require victim restitution when a sentence is deferred or suspended; the court has no discretion in such instances. State v. Gross, 98 N.M. 309, 648 P.2d 348 (Ct. App. 1982).

A fine is a sentence. State v. Aragon, 93 N.M. 132, 597 P.2d 317 (1979).

Defendant sentenced under statute existing when crime was committed. — Where defendant committed voluntary manslaughter before Indeterminate Sentence Act was passed, but was convicted afterwards, defendant's sentencing under statute existing at time crime was committed was proper. State v. Armstrong, 61 N.M. 258, 298 P.2d 941 (1956).

Good behavior, indeterminate sentencing and parole laws are compatible and are being administered right along together. Owens v. Swope, 60 N.M. 71, 287 P.2d 605 (1955), cert. denied, 350 U.S. 954, 76 S. Ct. 343, 100 L. Ed. 830 (1956).

No constitutional separation-of-powers infirmity in unrestricted period-of-parole sentencing authority. — There is no constitutional separation-of-powers infirmity in the legislature's grant to the judiciary of an unrestricted period-of-parole sentencing authority, any more than there was in its grant to the parole board of the same power to set whatever period of parole the board chose to impose. State v. Freeman, 95 N.M. 127, 619 P.2d 572 (Ct. App. 1980).

Application to youthful offenders. — The basic sentences prescribed by this section are "mandatory" within the meaning of 32A-2-20D NMSA 1978, while the alterations in the basic sentences allowed by 31-18-15.1 NMSA 1978 are discretionary and, therefore, circumscribed by the Children's Code (32A-1-1 NMSA 1978 et seq.); thus, the maximum sentence that may be imposed upon a youthful offender convicted of a non-capital felony is the basic sentence prescribed by this section, plus, if applicable, the enhancements prescribed by 31-18-16 and 31-18-16.1 NMSA 1978. State v. Guerra, 2001-NMCA-031, 130 N.M. 302, 24 P.3d 334, cert. denied, N.M. , P.3d (2001).

Applicability of parole to indeterminate sentencing. — The parole provisions of this act apply to statutes such as 66-3-505 NMSA 1978 which prescribe an indeterminate

period of imprisonment, and trial court did not lack authority to impose the statutory term of parole of one year in addition to discretionary two years confinement for transferring stolen vehicle. State v. Baker, 116 N.M. 526, 864 P.2d 1277 (Ct. App. 1993).

Law reviews. — For comment, "Criminal Procedure - Preventive Detention in New Mexico," see 4 N.M.L. Rev. 247 (1974).

For comment, "Definitive Sentencing in New Mexico: The 1977 Criminal Sentencing Act," see 9 N.M.L. Rev. 131 (1978-79).

For article, "New Mexico Antitrust Law," see 9 N.M.L. Rev. 339 (1979).

For article, "Sufficiency of Provocation for Voluntary Manslaughter in New Mexico: Problems in Theory and Practice," see 12 N.M.L. Rev. 747 (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).

For annual survey of New Mexico law relating to criminal law, see 13 N.M.L. Rev. 323 (1983).

For annual survey of New Mexico law relating to criminal procedure, see 13 N.M.L. Rev. 341 (1983).

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

For annual survey of criminal procedure in New Mexico, see 18 N.M.L. Rev. 345 (1988).

For comment, "An Equal Protection Challenge to First Degree Depraved Mind Murder Under the New Mexico Constitution", see 19 N.M.L. Rev. 511 (1989).

For article, "Unintentional homicides caused by risk-creating conduct: Problems in distinguishing between depraved mind murder, second degree murder, involuntary manslaughter, and noncriminal homicide in New Mexico," 20 N.M.L. Rev. 55 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 825, 828, 944, 949.

Amount: constitutionality of statute providing for penalty or forfeiture as affected by failure to fix maximum amount, 114 A.L.R. 1126.

Felony or misdemeanor: character as felony or misdemeanor of offense for which a fine is provided as affected by provision for imprisonment until fine is satisfied, 127 A.L.R. 1286.

Right to credit on state sentence for time served under sentence of court of separate jurisdiction where state court fails to specify in that regard, 90 A.L.R.3d 408.

Sentencing: permissibility of sentence to a fine only, under statutory provision for imprisonment or imprisonment and fine, 35 A.L.R.4th 192.

Validity, construction, and application of concurrent-sentence doctrine - state cases, 56 A.L.R.5th 385.

II. JUDICIAL DISCRETION.

No entitlement to mitigation. — Mitigation of a sentence depends solely on the discretion of the district court and on no entitlement derived from any qualities of the defendant. State v. Cumpton, 2000-NMCA-033, 129 N.M. 47, 1 P.3d 429, cert. denied, 128 N.M. 688, 997 P.2d 820 (2000).

This section does not prohibit consecutive sentencing but leaves the issue to be resolved under the common law which gives the court the discretion to order that sentences be served concurrently or consecutively. State v. Jensen, 1998-NMCA-034, 124 N.M. 726, 955 P.2d 195.

Trial court is without authority to fix lesser sentence than that provided by statute. State v. Beachum, 82 N.M. 204, 477 P.2d 1019 (Ct. App. 1970) (decided under prior law).

Imposition of sentence bars increased penalty. — After imposition of a valid sentence, a court may not increase the penalty. State v. Crespin, 96 N.M. 640, 633 P.2d 1238 (Ct. App. 1981).

Impermissible to increase sentence because state failed to include "mitigation" language in sentence. — The use of the state's failure to include "mitigation" language in the judgment and sentence in order to later increase the defendant's sentence is impermissible. The proper remedy is to file an amended judgment and sentence containing the appropriate language. State v. Sisneros, 98 N.M. 279, 648 P.2d 318 (Ct. App. 1981), aff'd, 101 N.M. 679, 687 P.2d 736 (1984), overruled on other grounds State v. Saavedra, 108 N.M. 38, 766 P.2d 298 (1988).

Amendment of sentence to include mandatory parole period. — Where defendant's initial sentence lacked a mandatory parole period, it was not an illegal enhancement of the sentence for the court to amend the sentence to include the parole period even after the defendant had been released from the penitentiary having served his basic sentence of imprisonment. State v. Acuna, 103 N.M. 279, 705 P.2d 685 (Ct. App. 1985).

Credit toward parole for time served. — The parole board, not the sentencing court, determines whether credit should be given toward a defendant's mandatory parole

period for any time served. State v. Martinez, 108 N.M. 604, 775 P.2d 1321 (Ct. App. 1989).

Execution of sentence bars imposition of additional punishment. — Once a sentence is executed by the payment of a fine, the trial court lacks authority to impose additional punishment upon defendant. State v. Aragon, 93 N.M. 132, 597 P.2d 317 (1979).

Contradictory judgment renders sentence improper. — Where the trial court deferred a sentence of imprisonment and imposed a sentence of a fine for the same offense, either the deferral or the fine is subject to being stricken as an improper sentence, and the execution of either part of the sentence renders the remaining part void. State v. Aragon, 93 N.M. 132, 597 P.2d 317 (1979).

Judges not authorized to limit eligibility for parole. — The legislature has not authorized judges, in imposing sentence, to limit eligibility for parole, but rather has authorized the state board of probation and parole to grant paroles consistent with eligibility conditions established by the legislature; the judge may express his views concerning a prospective parole but the final decision on parole shall be of the board. State v. Hovey, 87 N.M. 398, 534 P.2d 777 (Ct. App. 1975).

A provision in the trial court's judgment that defendant who pleaded guilty of a fourth-degree felony was not to be considered for parole for a minimum of one year was beyond the court's sentencing authority, was not a valid part of defendant's sentence and did not limit the authority of the state board of probation and parole to consider defendant for parole. State v. Hovey, 87 N.M. 398, 534 P.2d 777 (Ct. App. 1975).

Applicability of parole to indeterminate sentencing. — The parole provisions of this act apply to statutes such as 66-3-505 NMSA 1978 which prescribe an indeterminate period of imprisonment, and trial court did not lack authority to impose the statutory term of parole of one year in addition to discretionary two years confinement for transferring stolen vehicle. State v. Baker, 116 N.M. 526, 864 P.2d 1277 (Ct. App. 1993).

District judge may not alter judgment after issuance of commitment. — In the absence of an adjudication by the supreme court to the contrary, it is the opinion that a district judge is without authority to change, alter or amend a judgment after issuance of commitment to the penitentiary. 1959-60 Op. Att'y Gen. No. 59-122.

Refusal to grant leniency. — The sentencing court's imposition of the basic sentence for a fourth-degree felony and failure to suspend the sentence on the basis that the defendant refused to name his drug source did not constitute an increase, enhancement, or aggravation of the sentence imposed. State v. Sosa, 1996-NMSC-057, 122 N.M. 446, 926 P.2d 299.

III. SPECIFIC SENTENCES.

Failure to instruct jury to find whether crimes resulted in death was harmless error where overwhelming evidence was that defendant participated in armed robbery of victim, victim was beaten in head with metal pipe and suffered fractured skull, died soon thereafter of his injuries, and there was no evidence of another cause of death, nor did defendant dispute that armed robbery resulted in victim's death. State v. McDonald, 2004-NMSC-033, 136 N.M. 417, 99 P.3d 667.

Sentences served concurrently unless trial court or legislature requires consecutive sentences. — The trial court has discretion to require sentences to be served consecutively, but if this is not done, and there is no legislation covering the situation, the sentences are to be served concurrently. State v. Mayberry, 97 N.M. 760, 643 P.2d 629 (Ct. App. 1982).

Proper to enhance sentence under both habitual offender and firearm enhancement provisions. — It is not improper to enhance a sentence under the general habitual offender statute if it has already been enhanced under the firearm enhancement statute. State v. Reaves, 99 N.M. 73, 653 P.2d 904 (Ct. App. 1982).

Multiple enhancements permitted. — In the absence of the type of “dual use” (i.e., when the same fact is used both as an element of the crime and a subsequent enhancement or as the basis for two separate enhancements) discussed in State v. Keith, 102 N.M. 462, 697 P.2d 145 (Ct. App. 1985) and its progeny, the legislature has authorized both enhancements under the basic sentencing statute and on the finding of aggravating circumstances. State v. McDonald, 2003-NMCA-123, 134 N.M. 486, 79 P.3d 830, cert. granted, 2003-NMCERT-001, 134 N.M. 612, 81 P.3d 555.

Enhanced sentences cannot be served concurrently. — An additional one-year sentence for the use of a firearm and an additional one-year sentence as an habitual offender cannot be served concurrently. State v. Mayberry, 97 N.M. 760, 643 P.2d 629 (Ct. App. 1982).

Enhanced sentences invalidated. — Where defendant’s basic sentences imposed under this section were increased under 31-18-15.1 NMSA 1978 based on the district court's findings of aggravating circumstances, and not based on a jury’s findings and under a burden of proof beyond a reasonable doubt, the enhancements are invalidated. State v. Frawley, 2005-NMCA-017, 137 N.M. 185, 106 P.3d 580, cert. denied, 2005-NMCERT-002, 137 N.M. 265, 110 P.3d 73, cert. granted, 2005-NMCERT-002, 137 N.M. 265, 110 P.3d 73.

Proper aggravated battery sentence not made erroneous by superfluous reference to another offense. — Having stated his reason for altering the basic sentence for felony aggravated battery, the altered sentence is not made erroneous by the court's superfluous reference to another offense. State v. Wilson, 97 N.M. 534, 641 P.2d 1081 (Ct. App. 1982).

Imprisonment for noncompliance with parole matters is not a term of imprisonment which can be imposed by sentence, as such imprisonment results only after sentence has been imposed. State v. Gonzales, 96 N.M. 556, 632 P.2d 1194 (Ct. App. 1981).

When multiple parole periods commence. — The New Mexico Criminal Sentencing Act (31-18-12 to 31-18-21 NMSA 1978) requires that in the case of consecutive sentencing, the parole period of each offense commence immediately after the period of imprisonment for that offense, and such parole time will run concurrently with the running of any subsequent basic sentence then being served. Brock v. Sullivan, 105 N.M. 412, 733 P.2d 860 (1987).

The defendant, convicted of a fourth-degree felony and a misdemeanor, was sentenced consecutively to 18 months' imprisonment for the felony and 364 days for the misdemeanor. The court erred in requiring him to serve his parole period after the completion of the entire sentence, 18 months and 364 days, instead of allowing him to begin his parole after the term for the felony had expired and concurrently with the term for the misdemeanor. Gillespie v. State, 107 N.M. 455, 760 P.2d 147 (1988).

Lesser charge against codefendant provides no basis for relief. — The fact that defendant was sentenced to the term authorized by law provides no basis for post-conviction relief where defendant asserts that "codefendants" were sentenced for a fourth-degree felony on the basis of "the same identical act," and that the state had reduced the charge to a fourth-degree felony on one codefendant. State v. Follis, 81 N.M. 690, 472 P.2d 655 (Ct. App. 1970).

Sentence upon two charges arising out of same transaction. — Under former law, which required that the term of imprisonment "shall not exceed the maximum nor be less than the minimum fixed by law," where appellant was sentenced for both rape and assault with intent to commit rape, both charges arose out of the same transaction, were committed at the same time as part of a continuous act, and were inspired by the same criminal intent which was an essential element of each offense, and, accordingly, were susceptible of only one punishment. State v. Blackwell, 76 N.M. 445, 415 P.2d 563 (1966).

Consecutive and concurrent sentences. — Where 1969 sentences were expressly made consecutive to 1967 sentences, and eight sentences in 1969 were also expressly made consecutive, these nine consecutive sentences were validly imposed. Deats v. State, 84 N.M. 405, 503 P.2d 1183 (Ct. App. 1972) (decided under prior law).

Period of parole is to be in addition to basic sentence and is considered a part of the sentence of the convicted person. State v. Johnson, 94 N.M. 636, 614 P.2d 1085 (Ct. App. 1980).

There is no restriction placed upon period of parole except that it be for a reasonable period of time consistent with the needs of the individual. State v. Johnson, 94 N.M. 636, 614 P.2d 1085 (Ct. App. 1980).

Homicide by vehicle. — Even though 66-8-101 NMSA 1978 does not include the language "resulting in the death of a human being," the crime of homicide by vehicle is subject to the six-year sentence authorized by Subsection A(4). State v. Guerro, 1999-NMCA-026, 126 N.M. 699, 974 P.2d 669, cert. denied, 126 N.M. 533, 972 P.2d 352 (1999).

Issuing a worthless check over $25.00. — The offense of issuing a worthless check over $25.00 is a "felony" but could not constitute a "fourth degree felony" because the minimum sentence imposed for issuing worthless checks is less than the stated sentence for fourth degree felonies. State v. Muzio, 105 N.M. 352, 732 P.2d 879 (Ct. App. 1987).

Voluntary manslaughter with firearm enhancement. — Upon conviction of voluntary manslaughter, with firearm enhancement, imposition of a three-year sentence under 30-2-3 NMSA 1978, plus an additional three-year sentence under this section, and an additional one-year firearm enhancement, did not result in multiple punishments for the same offense in violation of double jeopardy. State v. Alvarado, 1997-NMCA-027, 123 N.M. 187, 936 P.2d 869.

31-18-15.1. Alteration of basic sentence; mitigating or aggravating circumstances; procedure.

A. The court shall hold a sentencing hearing to determine if mitigating or aggravating circumstances exist and take whatever evidence or statements it deems will aid it in reaching a decision. The court may alter the basic sentence as prescribed in Section 31-18-15 NMSA 1978 upon a finding by the judge of any mitigating or aggravating circumstances surrounding the offense or concerning the offender. If the court determines to alter the basic sentence, it shall issue a brief statement of reasons for the alteration and incorporate that statement in the record of the case.

B. The judge shall not consider the use of a firearm or prior felony convictions as aggravating circumstances for the purpose of altering the basic sentence.

C. The amount of the alteration of the basic sentence for noncapital felonies shall be determined by the judge. However, in no case shall the alteration exceed one-third of the basic sentence; provided, that when the offender is a serious youthful offender or a youthful offender, the judge may reduce the sentence by more than one-third of the basic sentence.

History: 1978 Comp., § 31-18-15.1, enacted by Laws 1979, ch. 152, § 2; 1993, ch. 77, § 6.

ANNOTATIONS

I. GENERAL CONSIDERATION.

The 1993 amendment, effective July 1, 1993, added the language beginning "provided, that" at the end of Subsection C.

Section constitutional. — This section does not violate the doctrine of separation of powers. State v. Wilson, 97 N.M. 534, 641 P.2d 1081 (Ct. App. 1982).

This section is not unconstitutionally vague. State v. Segotta, 100 N.M. 498, 672 P.2d 1129 (1983).

There is no double jeopardy in considering the circumstances of both the felony and the offender in determining whether the basic sentence should be altered. State v. Wilson, 97 N.M. 534, 641 P.2d 1081 (Ct. App. 1982).

No due process concern where sentence not altered. — Where the trial court did not alter the defendant's basic sentence upward or downward as a result of aggravating circumstances, there is no need to consider whether the defendant's sentencing invokes due process concerns relating to the presentation of those aggravating circumstances. State v. Gardner, 2003-NMCA-107, 134 N.M. 294, 76 P.3d 47, cert. denied, 134 N.M. 179, 74 P.3d. 1071 (2003).

Legislature establishes criminal penalties and determines court's sentencing authority. — The legislature establishes criminal penalties; the trial court's authority to sentence is that which has been provided by law. State v. Wilson, 97 N.M. 534, 641 P.2d 1081 (Ct. App. 1982).

Multiple enhancements permitted. — In the absence of the type of "dual use" (i.e., when the same fact is used both as an element of the crime and a subsequent enhancement or as the basis for two separate enhancements) discussed in State v. Keith, 102 N.M. 462, 697 P.2d 145 (Ct. App. 1985) and its progeny, the legislature has authorized both enhancements under the basic sentencing statute and on the finding of aggravating circumstances. State v. McDonald, 2003-NMCA-123, 134 N.M. 486, 79 P.3d 830, cert. granted, 2003-NMCERT-001, 134 N.M. 612, 81 P.3d 555.

State v. Wilson, 2001-NMCA-032, 130 N.M. 319, 24 P.3d 351 can no longer be considered controlling authority regarding sentencing enhancements of basic sentences. State v. Frawley, 2005-NMCA-017, 137 N.M. 185, 106 P.3d 580, cert. denied, 2005-NMCERT-002, 137 N.M. 265, 110 P.3d 73, cert. granted, 2005-NMCERT-002, 137 N.M. 265, 110 P.3d 73.

Section concerns sentences for felony convictions. — This section concerns only the alteration of the basic sentences for felony convictions. There is no rule or statute in the district or magistrate courts specifically requiring the court to provide defendants in misdemeanor cases the right to speak before sentence is pronounced. State v. Stenz, 109 N.M. 536, 787 P.2d 455 (Ct. App. 1990).

Application to youthful offenders. — The basic sentences prescribed by 31-18-15 NMSA 1978 are "mandatory" within the meaning of 32A-2-20D NMSA 1978, while the alterations in the basic sentences allowed by this section are discretionary and, therefore, circumscribed by the Children's Code (32A-1-1 NMSA 1978 et seq.); thus, the maximum sentence that may be imposed upon a youthful offender convicted of a non-capital felony is the basic sentence, plus, if applicable, the enhancements prescribed by 31-18-16 and 31-18-16.1 NMSA 1978. State v. Guerra, 2001-NMCA-031, 130 N.M. 302, 24 P.3d 334, cert. denied, N.M. , P.3d (2001).

Offender not subject to both felony DWI provision and aggravation statute. — The maximum sentence for felony DWI under 66-8-102(G) NMSA 1978 cannot be enhanced by the aggravation provisions of this section. State v. Coyazo, 2001-NMCA-018, 130 N.M. 428, 25 P.3d 267, cert. denied, 130 N.M. 254, 23 P.3d 929 (2001).

Aggravated battery provision and this section not in conflict. — Section 30-3-5 NMSA 1978 (aggravated battery) and this section do not provide punishment for the same offense, and these sections are not in conflict. State v. Wilson, 97 N.M. 534, 641 P.2d 1081 (Ct. App. 1982).

Relation to 31-18-16 NMSA 1978. — The defendant was charged with the use of a firearm in the murder of a police officer, and the jury found that he did use a firearm in committing that crime. Section 31-18-16 NMSA 1978 provided a separate and distinct basis (use of a firearm) for further altering his basic sentence in addition to the alteration for aggravating circumstances permitted by this section: the language and requirements of each statute were totally independent of the other. State v. Hall, 107 N.M. 17, 751 P.2d 701 (Ct. App. 1987).

Law reviews. — For article, "Sufficiency of Provocation for Voluntary Manslaughter in New Mexico: Problems in Theory and Practice," see 12 N.M.L. Rev. 747 (1982).

For annual survey of New Mexico law relating to criminal procedure, see 13 N.M.L. Rev. 341 (1983).

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).

For article, "Unintentional homicides caused by risk-creating conduct: Problems in distinguishing between depraved mind murder, second degree murder, involuntary manslaughter, and noncriminal homicide in New Mexico," 20 N.M.L. Rev. 55 (1990).

For annual survey of New Mexico Criminal Procedure, see 20 N.M.L. Rev. 285 (1990).

For survey of 1990-91 criminal procedure and evidence, see 22 N.M.L. Rev. 713 (1992).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Power of court to increase severity of unlawful sentence - modern status, 28 A.L.R.4th 147.

Computation of incarceration time under work-release or "hardship" sentences, 28 A.L.R.4th 1265.

Defendant's right to credit for time spent in halfway house, rehabilitation center or similar restrictive environment as a condition of pretrial release, 29 A.L.R.4th 240.

Admissibility of expert testimony as to appropriate punishment for convicted defendant, 47 A.L.R.4th 1069.

What constitutes unusually "vulnerable" victim under sentencing guideline § 3A1.1 permitting increase in offense level, 114 A.L.R. Fed. 355.

Downward departure from United States Sentencing Guidelines (USSG §§ 1A1.1 et seq.) based on extraordinary family circumstances, 145 A.L.R. Fed. 559.

Downward departure from United States Sentencing Guidelines (USSG §§ 1A1.1 et seq) based on vulnerability to abuse in prison, 155 A.L.R. Fed. 327.

Downward departure from United States Sentencing Guidelines (U.S.S.G. § 1A1.1 et seq.) based on aberrant behavior, 164 A.L.R. Fed. 61.

II. PROCEDURAL MATTERS.

Crime circumstances and offender background. — This section provides for broad inquiry into the circumstances of the crime and the background of the offender. Reyes v. Quintana, 853 F.2d 784 (10th Cir. 1988).

Increasing sentence based on consideration of element of offense. — Where defendant noted that physical injury is an element of the crime of second degree criminal sexual penetration under 30-9-11B(2) NMSA 1978, and he contended the trial court's consideration of the physical injury suffered by the victim in increasing the basic sentence pursuant to this section exposed him to double jeopardy, the court's consideration of circumstances surrounding an element of the offense did not expose defendant to double jeopardy. State v. Bernal, 106 N.M. 117, 739 P.2d 986 (Ct. App. 1987).

Notice of state's intent to seek aggravation. — A defendant must be given notice of the state's intention to seek aggravation and of the aggravating circumstances on which it intends to rely, unless the circumstance was itself an element of the underlying offense or a fact used to establish such an element. While the court may rely upon aggravating circumstances not urged by the state, the court should also provide notice to the defendant of those circumstances that were not established at trial under the foregoing exception. Caristo v. Sullivan, 112 N.M. 623, 818 P.2d 401 (1991).

Defendant was not prejudiced by late filing of the state's written notice where it reserved its right to seek aggravation in a plea agreement and filed written notice of its intent to do so in open court during the sentencing hearing one month later, and where defendant was on notice of the aggravating factors because they were among the circumstances forming the basis of the charges on which he was indicted. State v. Tortolito, 1997-NMCA-128, 124 N.M. 368, 950 P.2d 811, cert. denied, 124 N.M. 311, 950 P.2d 284 (1997).

Statement of reasons for alteration. — Appellate review would have been 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, 106 N.M. 117, 739 P.2d 986 (Ct. App. 1987).

The factors the trial judge stated were permissible considerations, and his statement was sufficient under subsection A, where the court, by its statement after evidence and argument, indicated that it considered: (1) testimony of a psychologist that defendant could be a "power" rapist, that defendant's drinking triggered violent and aggressive behavior, and that the court had no guarantee or expectation that his alcohol abuse could be controlled, and (2) evidence that defendant's action was "brutal" in nature, and the court emphasized it had a duty to protect society and that it could not risk defendant being unable to control alcohol abuse. State v. Bernal, 106 N.M. 117, 739 P.2d 986 (Ct. App. 1987).

Court must specify aggravating circumstances. — Case was remanded for a new sentencing hearing on defendant's convictions for kidnaping, criminal sexual penetration, and robbery, where the trial court found the existence of aggravating circumstances, but did not specify what those circumstances were. State v. McGuire, 110 N.M. 304, 795 P.2d 996 (1990).

The preferred practice is for a sentencing judge to note the factors argued in mitigation and indicate whether they are outweighed by any aggravating factors; however, a sentencing judge is not required to make detailed, exhaustive findings or cite every claim or nuance advanced. State v. Watchman, 111 N.M. 727, 809 P.2d 641 (Ct. App. 1991), overruled in part on other grounds, State v. Hosteen, 1996-NMCA-084, 122 N.M. 228, 923 P.2d 595.

Presumption as to motive in imposing sentence. — When a sentencing judge enhances a sentence based upon circumstances factually supported in the record, and those circumstances constitute proper factors to consider under the enhancement statute, this court will not presume improper motive in imposing sentence. Reyes v. Quintana, 853 F.2d 784 (10th Cir. 1988).

Judge's increase of the sentence of a defendant charged with first degree murder, based on defendant's pursuit of the victim, is not tantamount to basing the increase on a finding of deliberate intention to kill, an element of first degree murder, and is not

violative of the double jeopardy clause. Reyes v. Quintana, 853 F.2d 784 (10th Cir. 1988).

Circumstances surrounding each element of offense may be considered. — The elements of an offense do no more than establish the offense. The circumstances surrounding the offense, including the circumstances surrounding each of the elements of the offense, may be considered under this section. State v. Wilson, 97 N.M. 534, 641 P.2d 1081 (Ct. App. 1982).

Sentencing hearing is mandatory. State v. Tomlinson, 98 N.M. 337, 648 P.2d 795 (Ct. App.), aff'd, 98 N.M. 213, 647 P.2d 415 (1982).

Defendant must be given opportunity to speak before sentence pronounced. — This section extends the common-law doctrine of allocutus to noncapital felonies, as enumerated in 31-18-15 NMSA 1978, and the trial judge must give the defendant an opportunity to speak before he pronounces sentence; failure to do so renders the sentence invalid. Tomlinson v. State, 98 N.M. 213, 647 P.2d 415 (1982).

The district judge must give a defendant an opportunity to speak before sentence is rendered. State v. Pothier, 104 N.M. 363, 721 P.2d 1294 (1986).

"Statement" before trial court for the purpose of this section is presentence report. State v. Wilson, 97 N.M. 534, 641 P.2d 1081 (Ct. App. 1982).

Statutory compliance where evidence taken, reasoning articulated and defendant given chance to comment. — Where, without the assistance of counsel, the trial court takes evidence it deems would aid it, articulates its reasoning and gives defense counsel a chance to comment, this section is complied with. State v. Tomlinson, 98 N.M. 337, 648 P.2d 795 (Ct. App.), aff'd, 98 N.M. 213, 647 P.2d 415 (1982).

Defendant's right to allocution was not denied when the trial court refused to grant a continuance for sentencing until her psychologist could testify; the court gave her the opportunity to make a proffer as to the expert's testimony, which she did, and she did not allege that the expert's testimony would be different from that given at trial. State v. Setser, 1997-NMSC-004, 122 N.M. 794, 932 P.2d 484.

Impermissible to increase sentence if state failed to include "mitigation" language in sentence. — The use of the state's failure to include "mitigation" language in the judgment and sentence in order to later increase the defendant's sentence is impermissible. The proper remedy is to file an amended judgment and sentence containing the appropriate language. State v. Sisneros, 98 N.M. 279, 648 P.2d 318 (Ct. App. 1981), aff'd, 101 N.M. 679, 687 P.2d 736 (1984), overruled on other grounds State v. Saavedra, 108 N.M. 38, 766 P.2d 298 (1988).

Proper aggravated battery sentence not made erroneous by superfluous reference to another offense. — Having stated his reason for altering the basic

sentence for felony aggravated battery, the altered sentence is not made erroneous by the court's superfluous reference to another offense. State v. Wilson, 97 N.M. 534, 641 P.2d 1081 (Ct. App. 1982).

Sentences served concurrently unless trial court or legislature requires consecutive sentences. — The trial court has discretion to require sentences to be served consecutively, but if this is not done, and there is no legislation covering the situation, the sentences are to be served concurrently. State v. Mayberry, 97 N.M. 760, 643 P.2d 629 (Ct. App. 1982).

III. AGGRAVATING AND MITIGATING FACTORS.

Enhanced sentences invalidated. — Where defendant's basic sentences imposed under 31-18-15 NMSA 1978 were increased under this section based on the district court's findings of aggravating circumstances, and not based on a jury's findings and under a burden of proof beyond a reasonable doubt, the enhancements are invalidated. State v. Frawley, 2005-NMCA-017, 137 N.M. 185, 106 P.3d 580, cert. denied, 2005-NMCERT-002, 137 N.M. 265, 110 P.3d 73, cert. granted, 2005-NMCERT-002, 137 N.M. 265, 110 P.3d 73.

Use of contemporaneous crime. — A trial court, in considering enhancement, cannot consider the elements of a separate but contemporaneous conviction as an aggravating factor; however, the trial court is free to consider the circumstances surrounding the offense, as long as the court does not rely solely on the elements of the statute necessary to define the crime. State v. Fuentes, 119 N.M. 104, 888 P.2d 986 (Ct. App. 1994).

Use of firearm as permissible aggravating factor. — Because Subsection B prohibits only the basic use of a firearm from being used as an aggravator, there was no error in the trial court's use of other circumstances involving the type of firearm with its potential for use to create generalized fear and indiscriminate harm. State v. Roper, 2001-NMCA-093, 131 N.M. 189, 34 P.3d 133, cert. quashed, 131 N.M. 619, 41 P.3d 345 (2001).

Amount of time spent planning murder. — Use, as an aggravating factor, of the amount of time that defendant spent planning the murder was not inappropriate on the basis that the court was, in substance, punishing him for having engaged in a conspiracy. State v. Castillo-Sanchez, 1999-NMCA-085, 127 N.M. 540, 984 P.2d 787, cert. denied, 127 N.M. 390, 981 P.2d 1208 (1999).

Aggravating factors for fraud. — Although several of the aggravating factors considered by the court in a fraud case were proper, consideration "that the money is apparently gone or has been spent", without more, was a neutral factor and, on remand for resentencing, should not be considered unless the court can spell out why this is an aggravating factor. State v. Whitaker, 110 N.M. 486, 797 P.2d 275 (Ct. App. 1990).

Prolonged wait for victim, accusatory statement and deliberateness properly considered aggravating circumstances. — The defendant's prolonged wait for the victim, her accusatory statement before she shot the victim and her deliberateness may properly be considered as aggravating and may properly add an additional year to the sentence for aggravated battery. State v. Wilson, 97 N.M. 534, 641 P.2d 1081 (Ct. App. 1982).

Consideration of false testimony. — A trial judge at sentencing may consider whether the defendant's trial testimony contained willful and material falsehoods; however, the consideration of false testimony is justified only under circumstances guaranteeing its probative value to sentencing for the underlying offense and is subject to minimum safeguards required by due process. State v. James, 109 N.M. 278, 784 P.2d 1021 (Ct. App. 1989).

Age of child victim as aggravating factor. — Where the defendant was charged with rape of a child, criminal sexual contact of a minor, and contributing to the delinquency of a minor, the court properly considered the minority of the victims as an aggravating circumstance even though it was an essential element of each crime. State v. Cawley, 110 N.M. 705, 799 P.2d 574 (1990).

Lack of remorse arguably is a circumstance "concerning the offender," and, thus, is a permissible factor in sentencing. Swafford v. State, 112 N.M. 3, 810 P.2d 1223 (1991).

Because the court did not express concern about suspected perjury, and because the court considered the defendant's lack of remorse over a long period of time in a variety of situations, the trial court did not err by using lack of remorse as an aggravating circumstance. State v. Wilson, 117 N.M. 11, 868 P.2d 656 (Ct. App. 1993).

Future dangerousness. — Trial court had sufficient basis to aggravate defendant's sentence based on both his lack of remorse and future dangerousness to the victim and an eye witness as based on psychologist's report and testimony describing defendant's conduct. State v. Fike, 2002-NMCA-027, 131 N.M. 676, 41 P.3d 944, cert. denied, 131 N.M. 737, 42 P.3d 842 (2002).

Events surrounding crime and nature of defendant's threat to society. — Findings that the defendant had numerous opportunities to avoid the auto collision and did not put on his brakes at all before striking the victim's car provided an adequate basis for aggravation of the defendant's sentences for vehicular homicide. State v. Landgraf, 1996-NMCA-024, 121 N.M. 445, 913 P.2d 252.

Impermissible aggravating factor. — While the victim's blood relationship to defendant arguably was a circumstance surrounding the offense of criminal sexual penetration, it was error for the court to consider such relationship as an aggravating factor at sentencing on a criminal sexual penetration count after defendant had also been convicted of incest. Swafford v. State, 112 N.M. 3, 810 P.2d 1223 (1991).

This section does not by its own terms permit the trial judge to consider the elements of either the offense for which the defendant was sentenced or a separate, but contemporaneous, conviction as an aggravating factor. Swafford v. State, 112 N.M. 3, 810 P.2d 1223 (1991).

Harm to wife to force alibi testimony. — There is no direct or circumstantial evidence that would support consideration of harm to the defendant's wife as an aggravating circumstance. The evidence in the record required speculation about the defendant's role in inducing the alibi and the exculpatory letters, and the evidence involved conduct not directly related to the defendant's dangerousness or candidacy for rehabilitation. State v. Wilson, 117 N.M. 11, 868 P.2d 656 (Ct. App. 1993).

Defendant's cooperation with authorities. — A sentencing judge may take into account as a mitigating factor a defendant's voluntary cooperation with authorities. However, a sentence may not be increased based upon a defendant's failure to cooperate. State v. Callaway, 109 N.M. 564, 787 P.2d 1247 (Ct. App. 1989), rev'd on other grounds, 109 N.M. 416, 785 P.2d 1035, cert. denied, 496 U.S. 912, 110 S. Ct. 2603, 110 L. Ed. 2d 283 (1990).

Trial court's offer to cut defendant's sentence in half if he provided information pertaining to another individual involved in the crime was a permissible extension of an offer of leniency to the defendant. State v. Callaway, 109 N.M. 564, 787 P.2d 1247 (Ct. App. 1989), rev'd on other grounds, 109 N.M. 416, 785 P.2d 1035, cert. denied, 496 U.S. 912, 110 S. Ct. 2603, 110 L. Ed. 2d 283 (1990).

31-18-15.2. Definitions.

As used in the Criminal Sentencing Act [Chapter 31, Article 18 NMSA 1978]:

A. "serious youthful offender" means an individual fifteen to eighteen years of age who is charged with and indicted or bound over for trial for first degree murder; and

B. "youthful offender" means a delinquent child subject to adult or juvenile sanctions who is:

(1) fourteen to eighteen years of age at the time of the offense and who is adjudicated for at least one of the following offenses:

(a) second degree murder, as provided in Section 30-2-1 NMSA 1978;

(b) assault with intent to commit a violent felony, as provided in Section 30-3-3 NMSA 1978;

(c) kidnapping, as provided in Section 30-4-1 NMSA 1978;

(d) aggravated battery, as provided in Subsection C of Section 30-3-5 NMSA 1978;

(e) aggravated battery upon a peace officer, as provided in Subsection C of Section 30-22-25 NMSA 1978;

(f) shooting at a dwelling or occupied building or shooting at or from a motor vehicle, as provided in Section 30-3-8 NMSA 1978;

(g) dangerous use of explosives, as provided in Section 30-7-5 NMSA 1978;

(h) criminal sexual penetration, as provided in Section 30-9-11 NMSA 1978;

(i) robbery, as provided in Section 30-16-2 NMSA 1978;

(j) aggravated burglary, as provided in Section 30-16-4 NMSA 1978;

(k) aggravated arson, as provided in Section 30-17-6 NMSA 1978; or

(l) abuse of a child that results in great bodily harm or death to the child, as provided in Section 30-6-1 NMSA 1978;

(2) fourteen to eighteen years of age at the time of the offense and adjudicated for any felony offense and who has had three prior, separate felony adjudications within a three-year time period immediately preceding the instant offense. The felony adjudications relied upon as prior adjudications shall not have arisen out of the same transaction or occurrence or series of events related in time and location. Successful completion of consent decrees is not considered a prior adjudication for the purposes of this paragraph; or

(3) fourteen years of age and adjudicated for first degree murder, as provided in Section 30-2-1 NMSA 1978.

History: Laws 1993, ch. 77, § 1; 1994, ch. 18, § 2; 1995, ch. 205, § 1; 1996, ch. 85, § 1.

ANNOTATIONS

The 1994 amendment, effective July 1, 1994, inserted Subparagraph B(1)(e), and redesignated former Subparagraphs B(1)(e) to B(1)(i) as Subparagraphs B(1)(f) to B(1)(j).

The 1995 amendment, effective June 16, 1995, inserted "Subsection C of" in Subdivision B(1)(d), and added Subdivision B(1)(e) and redesignated the remaining subdivisions accordingly.

The 1996 amendment, effective July 1, 1996, substituted "fifteen to eighteen" for "sixteen or seventeen" in Subsection A; substituted "fourteen" for "fifteen" at the beginning of Paragraphs B(1), (2) and (3); deleted "which results in great bodily harm to another person" in Subparagraph B(1)(f) preceding "as provided"; added Subparagraph b(1)(l); and substituted "three-year" for "two-year" in Paragraph B(2).

31-18-15.3. Serious youthful offender; disposition.

A. An alleged serious youthful offender may be detained in any of the following places, prior to arraignment in metropolitan, magistrate or district court:

(1) a detention facility for delinquent children, licensed by the children, youth and families department;

(2) any other suitable place, other than a facility for the care and rehabilitation of delinquent children, that meets standards for detention facilities, as set forth in the Children's Code and federal law; or

(3) a county jail, if a facility described in Paragraph (1) or (2) of this subsection is not appropriate.

B. When an alleged serious youthful offender is detained in a juvenile detention facility prior to trial, the time spent in the juvenile detention facility shall count towards completion of any sentence imposed.

C. At arraignment, when a metropolitan or district court judge or a magistrate determines that an alleged serious youthful offender should remain in custody, the alleged serious youthful offender may be detained in an adult or juvenile detention facility, subject to the facility's accreditation and the provisions of applicable federal law.

D. When an alleged serious youthful offender is found guilty of first degree murder, the court shall sentence the offender pursuant to the provisions of the Criminal Sentencing Act [Chapter 31, Article 18 NMSA 1978]. The court may sentence the offender to less than, but not exceeding, the mandatory term for an adult. The determination of guilt becomes a conviction for purposes of the Criminal Sentencing Act.

E. Prior to the sentencing of an alleged serious youthful offender who is convicted of first degree murder, adult probation services shall prepare a presentence report and submit the report to the court and the parties five days prior to the sentencing hearing.

F. When the alleged serious youthful offender is convicted of a lesser offense than first degree murder, the court shall provide for disposition of the offender pursuant to the provisions of Section 32-2-19 or 32-2-20 NMSA 1978 [32A-2-19 or 32A-2-20 NMSA 1978]. When an offender is adjudicated as a delinquent child, the conviction shall not be used as a conviction for purposes of the Criminal Sentencing Act.

History: Laws 1993, ch. 77, § 3.

ANNOTATIONS

Compiler's notes. — Sections 32-2-19 and 32-2-20 NMSA 1978, referred to in the first sentence in Subsection F, were recompiled as 32A-2-19 and 32A-2-20 NMSA 1978 in 1993. See Article 2 of Chapter 32A NMSA 1978 and notes thereto.

Amenability to treatment. — Subsection F of this section gives the district court the discretion to impose an adult sentence as indicated in 32A-2-20 NMSA 1978 based on a finding that a child is not amenable to treatment. If the district court finds the child is amenable to treatment, then the district court should impose a juvenile disposition in accordance with 32A-2-19 NMSA 1978. State v. Muniz, 2003-NMSC-021, 134 N.M. 152, 74 P.3d 86.

Children initially charged with first degree murder, but found guilty of lesser crimes, may be sentenced as adults under Subsection F of this section if the district court finds that circumstances warrant such a sentence, even when those children are found guilty of crimes that would otherwise warrant only a juvenile disposition. State v. Muniz, 2003-NMSC-021, 134 N.M. 152, 74 P.3d 86.

31-18-16. Use of firearm; alteration of basic sentence; suspension and deferral limited.

A. When a separate finding of fact by the court or jury shows that a firearm was used in the commission of a noncapital felony, the basic sentence of imprisonment prescribed for the offense in Section 31-18-15 NMSA 1978 shall be increased by one year, and the sentence imposed by this subsection shall be the first year served and shall not be suspended or deferred; provided, that when the offender is a serious youthful offender or a youthful offender, the sentence imposed by this subsection may be increased by one year.

B. For a second or subsequent noncapital felony in which a firearm is used, the basic sentence of imprisonment prescribed in Section 31-18-15 NMSA 1978 shall be increased by three years, and the sentence imposed by this subsection shall be the first three years served and shall not be suspended or deferred; provided, that when the offender is a serious youthful offender or a youthful offender, the sentence imposed by this subsection may be increased by three years.

C. If the case is tried before a jury and if a prima facie case has been established showing that a firearm was used in the commission of the offense, the court shall submit the issue to the jury by special interrogatory. If the case is tried by the court and if a prima facie case has been established showing that a firearm was used in the commission of the offense, the court shall decide the issue and shall make a separate finding of fact thereon.

History: 1953 Comp., § 40A-29-29, enacted by Laws 1977, ch. 216, § 5; 1979, ch. 152, § 3; 1993, ch. 77, § 7.

ANNOTATIONS

I. GENERAL CONSIDERATION.

The 1993 amendment, effective July 1, 1993, added the provisos at the end of Subsections A and B.

Intent of statute is to deter the use of firearms in committing felonies. State v. Trujillo, 91 N.M. 641, 578 P.2d 342 (Ct. App.), cert. denied, 91 N.M. 751, 580 P.2d 972 (1978) (decided under former 31-18-4 NMSA 1978).

Section directed at sentencing only. — This section is, by its own terms and in actual application, directed at sentencing only. Cordova v. Romero, 614 F.2d 1267 (10th Cir.), cert. denied, 449 U.S. 851, 101 S. Ct. 142, 66 L. Ed. 2d 63 (1980) (decided under former 31-18-4 NMSA 1978).

This section does not create new class of crimes; rather, it provides for additional consequences for felonies committed by use of a firearm. Cordova v. Romero, 614 F.2d 1267 (10th Cir.), cert. denied, 449 U.S. 851, 101 S. Ct. 142, 66 L. Ed. 2d 63 (1980) (decided under former 31-18-4 NMSA 1978).

There is no repugnancy between 30-16-2 NMSA 1978 and this section. — Subsection B of this section does not conflict with 30-16-2 NMSA 1978 when it provides that the first year of the statutory sentence shall not be suspended. The two statutes are in harmony; each expresses a separate legislative intent. State v. Wilkins, 88 N.M. 116, 537 P.2d 1012 (Ct. App.), cert. denied, 88 N.M. 319, 540 P.2d 249 (1975).

Combined use of sections creates no new crime. — No new crime is created by the combined use of 30-16-2 NMSA 1978 and this section in an indictment. Section 30-16-2 NMSA 1978 defines robbery with a deadly weapon, the crime of which defendant was convicted. This section specifies various consequences for the defendant if a finding is made that the deadly weapon used in the robbery was, in fact, a firearm, and serves no other purpose in the indictment than to alert the defendant to the possible sentencing consequences following a conviction under 30-16-2 NMSA 1978. State v. Sanchez, 87 N.M. 140, 530 P.2d 404 (Ct. App. 1974).

Section mandatory. — The enhancement provisions of this section are mandatory. State v. Kendall, 90 N.M. 236, 561 P.2d 935 (Ct. App. 1977).

Sentence enhancement provisions for use of firearm mandatory. — State v. Pendley, 92 N.M. 658, 593 P.2d 755 (Ct. App. 1979).

The provisions of this section were mandatory in a robbery case where a special finding was made by the jury that a firearm was used. State v. Wilkins, 88 N.M. 116, 537 P.2d 1012 (Ct. App.), cert. denied, 88 N.M. 319, 540 P.2d 249 (1975).

Application not prohibited by double jeopardy provisions. — Neither the rules of statutory construction nor the federal and state constitutional provisions against double jeopardy prohibit the application of the firearm enhancement statute to a person convicted of aggravated battery with a deadly weapon when the weapon used was a firearm. State v. Gonzales, 95 N.M. 636, 624 P.2d 1033 (Ct. App. 1981).

No double jeopardy in aggravated assault application. — Double jeopardy did not prohibit the trial court from enhancing defendant's sentence for aggravated assault with a deadly weapon (30-3-2A NMSA 1978), under this section, since each section contains an element or elements not included in the other and the phrase "a noncapital felony" means "any noncapital felony". State v. Charlton, 115 N.M. 35, 846 P.2d 341 (Ct. App. 1992).

Judgment suspending firearm enhancement provision of original sentence void, and later resentencing constitutional. — Since a judgment purporting to suspend a firearm enhancement provision of an original sentence is void, where the defendant is not sentenced to serve any time of official confinement, he cannot be said to have served any portion thereof and he cannot be held to have accrued a right to a credit against the enhanced portion of his sentence as later imposed. Double jeopardy does not attach, and a resentencing for the mandatory enhancement provision of this section must stand. State v. Aguilar, 98 N.M. 510, 650 P.2d 32 (Ct. App. 1982).

Relation to 31-18-15.1 NMSA 1978. — The defendant was charged with the use of a firearm in the murder of a police officer, and the jury found that he did use a firearm in committing that crime. This section provided a separate and distinct basis (use of a firearm) for further altering his basic sentence in addition to the alteration for aggravating circumstances permitted by 31-18-15.1 NMSA 1978: the language and requirements of each statute were totally independent of the other. State v. Hall, 107 N.M. 17, 751 P.2d 701 (Ct. App. 1987).

It is solely within province of legislature to establish penalties for criminal behavior. State v. Lack, 98 N.M. 500, 650 P.2d 22 (Ct. App. 1982).

Law reviews. — For survey, "Evidence: Prior Crimes and Prior Bad Acts Evidence," see 6 N.M.L. Rev. 405 (1976).

For comment, "Definitive Sentencing in New Mexico: The 1977 Criminal Sentencing Act," see 9 N.M.L. Rev. 131 (1978-79).

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 criminal law, see 13 N.M.L. Rev. 323 (1983).

For annual survey of New Mexico law relating to criminal procedure, see 13 N.M.L. Rev. 341 (1983).

For annual survey of New Mexico Criminal Procedure, see 20 N.M.L. Rev. 285 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law § 926.

Validity of statutes prohibiting or restricting parole, probation, or suspension of sentence in cases of violent crimes, 100 A.L.R.3d 431.

Propriety of using single prior felony conviction as basis for offense of possessing weapon by convicted felon and to enhance sentence, 37 A.L.R.4th 1168.

II. PROCEDURAL MATTERS.

Punishment to be applied for each felony committed. — If this section punishes for "use" of a firearm in committing a felony, the punishment is to be applied for each felony committed by using a firearm. State v. Kendall, 90 N.M. 236, 561 P.2d 935 (Ct. App. 1977).

Application to some, not all, of crimes charged. — The trial court did not err in applying this section to two of the crimes which the defendant committed, rather than applying one firearm enhancement sentence to his entire series of crimes. State v. Espinosa, 107 N.M. 293, 756 P.2d 573 (1988).

Notification to defendant. — Under this section, the prosecution does not have to formally notify a defendant in a charging instrument of either firearm use or that the state may seek a firearm enhanced sentence. State v. Badoni, 2003-NMCA-009, 133 N.M. 257, 62 P.3d 348, cert. denied, 133 N.M. 126, 61 P.3d 835 (2003).

Section requires separate finding of fact that firearm was used. And where the jury did not make a separate finding of fact as to use of a firearm, the enhanced sentence under this section was not proper. State v. Duran, 91 N.M. 35, 570 P.2d 39 (Ct. App.), cert. denied, 91 N.M. 3, 569 P.2d 413 (1977), cert. denied, 435 U.S. 972, 98 S. Ct. 1615, 56 L. Ed. 2d 65 (1978).

Objection to absence of separate finding not waived. — Defendant did not waive his objection to the absence of a separate finding of fact by failing to request that the special interrogatory be submitted to the jury, as it was not defendant's obligation to see that his sentence was enhanced. State v. Duran, 91 N.M. 35, 570 P.2d 39 (Ct. App.), cert. denied, 91 N.M. 3, 569 P.2d 413 (1977), cert. denied, 435 U.S. 972, 98 S. Ct. 1615, 56 L. Ed. 2d 65 (1978).

Use of firearm must be proved beyond reasonable doubt. — Proof beyond a reasonable doubt is the traditional burden which our system of criminal justice deems essential, and the due process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged; this standard applies not only to factual determinations of guilt, but also to the factual determination that a firearm was used, because that fact is a predicate for enhancing defendant's sentence. State v. Kendall, 90 N.M. 236, 561 P.2d 935 (Ct. App. 1977).

Failure to instruct as to burden of proof. — Where the burden of proof instruction, by its wording, was applied to a determination of guilt, no reference was made to use of a firearm, and after the guilty verdicts were returned, instructions were given submitting the use of a firearm issue to the jury without a burden of proof instruction, the jury was not instructed on the burden of proof concerning use of a firearm; however, defendant did not complain of the absence of an instruction, he acquiesced in submitting only use instructions after a guilty verdict was returned, the evidence was almost uncontradicted that a firearm was used as to each count, and, accordingly, there was no violation of federal due process because the jury was not instructed that the firearm use must be proved beyond a reasonable doubt. State v. Kendall, 90 N.M. 236, 561 P.2d 935 (Ct. App. 1977).

Prior conviction required. — For there to be a second or subsequent felony within the terms of the statute, there must have been a conviction preceding the commission of the offense to which application of the statute is sought. State v. Garcia, 91 N.M. 664, 579 P.2d 790 (1978) (decided under former 31-18-4 NMSA).

Proper to enhance sentences under both habitual offender and firearm enhancement provisions. — It is not improper to enhance a sentence under the general habitual offender statute if it has already been enhanced under the firearm enhancement statute. State v. Reaves, 99 N.M. 73, 653 P.2d 904 (Ct. App. 1982).

Failure to enhance felony sentences as required. — Where the defendant was convicted of three counts, the trial court failed to follow the habitual offender statute when it enhanced defendant's total sentence by one year, because the habitual offender statute required the court to enhance each of defendant's current felony sentences by one year. State v. Bachicha, 111 N.M. 601, 808 P.2d 51 (Ct. App. 1991).

III. SENTENCES.

Sentences served concurrently unless trial court or legislature requires consecutive sentences. — The trial court has discretion to require sentences to be served consecutively, but if this is not done, and there is no legislation covering the situation, the sentences are to be served concurrently. State v. Mayberry, 97 N.M. 760, 643 P.2d 629 (Ct. App. 1982).

Section does not negate enhanced sentence for accessory. — This section is worded in terms of a finding of fact "that a firearm was used in the commission" of the crime, but the statutory wording does not limit the enhanced sentence to situations where the defendant was the user of the firearm. Thus, the statute does not negate an enhanced sentence for an accessory when a firearm was used by the principal. State v. Roque, 91 N.M. 7, 569 P.2d 417 (Ct. App.), cert. denied, 91 N.M. 4, 569 P.2d 414 (1977); State v. Burdex, 100 N.M. 197, 668 P.2d 313 (Ct. App. 1983).

Concurrent or consecutive sentences. — The trial court has authority to order that a sentence be served concurrently or consecutively, and this section made no change in this authority. State v. Kendall, 90 N.M. 236, 561 P.2d 935 (Ct. App. 1977) (decided under former law).

The trial court has the discretion to order that sentences for different offenses be served concurrently or consecutively. State v. Lopez, 99 N.M. 612, 661 P.2d 890 (Ct. App. 1983).

New consecutive sentence following remand allowable where less than maximum possible penalty. — A new sentence imposed by the trial court following remand does not constitute a punishment for the defendant having previously exercised his rights to appeal where the term of incarceration ordered upon remand is less than the maximum penalty which can be imposed, despite the fact part of the new sentence is to be served consecutively, rather than concurrently. State v. Lopez, 99 N.M. 612, 661 P.2d 890 (Ct. App. 1983).

Sentences cannot be served concurrently. — An additional one-year sentence for the use of a firearm and an additional one-year sentence as an habitual offender cannot be served concurrently. State v. Mayberry, 97 N.M. 760, 643 P.2d 629 (Ct. App. 1982).

IV. SPECIFIC CASES.

"Use" of gun properly included within scope of statute. — The display of a gun in a menacing manner as a means of accomplishing a robbery or the employment of the gun to strike or "pistol whip" the victim is certainly "use" of the gun in the commonly accepted definition of that term. Because either such "use," i.e., the menacing display of or striking the victim with the gun, carries the ever-dangerous potential of a discharge of firearm, both such "uses" are properly included within the scope of the statute. State v. Trujillo, 91 N.M. 641, 578 P.2d 342 (Ct. App.), cert. denied, 91 N.M. 751, 580 P.2d 972 (1978) (decided under former 31-18-4 NMSA 1978).

Shotgun used as club. — Defendant "used" the firearm within the meaning of the statute when he used the shotgun as a club in committing aggravated battery. State v. Trujillo, 91 N.M. 641, 578 P.2d 342 (Ct. App.), cert. denied, 91 N.M. 751, 580 P.2d 972 (1978) (decided under former 31-18-4 NMSA 1978).

Possession of firearm not "use" of firearm. — Possession of a firearm during the commission of a felony does not constitute "use" of a firearm under this section since the defendant never pulled the firearm or in any way threatened to use it. State v. Chouinard, 93 N.M. 634, 603 P.2d 744 (Ct. App. 1979).

Money removed from register, under armed coercion, "carried away". — The instant a cashier, under coercion, removes money from a register, the element of "carrying away" the money is satisfied for purposes of armed robbery. State v. Williams, 97 N.M. 634, 642 P.2d 1093, cert. denied, 459 U.S. 845, 103 S. Ct. 101, 74 L. Ed. 2d 91 (1982).

No enhancement for charge of negligent use of firearm. — Under the facts of this case, the state was required to prove that the defendant negligently used a firearm to commit a noncapital felony and this conduct resulted in the death of a human being. Use of a firearm is thus the same conduct required to enhance defendant's sentence under Subsection A. Because the state would not be required to prove any additional facts in order to have the defendant's sentence enhanced, the firearm enhancement statute is subsumed within the offense of involuntary manslaughter by negligent use of a firearm. State v. Franklin, 116 N.M. 565, 865 P.2d 1209 (Ct. App. 1993).

Conspiracy not susceptible to firearm enforcement. — Since conspiracy is an initiatory crime which involves no physical act other than communication, it is not conceivable how a firearm could be used in the commission of that offense. Accordingly, the crime of conspiracy is not susceptible to firearm enhancement under this section. State v. Padilla, 118 N.M. 189, 879 P.2d 1208 (Ct. App. 1994).

31-18-16.1. Repealed.

ANNOTATIONS

Repeals. — Laws 2003, ch. 384, § 6 repeals 31-18-16.1 NMSA 1978, effective July 1, 2003, relating to noncapital felonies against persons sixty years of age or older or handicapped persons; alteration of basic sentence; suspension and deferral limited. For provisions of former section, see 2000 Replacement Pamphlet.

31-18-17. Habitual offenders; alteration of basic sentence.

A. A person convicted of a noncapital felony in this state whether within the Criminal Code [30-1-1 NMSA 1978] or the Controlled Substances Act [30-31-1 NMSA 1978] or not who has incurred one prior felony conviction that was part of a separate transaction or occurrence or conditional discharge under Section 31-20-13 NMSA 1978 is a habitual offender and his basic sentence shall be increased by one year. The sentence imposed pursuant to this subsection shall not be suspended or deferred, unless the court makes a specific finding that the prior felony conviction and the instant felony conviction are both for nonviolent felony offenses and that justice will not be served by imposing a mandatory sentence of imprisonment and that there are substantial and compelling

reasons, stated on the record, for departing from the sentence imposed pursuant to this subsection.

B. A person convicted of a noncapital felony in this state whether within the Criminal Code or the Controlled Substances Act or not who has incurred two prior felony convictions that were parts of separate transactions or occurrences or conditional discharge under Section 31-20-13 NMSA 1978 is a habitual offender and his basic sentence shall be increased by four years. The sentence imposed by this subsection shall not be suspended or deferred.

C. A person convicted of a noncapital felony in this state whether within the Criminal Code or the Controlled Substances Act or not who has incurred three or more prior felony convictions that were parts of separate transactions or occurrences or conditional discharge under Section 31-20-13 NMSA 1978 is a habitual offender and his basic sentence shall be increased by eight years. The sentence imposed by this subsection shall not be suspended or deferred.

D. As used in this section, "prior felony conviction" means:

(1) a conviction, when less than ten years have passed prior to the instant felony conviction since the person completed serving his sentence or period of probation or parole for the prior felony, whichever is later, for a prior felony committed within New Mexico whether within the Criminal Code or not, but not including a conviction for a felony pursuant to the provisions of Section 66-8-102 NMSA 1978; or

(2) a prior felony, when less than ten years have passed prior to the instant felony conviction since the person completed serving his sentence or period of probation or parole for the prior felony, whichever is later, for which the person was convicted other than an offense triable by court martial if:

(a) the conviction was rendered by a court of another state, the United States, a territory of the United States or the commonwealth of Puerto Rico;

(b) the offense was punishable, at the time of conviction, by death or a maximum term of imprisonment of more than one year; or

(c) the offense would have been classified as a felony in this state at the time of conviction.

E. As used in this section, "nonviolent felony offense" means application of force, threatened use of force or a deadly weapon was not used by the offender in the commission of the offense.

History: 1953 Comp., § 40A-29-30, enacted by Laws 1977, ch. 216, § 6; 1979, ch. 158, § 1; 1983, ch. 127, § 1; 1993, ch. 77, § 9; 1993, ch. 283, § 1; 2002, ch. 7, § 1; 2003, ch. 90, § 1.

ANNOTATIONS

I. GENERAL CONSIDERATION.

Cross references. — For information, see 31-18-19 NMSA 1978.

For procedure and sentencing, see 31-18-20 NMSA 1978.

For time period within which habitual criminal offender proceeding must be commenced, see Rule 5-604 NMRA.

1993 amendments. — Laws 1993, ch. 77, § 9, effective July 1, 1993, adding provisos at the end of Subsections B through D relating to youthful offenders, was approved on March 19, 1993. However, Laws 1993, ch. 283, § 1, effective June 18, 1993, inserting "or conditional discharge under Section 31-20-7 NMSA 1978" in Subsections B through D, was approved on April 7, 1993. The section is set out as amended by Laws 1993, ch. 283, § 1. See 12-1-8 NMSA 1978. Section 31-20-7 has been compiled as 31-20-13 to avoid confusion with the repealed 31-20-7 NMSA 1978.

The 2002 amendment, effective July 1, 2002, deleted former Subsection A defining "prior felony conviction" and redesignated the following subsections accordingly; updated the internal references in Subsections A, B, and C; added the last sentence in present Subsection A; and added Subsections D and E.

The 2003 amendment, effective March 28, 2003, inserted "but not including a conviction for a felony pursuant to the provisions of Section 66-8-102 NMSA 1978" near the end of Paragraph D(1).

Constitutional provision inapplicable. — Because the Habitual Offender Act was not repealed, Article IV, Section 33, of the New Mexico Constitution does not apply to the 2002 amendment to this section or to the interpretation of the amendment through 12-2A-16 NMSA 1978. State v. Shay, 2004-NMCA-077, 136 N.M. 8, 94 P.3d 8, cert. granted, 2004-NMCERT-006, 135 N.M. 788, 93 P.3d 1292.

Application of 2002 amendment. — The date a sentence is imposed is the appropriate date to determine whether the 2002 amendment to this section applies to a given case. State v. Shay, 2004-NMCA-077, 136 N.M. 8, 94 P.3d 8, cert. granted, 2004-NMCERT-006, 135 N.M. 788, 93 P.3d 1292.

The 2002 amendment to this section does not apply to defendant’s sentence for a probation violation when the original sentence was imposed prior to the amendment’s effective date under a plea agreement. State v. Ortega, 2004-NMCA-080, 135 N.M. 737, 93 P.3d 758, cert. denied, 2004-NMCERT-006, 135 N.M. 787, 93 P.3d 1292.

Where the district court accepted a plea agreement and entered sentence prior to July 1, 2002, and the sentence included a suspended sentence and probation, but after a

probation violation, the district court ordered the basic sentence to be served as well as a habitual offender enhancement for a prior felony conviction that would not have been included for enhancement purposes under the 2002 amendment, because the district court had imposed sentence prior to July 1, 2002, based on the plea agreement, it properly applied this section. State v. Ortega, 2004-NMCA-080, 135 N.M. 737, 93 P.3d 758, cert. denied, 2004-NMCERT-006, 135 N.M. 787, 93 P.3d 1292.

Effect of 2002 amendment constitutionally precluded. — Article IV, Section 34 of the New Mexico Constitution precludes the effect of the 2002 amendment to the habitual offender statute, when a supplemental criminal information is filed before, and defendant is sentenced after, the July 1, 2002 effective date of the amendment. State v. Stanford, 2004-NMCA-071, 136 N.M. 14, 94 P.3d 14.

It is solely within province of legislature to establish penalties for criminal behavior. State v. Lack, 98 N.M. 500, 650 P.2d 22 (Ct. App. 1982).

Application to Controlled Substances Act. — In 1983 the habitual offender statute was amended to include persons convicted of narcotics offenses, overruling that part of State v. Lujan, 76 N.M. 111, 412 P.2d 405 (1966), which held that the Habitual Offender Act did not apply to persons convicted under the Controlled Substances Act (30-31-1 NMSA 1978 et seq.). Minner v. Kerby, 30 F.3d 1311 (10th Cir. 1994).

Although the habitual offender statute applies to a prior felony conviction under the Controlled Substances Act, 30-31-1 to -41 NMSA 1978, it does not apply if there is a conditional discharge under 30-31-28 NMSA 1978. State v. Fairres, 2003-NMCA-152, 134 N.M. 668, 81 P.3d 611, cert. denied, 2003-NMCERT-003, 135 N.M. 51, 84 P.3d 668.

Intent of habitual criminal provisions. — Object of habitual offender statute is to inhibit repetition of criminal acts by individuals against the peace and dignity of the state. It is designed to protect society against habitual offenders. State v. Baldonado, 79 N.M. 175, 441 P.2d 215 (Ct. App. 1968).

It is inherent in the habitual criminal statutes that, after punishment is imposed for the commission of a crime, the increased penalty is held in terrorem over the criminal for the purpose of effecting his reformation and preventing further and subsequent offenses by him, so that for the purpose of this section, each felony must have been committed after conviction for a preceding felony. State v. Montoya, 92 N.M. 734, 594 P.2d 1190 (Ct. App. 1979), aff'd, 94 N.M. 704, 616 P.2d 417 (1980); State v. Linam, 93 N.M. 307, 600 P.2d 253 (1979); State v. Rogers, 93 N.M. 519, 602 P.2d 616 (1979).

The intent of habitual offender laws is to provide an increased penalty in order to deter commission of a subsequent offense. It is the opportunity to reform under threat of a more severe penalty which serves to deter. State v. Linam, 93 N.M. 307, 600 P.2d 253, cert. denied, 444 U.S. 846, 100 S. Ct. 91, 62 L. Ed. 2d 59 (1979).

This section is not an ex post facto law since it is procedural in nature. It does not punish criminals for earlier offenses, but merely increases the penalty for the repetition of criminal conduct. State v. Oglesby, 96 N.M. 352, 630 P.2d 304 (Ct. App. 1981).

Enhanced punishment not prohibited as double jeopardy. — Since defendant's first conviction, standing alone, was not the cause of the enhanced sentence of which he complained, defendant's enhanced punishment was not prohibited as double jeopardy. State v. Gonzales, 84 N.M. 275, 502 P.2d 300 (Ct. App.), cert. denied, 84 N.M. 271, 502 P.2d 296 (1972).

The contention that the habitual offender statute violates double jeopardy is without merit. State v. Olivares, 95 N.M. 222, 620 P.2d 380 (Ct. App. 1980).

Because the habitual offender proceeding is a sentencing procedure and not a trial of an offense, there is no double jeopardy. State v. James, 94 N.M. 604, 614 P.2d 16 (1980).

Since the law in New Mexico is that an habitual proceeding only involves sentencing and not the trial of any crime, double jeopardy does not attach to proceedings under this section. State v. Garcia, 95 N.M. 246, 620 P.2d 1271 (1980).

The imposition of an enhanced sentence after defendant has already begun serving his sentence on the underlying felony conviction is not violative of constitutional double jeopardy provisions. State v. Oglesby, 96 N.M. 352, 630 P.2d 304 (Ct. App. 1981).

Habitual offender enhancement of an escape conviction does not constitute double jeopardy. State v. Najar, 118 N.M. 230, 880 P.2d 327 (Ct. App. 1994).

New Mexico's habitual offender statute does not multiply punishments for a prior crime, but simply increases the punishment for a new crime. Because sentences enhanced under habitual offender statutes are not punishment for the prior offense, they do not normally raise double jeopardy issues. Yparrea v. Dorsey, 64 F.3d 577 (10th Cir. 1995).

When a defendant with two prior felonies was convicted of a third felony and, under a plea agreement, was sentenced as a second offender subject to resentencing as a third offender if he violated the terms of his probation, the enhancement of his sentence as a third offender when he was resentenced following his violation of probation did not violate double jeopardy. State v. Freed, 1996-NMCA-044, 121 N.M. 562, 915 P.2d 325.

Defendant, a three-time felony offender, had no reasonable expectation of finality in a three-year probationary sentence for a larceny conviction; therefore, it was not a violation of his double jeopardy rights for the state to seek a subsequent conviction of defendant, during the probationary period, under the habitual offender laws. State v. Villalobos, 1998-NMSC-036, 126 N.M. 255, 968 P.2d 766.

Delay in filing charge not, in itself, prejudicial. — A due process issue based on a delay in filing a charge involves prejudice that deprives the defendant of a fair trial on the delayed charge. The delay, in itself, does not establish prejudice. State v. Mayberry, 97 N.M. 760, 643 P.2d 629 (Ct. App. 1982).

Supplemental habitual offender charge not dismissed where original sentence not completely served. — Where, at the time a supplemental information is filed, the defendant has not completed serving his original sentence, the filing delay, in relation to time served, does not require a dismissal of an habitual offender charge. State v. Mayberry, 97 N.M. 760, 643 P.2d 629 (Ct. App. 1982).

No dismissal for delay even where prosecutor originally knew of prior conviction. — Where, before the defendant is convicted for a felony, the prosecutor knows of a prior felony conviction, this knowledge does not require the dismissal of a latter habitual offender charge because of a filing delay. State v. Mayberry, 97 N.M. 760, 643 P.2d 629 (Ct. App. 1982).

Delay in enhancement sentencing constitutional. — Even if the habitual offender proceeding in defendant's case was part of his burglary prosecution, delay of his enhancement sentencing for at least 15 months after he pleaded guilty did not violate his right to a speedy trial. Perez v. Sullivan, 793 F.2d 249 (10th Cir.), cert. denied, 479 U.S. 936, 107 S. Ct. 413, 93 L. Ed. 2d 364 (1986).

When sentence completely served, enhancement improper. — Double jeopardy considerations preclude the enhancement of a defendant's sentence after the defendant has completely served that underlying sentence, no matter when the habitual proceedings were initiated. State v. Gaddy, 110 N.M. 120, 792 P.2d 1163 (Ct. App. 1990).

Jurisdiction to enhance sentence prior to expiration of parole. — A parole term is part of a sentence for purposes of a court's sentencing authority; thus, since the defendant had completely served an underlying sentence as of the date of an underlying enhancement proceeding but was still subject to a mandatory one-year parole, the trial court had jurisdiction to enhance his sentence as an habitual offender. State v. Roybal, 120 N.M. 507, 903 P.2d 249 (Ct. App. 1995).

Not cruel and unusual punishment. — Although the New Mexico supreme court has held that habitual criminality is a status rather than an offense, the defendant was not convicted of being an habitual criminal but of the commission of a criminal act; he was, therefore, appropriately punished for the commission of that crime by a substituted enhanced sentence as prescribed by statute, and his punishment was not cruel and unusual punishment. State v. Gonzales, 84 N.M. 275, 502 P.2d 300 (Ct. App.), cert. denied, 84 N.M. 271, 502 P.2d 296 (1972).

Specific term may be cruel and unusual punishment. — In extremely limited circumstances, a trial court may determine that a mandatory prison term is

constitutionally impermissible under U.S. Const., amend. VIII, and N.M. Const., art. II, § 13. State v. Arrington, 115 N.M. 559, 855 P.2d 133 (Ct. App. 1993).

Mandatory incarceration which would have been life-threatening to defendant because her serious medical needs would not have been handled adequately under customary prison practices and because there was no showing that the prison would make special provisions for defendant would have constituted cruel and unusual punishment, allowing the trial court to order defendant to serve the unsuspended portion of her sentence in the custody of her parents. State v. Arrington, 115 N.M. 559, 855 P.2d 133 (Ct. App. 1993).

Uneven enforcement in actual practice does not make statute unconstitutional. — That there may, in actual practice, be uneven enforcement of the habitual offender statute does not make the law unconstitutional. State v. Sedillo, 82 N.M. 287, 480 P.2d 401 (Ct. App. 1971).

The allegation of a "consistent and invariable administrative practice," in not enforcing the law with respect to habitual offenders uniformly, does not bring a case within the purview of the equal protection clause of the constitution. State v. Baldonado, 79 N.M. 175, 441 P.2d 215 (Ct. App. 1968).

Object of habitual offender statute is to inhibit repetition of criminal acts by individuals against the peace and dignity of the state. It is designed to protect society against habitual offenders. State v. Baldonado, 79 N.M. 175, 441 P.2d 215 (Ct. App. 1968).

Terms of habitual offender statute are mandatory, and a district attorney or judge, or both, may not nullify the statutes by ignoring them. State v. McCraw, 59 N.M. 348, 284 P.2d 670 (1955).

The provisions of the Habitual Offender Act are mandatory. State v. Davis, 104 N.M. 229, 719 P.2d 807 (1986).

Act must be interpreted narrowly. — The habitual offender statute is highly penal in nature, and its application must be interpreted narrowly. State v. Lujan, 76 N.M. 111, 412 P.2d 405 (1966).

Habitual criminality is a status, not an offense. State v. Cruz, 82 N.M. 522, 484 P.2d 364 (Ct. App. 1971), cert. denied, 92 N.M. 180, 585 P.2d 324 (1978).

This section creates no new offense, but merely provides a proceeding by which to determine the penalty to be imposed on one previously convicted in New Mexico of a felony. Lott v. Cox, 76 N.M. 76, 412 P.2d 249 (1966).

The habitual offender statute does not make the conviction of prior felonies the subject of punishment, as such, as a separate offense. It only provides that proof of the

conviction of prior felonies increases the penalty to be imposed upon conviction of a subsequent felony in New Mexico. The amount by which such penalty is required to be increased depends upon the number of prior convictions. French v. Cox, 74 N.M. 593, 396 P.2d 423 (1964).

Filing of habitual criminal information does not create new criminal case nor constitute a separate offense. Proof of the conviction of prior felonies merely increases the penalty to be imposed upon conviction of a subsequent felony in New Mexico. State v. Knight, 75 N.M. 197, 402 P.2d 380 (1965).

The filing of habitual criminal information does not create a new criminal case nor constitute a separate offense. Proof of the conviction of prior felonies merely increases the penalty to be imposed upon conviction of a subsequent felony. Martinez v. Romero, 626 F.2d 807 (10th Cir.), cert. denied, 449 U.S. 1019, 101 S. Ct. 585, 66 L. Ed. 2d 481 (1980).

Law reviews. — For comment, "Definite Sentencing in New Mexico: The 1977 Criminal Sentencing Act," see 9 N.M.L. Rev. 131 (1978-79).

For note, "Negligent Hiring and Retention - Availability of Action Limited By Foreseeability Requirement," see 10 N.M.L. Rev. 491 (1980).

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 criminal procedure, see 12 N.M.L. Rev. 271 (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).

For annual survey of New Mexico law relating to criminal law, see 13 N.M.L. Rev. 323 (1983).

For annual survey of New Mexico law relating to criminal procedure, see 13 N.M.L. Rev. 341 (1983).

For annual survey of New Mexico criminal law, see 16 N.M.L. Rev. 9 (1986).

For annual survey of criminal procedure in New Mexico, see 18 N.M.L. Rev. 345 (1988).

For annual survey of New Mexico Criminal Procedure, see 20 N.M.L. Rev. 285 (1990).

For survey of 1990-91 criminal procedure and evidence, see 22 N.M.L. Rev. 713 (1992).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Constitutionality and construction of statute enhanced penalty for second or subsequent offenses, 58 A.L.R. 20, 82 A.L.R. 345, 116 A.L.R. 209, 132 A.L.R. 91, 139 A.L.R. 673.

Effect, as to prior offenses, of amendment increasing punishment for crime, 167 A.L.R. 845.

What constitutes former "conviction" within statute enhancing penalty for second or subsequent offenses, 5 A.L.R.2d 1080.

Propriety, under statute enhancing punishment for second or subsequent offense, of restricting new trial to issue of status as habitual criminal, 79 A.L.R.2d 826.

Form and sufficiency of allegations as to time, place, or court of prior offenses or convictions, under habitual criminal act or statute enhancing punishment for repeated offenses, 80 A.L.R.2d 1196.

Right of court in imposing sentence to consider other offenses committed by defendant in absence of statute in that regard, 96 A.L.R.2d 768.

Adequacy of defense counsel's representation of criminal client regarding prior convictions, 14 A.L.R.4th 227.

Propriety of using single prior felony conviction as basis for offense of possessing weapon by convicted felon and to enhance sentence, 37 A.L.R.4th 1168.

Chronological or procedural sequence of former convictions as affecting enhancement of penalty under habitual offender statutes, 7 A.L.R.5th 263.

Use of prior military conviction to establish repeat offender status, 11 A.L.R.5th 218.

Imposition of enhanced sentence under recidivist statute as cruel and unusual punishment, 27 A.L.R. Fed. 110.

II. PRIOR FELONY CONVICTION.

Discretion of district court. — In 2002, the legislature amended this section to allow the district court some discretion in imposing the habitual enhancement to cases in which there is one prior felony conviction. State v. Shay, 2004-NMCA-077, 136 N.M. 8, 94 P.3d 8, cert. granted, 2004-NMCERT-006, 135 N.M. 788, 93 P.3d 1292.

Legislature limited definition of “prior felony conviction” in its 2003 amendment to the habitual offender statute. State v. Shay, 2004-NMCA-077, 136 N.M. 8, 94 P.3d 8, cert. granted, 2004-NMCERT-006, 135 N.M. 788, 93 P.3d 1292.

Applying 12-2A-16 C NMSA 1978 to the 2002 amendment to this section, the 2002 amendment effectively reduces the potential enhanced penalties for violating felony statutes by narrowing the definition of “prior felony conviction.” State v. Shay, 2004-NMCA-077, 136 N.M. 8, 94 P.3d 8, cert. granted, 2004-NMCERT-006, 135 N.M. 788, 93 P.3d 1292.

Prior conviction must be separate transaction. — Each prior felony conviction must be part of a "separate transaction or occurrence." State v. Peppers, 110 N.M. 393, 796 P.2d 614 (Ct. App. 1990).

Meaning of "convicted". — "Convicted", as ordinarily used in legal phraseology as indicating a particular phase of a criminal prosecution, includes the establishing of guilt whether by accused's admission in open court by plea of guilty to the charges presented, or by a verdict or finding of a court or jury. State v. Larranaga, 77 N.M. 528, 424 P.2d 804 (1967).

A plea of guilty constituted a legal conviction within the meaning of this section, even though the plea had not been reduced to a written judgment and sentence at the time the subsequent offense was committed. State v. Castillo, 105 N.M. 623, 735 P.2d 540 (Ct. App. 1987).

If defendant pleads guilty in criminal proceeding in another state where no adjudication of guilt entered, and if the courts of that state did not consider such an action to be a "conviction," then that proceeding may not be considered a conviction for the purposes of the Habitual Offender Act. State v. Burk, 101 N.M. 263, 680 P.2d 980 (Ct. App. 1984).

"Conviction" does not include imposition of sentence. — The "conviction" to which the habitual offender statute refers is simply a finding of guilt and does not include the imposition of a sentence. State v. Larranaga, 77 N.M. 528, 424 P.2d 804 (1967).

The habitual offender statute did not make imposition of sentence upon the previous convictions a prerequisite to the enhancement of punishment upon the fourth conviction. The conviction is the finding of guilt. Sentence is not an element of the conviction but rather a declaration of its consequences. State v. Larranaga, 77 N.M. 528, 424 P.2d 804 (1967).

Deferred sentence for previous conviction of no consequence. — Habitual offender proceedings are based by statute on prior felony convictions. Since it is not necessary to impose sentence in order to constitute a violation, a deferred sentence for a previous conviction is of no consequence. Padilla v. State, 90 N.M. 664, 568 P.2d 190 (1977).

A criminal sentence that was originally deferred may be enhanced in a later habitual offender proceeding. State v. Davis, 104 N.M. 229, 719 P.2d 807 (1986).

Conviction, not sentence, is polestar. — For purposes of enhancement "conviction" is the polestar, not the sentence imposed. State v. Davis, 104 N.M. 229, 719 P.2d 807 (1986).

Section contemplates valid convictions which have not been vacated. State v. Moser, 78 N.M. 212, 430 P.2d 106 (1967).

Probation violation is not a crime and does not trigger an enhancement as a habitual offender. State v. Ortega, 2004-NMCA-080, 135 N.M. 737, 93 P.3d 758, cert. denied, 2004-NMCERT-006, 135 N.M. 787, 93 P.3d 1292.

Question of constitutionality of prior trial and conviction may be raised. — Question of the adequacy of representation so as to meet the requirements of due process in a prior trial and conviction in another state may be raised as an issue under the habitual criminal statute. State v. Dalrymple, 75 N.M. 514, 407 P.2d 356 (1966).

Defendant's assertion that two prior felony convictions could not be used against him in prosecution under habitual criminal statute because they were constitutionally defective due to the absence of counsel at his preliminary examination in both convictions was without merit where the record showed that in each of the two prior felony convictions defendant entered pleas of guilty, that in each of the guilty pleas defendant had the advice of counsel, and no claim was made that the pleas were involuntary, defendant's claimed defect was waived when he pleaded guilty in the two prior felony proceedings. State v. Lopez, 84 N.M. 600, 506 P.2d 344 (Ct. App. 1973).

Collateral attack on prior conviction. — A defendant may collaterally attack the validity of a prior conviction where the state seeks to utilize the prior conviction as a basis for sentence enhancement under this section. State v. Valdez, 107 N.M. 642, 763 P.2d 76 (Ct. App. 1988).

Double use of prior felony. — Where the defendants were convicted of the charge of felon in possession of a firearm contrary to 30-7-16 NMSA 1978, and the defendants were also sentenced as habitual offenders in accordance with this section, the trial court erred in sentencing the defendants as habitual offenders when the same prior felony convictions were relied upon to convict the defendants of the underlying offense of felon in possession of a firearm. State v. Haddenham, 110 N.M. 149, 793 P.2d 279 (Ct. App. 1990).

If a prior felony conviction is already taken into account in determining the punishment for the specific crime, the legislature did not intend that prior felony conviction also to be used in establishing that defendant was a habitual offender. State v. Peppers, 110 N.M. 393, 796 P.2d 614 (Ct. App. 1990).

Where defendant's prior convictions for cocaine trafficking and possession of marijuana with intent to distribute resulted from a single arrest, the court did not make an impermissible "double use" of the prior convictions by utilizing the prior cocaine

trafficking conviction to enhance the defendant's present cocaine trafficking conviction to a first degree felony pursuant to 30-31-20 B(2) NMSA 1978, and then using the other prior conviction for possession of marijuana to enhance defendant's sentence under the general habitual-offender statute, 31-18-17 C NMSA 1978. State v. Hubbard, 113 N.M. 538, 828 P.2d 971 (Ct. App. 1992).

Where a trial court convicted defendant of one count of a second offense of trafficking a controlled substance and one count of conspiracy to commit that offense, and in sentencing defendant, the trial court used defendant's prior convictions twice to increase the punishment, the prior trafficking conviction could not be used to set defendant's underlying conspiracy to commit trafficking conviction as a second degree felony, and then be used to enhance defendant's sentence under the habitual offender statute. State v. Lacey, 2002-NMCA-032, 131 N.M. 684, 41 P.3d 952, cert. denied, 131 N.M. 737, 42 P.3d 842 (2002).

Proper reading of Subsection D(2). — Under the definition of "prior felony conviction", a prior felony conviction requires conformance with the provisions of Subsection A(2)(a) and (b) (now D(2)(a) and (b)) or conformance with Subsection A(2)(a) and (c) (now D(2)(a) and (c)) and should be read as though the word "and" was inserted between subparagraphs (a) and (b) of Subsection A(2) (now D(2)). State v. Harris, 101 N.M. 12, 677 P.2d 625 (1984).

Habitual criminal status not conviction, but enhanced sentence. — The habitual criminal status is not a conviction of a distinct crime. Indeed, a conviction on the merits has occurred and the crime convicted of is unrelated to the habitual criminal provisions, which produce not a judgment of guilt of the offense, but rather an enhanced sentence. Linam v. Griffin, 685 F.2d 369 (10th Cir. 1982), cert. denied, 459 U.S. 1211, 103 S. Ct. 1207, 75 L. Ed. 2d 447 (1983).

A habitual offender proceeding is a sentencing procedure and not a trial of an offense. Perez v. Sullivan, 793 F.2d 249 (10th Cir.), cert. denied, 479 U.S. 936, 107 S. Ct. 413, 93 L. Ed. 2d 364 (1986).

Habitual offender sentence of five-time shoplifting felon proper. — A sentence of eight years' imprisonment, imposed under the habitual offender statute against a defendant convicted for the fifth time on felony shoplifting charges, was not so disproportionate as to require reversal as cruel and unusual punishment under the New Mexico Constitution, notwithstanding facts that three of the convictions were over 15 years old, and the latest charge was only $3 over the minimum threshold for felony shoplifting. State v. Rueda, 1999-NMCA-033, 126 N.M. 738, 975 P.2d 351, cert. denied, 127 N.M. 391, 981 P.2d 1209 (1999).

Felony must be committed subsequent to prior conviction. — The felony for which a defendant is being punished must be one committed subsequent to the dates of the convictions relied on to effect an increase of the penalty. State v. Linam, 93 N.M. 307,

600 P.2d 253, cert. denied, 444 U.S. 846, 100 S. Ct. 91, 62 L. Ed. 2d 59 (1979) (decided prior to 2002 amendment of this section).

The repeal of former 31-18-5 NMSA 1978 and the enactment of this section do not affect the holding in State v. Linam, 93 N.M. 307, 600 P.2d 253, cert. denied, 444 U.S. 846, 100 S. Ct. 91, 62 L. Ed. 2d 59 (1979), that, for purposes of an enhanced sentence, the felony for which a defendant is being sentenced must have been committed after conviction for a preceding felony. Hernandez v. State, 96 N.M. 585, 633 P.2d 693 (1981) (decided prior to 2002 amendment of this section).

Remand following appeal allowed, to obtain evidence on date of prior crime. — The double jeopardy clause of the fifth amendment does not bar a remand following an appeal, directed at obtaining evidence as to the dates of the prior commission of crimes in order to satisfy the interpretation of the New Mexico habitual criminal statute that there be proof that each felony was committed after a conviction for the preceding felony. Linam v. Griffin, 685 F.2d 369 (10th Cir. 1982), cert. denied, 459 U.S. 1211, 103 S. Ct. 1207, 75 L. Ed. 2d 447 (1983) (decided prior to 2002 amendment of this section).

Sentence for each of multiple current convictions to be enhanced. — The reference to "a" felony in this section does not change the requirement that the sentence for each of multiple current felony convictions be enhanced. State v. Harris, 101 N.M. 12, 677 P.2d 625 (1984).

In choosing the term "basic sentence" the legislature referred to the sentence to be enhanced. If a person with a prior felony conviction is convicted of multiple felonies, then there are several basic sentences. Thus, there may be multiple enhancements. State v. Howard, 108 N.M. 560, 775 P.2d 762 (Ct. App. 1989).

Supplemental recidivist information not duplicitous. — A supplemental information which gave defendant notice that his three prior felony convictions would provide the basis for enhancing his sentence was not a joinder of offenses and, therefore, not void for duplicity. State v. Harris, 101 N.M. 12, 677 P.2d 625 (1984).

Sentences served concurrently unless trial court or legislature requires consecutive sentences. — The trial court has discretion to require sentences to be served consecutively, but if this is not done, and there is no legislation covering the situation, the sentences are to be served concurrently. State v. Mayberry, 97 N.M. 760, 643 P.2d 629 (Ct. App. 1982).

Sentences under multiple enhancement provisions. — It is not improper to enhance a sentence under the general habitual offender statute if it has already been enhanced under the firearm enhancement statute. State v. Reaves, 99 N.M. 73, 653 P.2d 904 (Ct. App. 1982).

The state was not prevented from using distinct felonies obtained in the same judgment and sentence for the separate purposes of enhancement under the felon in possession

statute and the general habitual offender statute. State v. Calvillo, 112 N.M. 140, 812 P.2d 794 (Ct. App. 1991).

Prior fourth-degree-felony DWI conviction, pursuant to Subsection G of 66-8-102 NMSA 1978, could not be used to enhance the sentences, pursuant to this section, of defendants convicted of a non-DWI felony. State v. Begay, 2001-NMSC-002, 130 N.M. 61, 17 P.3d 434.

Defendants convicted of the offense of felony DWI under Subsection G of 66-8-102 NMSA 1978 are not subject to sentence enhancement under both the felony DWI provision and this section. State v. Anaya, 1997-NMSC-010, 123 N.M. 14, 933 P.2d 223; State v. Gonzales, 1997-NMSC-050, 124 N.M. 171, 947 P.2d 128.

A prior armed robbery conviction may not be considered for enhancement under both the armed robbery statute and the habitual offender provision; accordingly, in the case of a defendant who has one prior burglary, one prior armed robbery, and one current armed robbery, the sentence for the current offense, discounting any reduction for mitigating circumstances, should be that for a second armed robbery, under 30-16-2 NMSA 1978, plus a one-year enhancement for the prior burglary under the habitual offender provisions. State v. Keith, 102 N.M. 462, 697 P.2d 145 (Ct. App. 1985).

Sentences cannot be served concurrently. — An additional one-year sentence for the use of a firearm and an additional one-year sentence as an habitual offender cannot be served concurrently. State v. Mayberry, 97 N.M. 760, 643 P.2d 629 (Ct. App. 1982).

Proper to enhance failure-to-appear charge. — Defendant's conviction for vehicular homicide could be used to enhance his failure-to-appear sentence, because the two acts - failure to appear at sentencing and vehicular homicide - were far from contemporaneous, and the state did not have to prove vehicular homicide as an element of the failure-to-appear offense. State v. Peppers, 110 N.M. 393, 796 P.2d 614 (Ct. App. 1990).

Multiple convictions at one trial. — Where a conviction on two or more counts arising out of acts committed in the course of a single transaction has been entered, the convictions should count as one for the purpose of sentencing under an habitual offender statute. On the other hand, where multiple convictions are obtained for crimes unrelated to one another, no prohibition has been found to prevent counting each conviction separately in habitual offender proceedings. State v. Sanchez, 87 N.M. 256, 531 P.2d 1229 (Ct. App. 1975).

If, under this section, multiple prior convictions arose out of a unified course of events, the multiple convictions count as one conviction in the habitual offender proceedings; but, if the defendant had a prior felony conviction, the trial court could properly enhance each of three subsequent felony convictions as a second felony conviction. State v. Baker, 90 N.M. 291, 562 P.2d 1145 (Ct. App. 1977).

Nature of punishment of prior conviction. — Where 17-year-old defendant was convicted in South Carolina of burglary and larceny, because the court found him amenable to treatment and placed him on probation as a "youthful offender" whose sentence was rehabilitative in nature his prior conviction did not satisfy the provisions of this section. State v. Smith, 2000-NMCA-101, 129 N.M. 738, 13 P.3d 470.

Conviction in another state. — Defendant's conviction by a Texas court constituted a "prior felony conviction" for purposes of the New Mexico habitual-offender statute, even though defendant had been placed on probation after his conviction, the indictment was set aside by a Texas court after completion of probation, and the conviction could not be considered under the Texas habitual-offender statute. State v. Edmondson, 112 N.M. 654, 818 P.2d 855 (Ct. App. 1991).

Where, contrary to defendant’s assertion, the evidence does not indicate that Section 18-4-502, Colorado Statutes, was not a felony in Colorado either at the time defendant committed the offense or at the time of his conviction, Colorado conviction was a felony covered by this section. State v. Sandoval, 2004-NMCA-046, 135 N.M. 420, 89 P.3d 92, cert. denied, 2004-NMCERT-006, 135 N.M. 789, 93 P.3d 1292.

Use of prior conviction that is not felony offense in New Mexico. — Whether or not the Colorado felony is a felony in New Mexico, the felony conviction may be used if it was punishable by imprisonment of more than one year. State v. Wilson, 117 N.M. 11, 868 P.2d 656 (Ct. App. 1993).

Prior convictions which are not felonies under laws of New Mexico will not support increased penalty for a felony conviction in New Mexico. State v. Knight, 75 N.M. 197, 402 P.2d 380 (1965); State v. Silas, 92 N.M. 434, 589 P.2d 674 (1979) (decided under former 31-18-5 NMSA 1978); State v. Montoya, 92 N.M. 734, 594 P.2d 1190 (Ct. App. 1979), aff'd, 94 N.M. 704, 616 P.2d 417 (1980).

Where prior federal convictions for transporting stolen automobiles across state lines were not felonies in New Mexico, an increased penalty for a forgery felony conviction in New Mexico as a habitual criminal is improper. State v. Knight, 75 N.M. 197, 402 P.2d 380 (1965).

Presumption as to law of sister state. — When previous conviction is charged to be an offense which is designated by name by the law of New Mexico as one falling within the required category, it is presumed that the conviction in the other state carried with it all the essentials of the crime in New Mexico, as the law of a sister state is presumed to be the same as that of the forum, absent proof to the contrary. State v. Lott, 73 N.M. 280, 387 P.2d 855 (1963).

Prior felony need not be such on date of prosecution as habitual criminal. — The habitual offender statute contains no provision requiring the prior felony to be such an offense on the date of subsequent prosecution as an habitual criminal. The date of the conviction in the foreign state is the time to be considered in determining whether the

offense charged as the prior conviction would have been a felony in this state. State v. Lott, 73 N.M. 280, 387 P.2d 855 (1963).

Amendment or repeal of statute subsequent to conviction under it. — If defendant's violation of a statute was a felony at the time, changes in or repeal of the statute subsequent to that time do not preclude the use of that conviction in prosecutions under the habitual offender statute. State v. Darrah, 76 N.M. 671, 417 P.2d 805 (1966).

Effect of executive pardon. — An executive pardon of the offense which provokes the court into imposing a life sentence under the habitual offender statute is unavailing to deny the court authority to employ the same felony convictions again for purpose of imposing a sentence under the habitual offender statute, if subsequent to his pardon the prisoner commits another felony. Shankle v. Woodruff, 64 N.M. 88, 324 P.2d 1017 (1958).

The governor has the power to pardon habitual offender sentences, but the pardoned offense may nevertheless be used to enhance future sentences for future crimes. State v. Mondragon, 107 N.M. 421, 759 P.2d 1003 (Ct. App. 1988).

"Purchase" of heroin is felony for purposes of section. — Where a federal conviction is had in New Mexico upon a purchase of heroin in New Mexico, the "purchase" of heroin necessarily includes the actual or constructive "possession" of heroin, and actual or constructive possession of heroin is a felony under the laws of New Mexico for purposes of this section. State v. Montoya, 94 N.M. 704, 616 P.2d 417 (1980).

Effect of additional convictions on habitual offender statute. — Prosecution under the habitual offender statute is not barred upon any conviction in addition to fourth felony conviction, and such additional conviction may be prosecuted for the purpose of enhancing sentence at any time, otherwise lawful, as if it were the fourth felony conviction. State v. Sanchez, 87 N.M. 256, 531 P.2d 1229 (Ct. App. 1975).

Alternative methods of showing prior convictions. — If a state adopts the policy of imposing heavier punishment for repeated offending, there is manifest propriety in guarding against the escape from this penalty of those whose previous conviction was not suitably made known to the court at the time of their trial. It is to prevent such a frustration of its policy that provision is made for alternative methods, either by alleging the fact of prior conviction in the indictment and showing it upon the trial, or by a subsequent proceeding in which the identity of the prisoner may be ascertained and he may be sentenced to the full punishment fixed by law. State v. Gonzales, 84 N.M. 275, 502 P.2d 300 (Ct. App.), cert. denied, 84 N.M. 271, 502 P.2d 296 (1972).

Enhanced sentence may be imposed though maximum for felony served. — Under this section, imposition of enhanced sentence was proper even though maximum

sentence for felony conviction which had given rise to it had been completely served. Lott v. Cox, 76 N.M. 76, 412 P.2d 249 (1966).

Nolo contendere plea as basis for conviction. — A plea of nolo contendere, accepted and recorded in open court, may provide a proper sentence for conviction which may be used to enhance a sentence under this habitual criminal statute. State v. Marquez, 105 N.M. 269, 731 P.2d 965 (Ct. App. 1986).

Chronologically, factually separate felonies properly used for enhancement. — Since the facts and elements of defendant's 1986 predicate felony of receiving stolen property and his 1988 felony conviction for felon in possession of a firearm were both separate in time and involved different facts from those underlying his felony convictions in the case under adjudication, they were properly used as separate felonies for purposes of enhancing defendant's later felony convictions under this section. State v. Yparrea, 114 N.M. 805, 845 P.2d 1259 (Ct. App. 1992).

Federal conviction as prior conviction. — For a federal conviction to be considered as a prior conviction under the habitual offender statute, the conviction must be for a crime which if committed within this state would be a felony. State v. Garcia, 92 N.M. 730, 594 P.2d 1186 (Ct. App.), cert. denied, 92 N.M. 532, 591 P.2d 286 (1979); State v. Montoya, 92 N.M. 734, 594 P.2d 1190 (Ct. App. 1979), aff'd, 94 N.M. 704, 616 P.2d 417 (1980).

III. PROCEDURAL MATTERS.

New rule setting order of proof to operate prospectively only. — The new rule of law in State v. Linam, 93 N.M. 307, 600 P.2d 253 (1979), decided on January 11, 1979, setting forth the order of proof required in habitual offender sentencing, was intended to operate prospectively only. State v. Valenzuela, 94 N.M. 340, 610 P.2d 744 (1980) (decided under former NMSA 31-18-5 1978).

Burden of proof. — Federal law requires that the state prove a prior conviction by a preponderance of evidence. State v. Smith, 2000-NMSC-005, 128 N.M. 588, 995 P.2d 1030.

State required to prove specific sequence of commissions and convictions. — In order to justify imposition of the enhanced sentence the state is required to prove a specific sequence of "commissions" and "convictions." State v. Valenzuela, 94 N.M. 285, 609 P.2d 1241 (Ct. App. 1979), aff'd, 94 N.M. 340, 610 P.2d 744 (1980) (decided under former 31-18-5 NMSA 1978).

Unless waived by the terms of the plea agreement. — Defendant waived his right to contest the evidence of the prior convictions by agreeing to the terms of the plea agreement. State v. Sanchez, 2001-NMCA-060, 130 N.M. 602, 28 P.3d 1143, cert denied, 130 N.M. 713, 30 P.3d 1147 (2001).

Date of commission of offense essential element in prosecution. — To establish the date of the commission of the offense giving rise to the habitual offender proceeding is an essential element in such a prosecution. State v. Valenzuela, 94 N.M. 285, 609 P.2d 1241 (Ct. App. 1979), aff'd, 94 N.M. 340, 610 P.2d 744 (1980) (decided under former 31-18-5 NMSA 1978).

Where there is no proof as to the date of commission of the second felony by defendant, an enhanced habitual offender sentence cannot stand. State v. Valenzuela, 94 N.M. 340, 610 P.2d 744 (1980) (decided under former 31-18-5 NMSA 1978).

Defendant's introduction to jury does not interfere with its duty of determining identity. — The introduction of the defendant to the jury by his name in no way interferes with the jury's duty of determining whether the named and identified defendant is the same person who was convicted of the crimes for which he is being charged in the supplemental information. State v. Olivares, 95 N.M. 222, 620 P.2d 380 (Ct. App. 1980).

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, 120 N.M. 507, 903 P.2d 249 (Ct. App. 1995).

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, 95 N.M. 246, 620 P.2d 1271 (1980).

Where state's exhibits establish prima facie case establishing valid guilty plea, the defendant must then produce evidence that supports the asserted invalidity of these pleas. State v. Garcia, 95 N.M. 246, 620 P.2d 1271 (1980).

Where defendant claims a prior guilty plea was invalid, the state makes a prima facie case establishing a valid guilty plea upon proof that the defendant has been convicted of a crime. State v. Garcia, 95 N.M. 246, 620 P.2d 1271 (1980).

When validity of prior convictions becomes proper issue. — Until the defendant raises an issue as to the validity of prior convictions, "validity" is not an issue in the case. State v. O'Neil, 91 N.M. 727, 580 P.2d 495 (Ct. App. 1978) (decided under former 31-18-5 NMSA 1978).

Conditional discharge used to enhance sentence. — Even though a prior conditional discharge could not be used for enhancement purposes at the time the defendant was originally sentenced, since he had agreed to such use and that he would not challenge it on appeal, the trial court did not err in using the conditional discharge to enhance the defendant's sentence. State v. Handa, 120 N.M. 38, 897 P.2d 225 (Ct. App. 1995).

Use of the defendant's prior conditional discharge to prove that he was a felon in order to convict him of the crime of felon in possession of a firearm and to enhance his sentence for underlying assault convictions did not violate his double jeopardy rights. State v. Handa, 120 N.M. 38, 897 P.2d 225 (Ct. App. 1995).

Guilty pleas, disputed by vague evidence, accepted. — Once the state's exhibits establish a prima facie case that a defendant has previously pled guilty to felonies, the defendant is entitled to bring forth contrary evidence, but it is his burden to do so. Based on the defendant's vague and somewhat inconsistent recollections about whether he had the advice of counsel before he pled guilty to previous crimes, the judge did not abuse her discretion in accepting those convictions as the basis for the habitual offender enhancements. State v. Duncan, 117 N.M. 407, 872 P.2d 380 (Ct. App. 1994).

Asserted invalidity of prior convictions is a defense to the habitual offender charge. State v. O'Neil, 91 N.M. 727, 580 P.2d 495 (Ct. App. 1978) (decided under former 31-18-5 NMSA 1978).

Burdens of production of evidence and of persuasion distinguished. — Where defendant's claim of invalidity is raised as a defense to a habitual offender charge, defendant must provide evidence in support of his defense. Once he does so, he is not required to persuade the fact finder concerning his defense; rather, the state has the burden of persuasion because it is the state, not defendant, who must prove a case. State v. O'Neil, 91 N.M. 727, 580 P.2d 495 (Ct. App. 1978) (decided under former 31-18-5 NMSA 1978).

Validity of prior guilty pleas is issue to be decided by court in a habitual offender proceeding. State v. O'Neil, 91 N.M. 727, 580 P.2d 495 (Ct. App. 1978) (decided under former 31-18-5 NMSA 1978).

Where record in habitual offender proceeding is silent as to invalidity, there is no basis for holding the prior convictions invalid. State v. O'Neil, 91 N.M. 727, 580 P.2d 495 (Ct. App. 1978) (decided under former 31-18-5 NMSA 1978).

Burden not on state when "record is silent". — A trial court errs in placing an affirmative burden on the state when the "record is silent" concerning the validity of prior guilty pleas. State v. O'Neil, 91 N.M. 727, 580 P.2d 495 (Ct. App. 1978) (decided under former 31-18-5 NMSA 1978).

Double jeopardy defense waived by plea agreement. — The defendant waived his double jeopardy defense by entering a plea agreement which provided that the state could pursue additional habitual offender proceedings to enhance the defendant's sentence in the event his probation was revoked or he otherwise failed to fulfill his obligations under the agreement, and 30-1-10 NMSA 1978, precluding waiver of a double jeopardy defense, did not apply to prevent waiver in such case. Montoya v. New Mexico, 55 F.3d 1496 (10th Cir. 1995).

Sentence enhancement based on violation of plea agreement. — Since the defendant violated the terms of a plea agreement providing that the state could pursue additional habitual offender proceedings to enhance the defendant's sentence in the event his probation was revoked or he otherwise failed to fulfill his obligations under the agreement, the imposition of additional sentence enhancements did not constitute an impermissible multiple punishment. Montoya v. New Mexico, 55 F.3d 1496 (10th Cir. 1995).

Since the plea agreement provided that the state would pursue additional enhancement if the defendant violated conditions of his probation, when the defendant violated the probation, additional enhancement was authorized based, not on the probation violation, but on the prior felonies. State v. Freed, 1996-NMCA-044, 121 N.M. 562, 915 P.2d 325.

Statutory scheme does not delegate legislative responsibility to prosecution. — In no sense does the habitual offender statutory scheme delegate to the prosecution the legislative responsibility to fix criminal penalties. Martinez v. Romero, 626 F.2d 807 (10th Cir.), cert. denied, 449 U.S. 1019, 101 S. Ct. 585, 66 L. Ed. 2d 481 (1980).

Subsection B only prohibits suspending or deferring one-year sentence imposed by subsection, and does not affect the trial court's discretion to suspend or defer the basic sentence imposed. State v. Russell, 94 N.M. 544, 612 P.2d 1355 (Ct. App. 1980).

Credit for time served. — When the defendant who had served one year of an enhanced sentence was subject to a second four-year enhancement, the court was required to give credit for the time served, and giving credit did not convert the second enhancement into an unauthorized three-year sentence. State v. Freed, 1996-NMCA-044, 121 N.M. 562, 915 P.2d 325.

31-18-18. Habitual offenders; duty of public officers to report.

Whenever it becomes known to any warden or prison official or any prison, probation, parole or police officer or other peace officer that any person charged with or convicted of a noncapital felony is or may be a habitual offender, it is his duty to promptly report the facts to the district attorney of the proper district, who shall then file an information.

History: 1953 Comp., § 40A-29-31, enacted by Laws 1977, ch. 216, § 7.

31-18-19. Habitual offender; duty of district attorney to prosecute.

If at any time, either after sentence or conviction, it appears that a person convicted of a noncapital felony is or may be a habitual offender, it is the duty of the district attorney of the district in which the present conviction was obtained to file an information charging that person as a habitual offender.

History: 1953 Comp., § 40A-29-32, enacted by Laws 1977, ch. 216, § 8.

ANNOTATIONS

Cross references. — For general consideration of the habitual offender statute, see notes to 31-18-17 NMSA 1978.

For procedure and sentence, see 31-18-20 NMSA 1978.

Habitual offender statute is mandatory and gives district attorney no discretion as to whether he will invoke the habitual criminal provision. State v. Sedillo, 82 N.M. 287, 480 P.2d 401 (Ct. App. 1971).

The district attorney had a duty to prosecute defendant as an habitual offender if his conviction brought him within the statute. State v. Cruz, 82 N.M. 522, 484 P.2d 364 (Ct. App. 1971).

The provisions of this act have been construed as mandatory. State v. Baldonado, 79 N.M. 175, 441 P.2d 215 (Ct. App. 1968).

The provisions of the habitual criminal statute are mandatory. State v. Santillanes, 98 N.M. 448, 649 P.2d 516 (Ct. App. 1982). See 1987 Op. Att'y Gen. No. 87-23.

The provisions of the Habitual Offender Act are mandatory, and the district attorney has an affirmative duty to prosecute habitual offenders. State v. Davis, 104 N.M. 229, 719 P.2d 807 (1986).

Discretion to seek or not seek enhanced sentencing. — Despite the mandatory tone of this section, the prosecutor has discretion to seek or not to seek enhanced sentencing. March v. State, 109 N.M. 110, 782 P.2d 82 (1989).

No vindictiveness in actions of district attorney's office in seeking habitual offender enhancements. See State v. Duncan, 117 N.M. 407, 872 P.2d 380 (Ct. App. 1994).

Enhanced sentence proper even though probation completed, where maximum statutory sentencing period unexpired. — Under this section, the imposition of an enhanced sentence is proper even though a defendant has completed a period of probation, where the maximum period for which he could have been sentenced for the offense has not yet expired. State v. Santillanes, 98 N.M. 448, 649 P.2d 516 (Ct. App. 1982).

Statutory scheme does not delegate legislative responsibility to prosecution. — In no sense does the habitual offender statutory scheme delegate to the prosecution the legislative responsibility to fix criminal penalties. Martinez v. Romero, 626 F.2d 807 (10th Cir.), cert. denied, 449 U.S. 1019, 101 S. Ct. 585, 66 L. Ed. 2d 481 (1980).

Specific statute controls over 39-1-1 NMSA 1978. — As the provisions of the habitual offender statute are mandatory, the specific provision of filing charges "at any time" in the statute controls over the general provision of 39-1-1 NMSA 1978, which gives a trial court jurisdiction over its final judgment in a nonjury trial for 30 days after entry of final judgment. State v. Padilla, 92 N.M. 19, 582 P.2d 396 (Ct. App.), cert. denied, 92 N.M. 180, 585 P.2d 324 (1978) (decided under former 31-18-6 NMSA 1978).

State's filing information violated expectation of finality in sentencing. — State's filing information as to enhanced sentencing after defendant's earning of meritorious deductions brought his service of sentence to an end violated his objectively reasonable expectation of finality in sentencing for double jeopardy purposes. March v. State, 109 N.M. 110, 782 P.2d 82 (1989).

Defendant's expectation of "final" sentencing. — Defendant, a three-time felony offender, had no reasonable expectation of finality in a three-year probationary sentence for a larceny conviction; therefore, it was not a violation of his double jeopardy rights for the state to seek a subsequent conviction of defendant, during the probationary period, under the habitual offender laws. State v. Villalobos, 1998-NMSC-036, 126 N.M. 255, 968 P.2d 766.

District attorney's or judge's knowledge of prior convictions. — Knowledge by the district attorney of prior convictions, and even knowledge by the judge, does not bar a prosecution under the habitual offender statute, the setting aside of a former sentence and the imposition of a new one. State v. McCraw, 59 N.M. 348, 284 P.2d 670 (1955).

Where, before the defendant is convicted for a felony, the prosecutor knows of a prior felony conviction, this knowledge does not require the dismissal of a latter habitual offender charge because of a filing delay. State v. Mayberry, 97 N.M. 760, 643 P.2d 629 (Ct. App. 1982).

Information does not purport to charge criminal offense. — An information under the habitual offender statutes does not purport to charge a criminal offense, but constitutes only a charge of prior convictions by defendant, which, if true, operates to enhance the penalty to be imposed. State v. Silva, 78 N.M. 286, 430 P.2d 783 (Ct. App. 1967).

Charging by supplemental information. — The state did not violate its own procedures, and thus did not violate due process, by charging appellant as an habitual offender by supplemental information, since the supplemental information did not charge an offense, but rather a status, that of habitual offender. Minner v. Kerby, 30 F.3d 1311 (10th Cir. 1994).

Charging by information sufficient. — Defendant had no right, either under New Mexico law or under the United States Constitution, to a grand jury indictment as to his habitual offender status. Minner v. Kerby, 30 F.3d 1311 (10th Cir. 1994).

Pleading prior convictions in information. — The controlling statute made no requirement that prior convictions be pleaded in the information itself. Shankle v. Woodruff, 64 N.M. 88, 324 P.2d 1017 (1958) (decided under former law).

Courts in which defendant was previously convicted need not be named. — The habitual offender statutes do not require that the court or courts in which a defendant has been previously convicted be named. State v. Silva, 78 N.M. 286, 430 P.2d 783 (Ct. App. 1967).

Information not insufficient because of improper grammatical construction. — Assuming the meaning to be plain, information or indictment is not rendered insufficient because of improper grammatical construction. State v. Silva, 78 N.M. 286, 430 P.2d 783 (Ct. App. 1967).

Objection to information not grounds for release on habeas corpus. — Objection to the information charging prior conviction sufficient to invoke the Habitual Criminal Act might have been made the basis of a timely appeal, but was not grounds for release on habeas corpus. Shankle v. Woodruff, 64 N.M. 88, 324 P.2d 1017 (1958).

Law reviews. — 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. — Duty and discretion of district or prosecuting attorney as regards prosecution for criminal offenses, 155 A.L.R. 10.

31-18-20. Habitual offenders; proceedings for prosecution.

A. The court wherein a person has been convicted of a noncapital felony and where that person has been charged as a habitual offender under the provisions of Section 31-18-19 NMSA 1978 shall bring the defendant before it, whether he is confined in prison or not. The court shall inform him of:

(1) the allegations of the information; and

(2) his right to be tried as to the truth thereof according to law.

B. The court shall require the defendant to say whether or not he is the same person as charged in the information. If the defendant denies being the same person or refuses to answer or remains silent, his plea or the fact of his silence shall be entered in the record and the court shall then conduct a hearing to determine if the offender is the same person.

C. If the court finds that the defendant is the same person and that he was in fact convicted of the previous crime or crimes as charged, the court shall sentence him to the punishment as prescribed in Section 31-18-17 NMSA 1978.

History: 1953 Comp., § 40A-29-33, enacted by Laws 1977, ch. 216, § 9; 1983, ch. 127, § 2.

ANNOTATIONS

I. GENERAL CONSIDERATION.

Cross references. — For general consideration of the habitual offender statute, see notes to 31-18-17 NMSA 1978.

For informations, see 31-18-19 NMSA 1978.

Purpose of former law. — Former section was enacted to give a person convicted of a felony in this state charged with being an habitual criminal the right to a separate trial before a jury and to require the state to prove in such separate proceedings the identity of the accused as the person alleged to have been convicted of the former crimes. Lott v. Cox, 75 N.M. 102, 401 P.2d 93 (1965) (decided under former law).

Habitual offender statute creates no new offense, but merely provides a proceeding whereby one previously convicted of a felony or felonies may be given an enhanced sentence, upon subsequent conviction in this state for another felony. State v. Bonner, 81 N.M. 471, 468 P.2d 636 (Ct. App. 1970).

The habitual criminal status is not a conviction of a distinct crime. Indeed, a conviction on the merits has occurred and the crime convicted of is unrelated to the habitual criminal provisions, which produce not a judgment of guilt of the offense, but rather an enhanced sentence. Linam v. Griffin, 685 F.2d 369 (10th Cir. 1982), cert. denied, 459 U.S. 1211, 103 S. Ct. 1207, 75 L. Ed. 2d 447 (1983).

Habitual criminal proceeding not constitutional adjudication. — The habitual criminal proceeding in New Mexico is not the kind of adjudication that is referred to in the fifth amendment double jeopardy clause. Linam v. Griffin, 685 F.2d 369 (10th Cir. 1982), cert. denied, 459 U.S. 1211, 103 S. Ct. 1207, 75 L. Ed. 2d 447 (1983).

New Mexico habitual criminal proceeding is a trial on the issue of punishment and double jeopardy bars a second try if the prosecution fails. Linam v. Griffin, 685 F.2d 369 (10th Cir. 1982), cert. denied, 459 U.S. 1211, 103 S. Ct. 1207, 75 L. Ed. 2d 447 (1983) (concurring opinion).

Proceeding not trial for purposes of determining competency. — The habitual offender proceeding is not a trial in the constitutional sense for purposes of making a determination as to competency and Rule 35(b), N.M.R. Crim. P. (now see Rule 5-602B), does not apply to such proceedings. State v. Nelson, 96 N.M. 654, 634 P.2d 676 (1981).

Where record in habitual offender proceeding is silent as to invalidity, there is no basis for holding the prior convictions invalid. State v. O'Neil, 91 N.M. 727, 580 P.2d 495 (Ct. App. 1978) (decided under former 31-18-7 NMSA 1978).

No jeopardy attaches in habitual proceeding. — A habitual proceeding involves only sentencing, not trial of an offense, therefore jeopardy does not attach. State v. Rogers, 93 N.M. 519, 602 P.2d 616 (1979).

Law reviews. — 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 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 § 677 et seq.; 39 Am. Jur. 2d Habitual Criminals, etc. § 29 et seq.

Reasonable doubt: rule of reasonable doubt as applicable to proof of previous conviction for purpose of enhancing punishment, 79 A.L.R. 1337.

Overemphasis in proof of former conviction in connection with habitual criminal law, or unnecessary introduction of evidence in that regard, as prejudicial to accused, 144 A.L.R. 240.

Cross-examination of accused: accused who testifies in his own behalf as subject to cross-examination to show previous conviction in order to enhance punishment, 153 A.L.R. 1159.

Habeas Corpus: invalidity of prior conviction or sentence as ground of habeas corpus where one is sentenced as second offender, 171 A.L.R. 541.

Identity: necessity, character and sufficiency of evidence of identity for purpose of statute as to enhanced punishment in case of prior conviction, 11 A.L.R.2d 870.

Right of court in imposing sentence to consider other offenses committed by defendant in absence of statute in that regard, 96 A.L.R.2d 768.

II. PROCEDURAL MATTERS.

Strict compliance required. — Strict compliance with the procedures set forth in this section is required. State v. Sanchez, 84 N.M. 163, 500 P.2d 448 (Ct. App. 1972).

Burden of proof. — Federal law requires that the state prove a prior conviction by a preponderance of evidence. State v. Smith, 2000-NMSC-005, 128 N.M. 588, 995 P.2d 1030.

Remand following appeal allowed, to obtain evidence on date of prior crime. — The double jeopardy clause of the fifth amendment does not bar a remand following an appeal, directed at obtaining evidence as to the dates of the prior commission of crimes in order to satisfy the interpretation of the New Mexico habitual criminal statute that there be proof that each felony was committed after a conviction for the preceding felony. Linam v. Griffin, 685 F.2d 369 (10th Cir. 1982), cert. denied, 459 U.S. 1211, 103 S. Ct. 1207, 75 L. Ed. 2d 447 (1983).

Judge to determine whether offense follows prior felony conviction. — Whether the commission of an offense was after a conviction for an earlier felony, thus qualifying for an enhanced penalty, may be determined by the trial judge. Hernandez v. State, 96 N.M. 585, 633 P.2d 693 (1981).

Jury issues limited to identity and prior conviction. — The only questions that must be submitted to a jury upon a defendant's demand under the habitual offender statutes are those of identity and whether the defendant was previously convicted of the specific crime charged in the enhancement proceedings. Hernandez v. State, 96 N.M. 585, 633 P.2d 693 (1981) (decided prior to 1983 amendment).

Unless defendant raises validity of prior conviction as a defense, there are two issues to be determined in an habitual offender proceeding: (1) whether there was a prior felony conviction, and (2) whether the defendant is the same person who was convicted of the prior felony. State v. Hernandez, 96 N.M. 604, 633 P.2d 712 (Ct. App.), rev'd on other grounds, 96 N.M. 585, 633 P.2d 693 (1981).

There is no need of presentment by grand jury where the question was simply whether the party had been convicted of an offense, as an indictment is confined to the question whether an offense has been committed. State v. Gonzales, 84 N.M. 275, 502 P.2d 300 (Ct. App.), cert. denied, 84 N.M. 271, 502 P.2d 296 (1972).

Allegation of former conviction in indictment not required by constitution. — Although the state may properly provide for the allegation of the former conviction in the indictment, for a finding by the jury on this point in connection with its verdict as to guilt and thereupon for the imposition of the full sentence prescribed, there is no constitutional mandate which requires the state to adopt this course even where the former conviction is known. State v. Gonzales, 84 N.M. 275, 502 P.2d 300 (Ct. App.), cert. denied, 84 N.M. 271, 502 P.2d 296 (1972).

Proof of defendant's identity. — Where a supplemental information was filed for the purpose of sentencing defendant as an habitual offender, the state was not required to affirmatively prove not only that defendant was the person previously convicted of the crimes listed in the information but also that he was the same person convicted in the underlying case in which the sentencing proceedings were taking place. State v. Salas, 1999-NMCA-099, 127 N.M. 686, 986 P.2d 482, cert. denied, 128 N.M. 149, 990 P.2d 823 (1999).

Separate proceeding permissible where only issue is identity. — The information charging defendant as an habitual offender was filed as a separate cause, and such a separate proceeding is permissible where the only issue is the identity of the accused as the person previously convicted of crimes within the meaning of the habitual offender statute. State v. Tipton, 77 N.M. 1, 419 P.2d 216 (1966).

Information dismissed where proceedings not commenced within six months of filing. — Where more than six months had passed since the filing of an information charging defendant under former 31-18-5 NMSA 1978 et seq. with being an habitual offender, the supreme court ordered that it be dismissed with prejudice in accordance with Rule 37(d), N.M.R. Crim. P. (now see Rule 5-604D), 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 the information dismissed. State v. Lopez, 89 N.M. 82, 547 P.2d 565 (1976) (decided under former law).

Right to counsel. — The charge of being a habitual criminal is too serious, and the potential prejudice resulting from the absence of counsel having the legal skill to determine whether there had, in fact, been a previous conviction, is too great, to allow a conviction to stand when it appears a defendant has entered a plea without the assistance of counsel to which he is entitled, or without having effectively waived the right. Johnson v. Cox, 72 N.M. 55, 380 P.2d 199, cert. denied, 375 U.S. 855, 84 S. Ct. 117, 11 L. Ed. 2d 82 (1963).

An indigent defendant facing the imposition of penalties under the habitual criminal statutes is entitled to have an attorney appointed to represent him in such hearing. There is no requirement that such appointed attorney be the same attorney that represented the indigent defendant in the proceeding which resulted in the Habitual Criminal Act becoming applicable. This is so even though the habitual criminal proceedings may be filed in the same action. Such being the case, it necessarily follows that the question of identity of the attorney in the two proceedings is of no consequence and that the court may pay him for his services in the initial proceeding and in the habitual criminal proceeding as well. 1966 Op. Att'y Gen. No. 66-27.

Duty of trial court to inform defendant of rights. — Under this section the trial court must inform the defendant of the allegations contained in the information and of his right to be tried as to the truth thereof according to law. Therefore, where there was no showing that the judge or an officer of the court so informed the defendant, defendant's confession of being convicted of another crime was disallowed, and the judgment was reversed. State v. Bonner, 86 N.M. 314, 523 P.2d 812 (Ct. App. 1974).

Trial court not specifically required to inform defendant of enhanced penalty. — This section does not specifically require the trial court to advise a defendant of the enhanced penalty. State v. Madrid, 83 N.M. 603, 495 P.2d 383 (Ct. App. 1972).

Trial court's failure to caution not considered on appeal. — Where defendant claimed that the trial court's procedure prior to his admitting the charge of being an

habitual offender was defective in that his admission could not legally be accepted because he was not duly cautioned as to his rights, but did not claim that his admission was involuntary, the issue of the trial court's failure to caution defendant would not be heard on appeal, since it was not raised in the trial court. State v. Jordan, 88 N.M. 230, 539 P.2d 620 (Ct. App. 1975).

Right to trial by jury may be waived. — Right to be tried by a jury is a requirement which may be waived either expressly or by implication. State v. Knight, 75 N.M. 197, 402 P.2d 380 (1965).

Circumstances showing waiver of jury trial. — Where appellant was represented by an attorney throughout the proceedings, had ample notice that habitual criminal charges were involved, and, in reply to questions by the court before the guilty plea was accepted to the forgery charges and prior to any examination by the court concerning the habitual criminal information, both appellant and his attorney assured the court that they had previously discussed the habitual criminal information and that they had also thoroughly discussed it with the district attorney, appellant's right to be tried by a jury was waived. State v. Knight, 75 N.M. 197, 402 P.2d 380 (1965).

Law requires admission or determination of identity. — Before defendant can be prosecuted under the habitual offender statute, the law requires an admission or a determination of identity. State v. Sanchez, 84 N.M. 163, 500 P.2d 448 (Ct. App. 1972).

An instruction which reads "aka" deprives defendant of jury determination. — An instruction which read "aka" (also known as) deprived defendant in a habitual offender prosecution of the right to have the jury determine the issue of identity. State v. Griffin, 94 N.M. 5, 606 P.2d 543 (Ct. App. 1980).

Use of aliases in indictments or jury instructions is proper where there is evidence of the alias and/or the surrounding circumstances reveal no resulting prejudice to the defendant. State v. Muniz, 95 N.M. 415, 622 P.2d 1035 (1981).

Jury's function of determining identity issue not preempted by instructions. — Instructions which simply told the jury to determine whether defendant was the same person that was convicted of several offenses that were charged in the indictments under other names did not preempt the jury's function of determining the issue of identity in a prosecution under the habitual offender statute. State v. Muniz, 95 N.M. 415, 622 P.2d 1035 (1981).

Judicial determination of identity may not properly be made prior to conviction in the felony case. Lott v. Cox, 75 N.M. 102, 401 P.2d 93 (1965) (decided under former law).

Waiver of jury trial does not amount to admission of identity. — Even though defendant affirmatively waived a jury trial on the question of identity, this did not amount to an admission that he was the same person charged in the supplemental information. State v. Sanchez, 84 N.M. 163, 500 P.2d 448 (Ct. App. 1972).

Statute does not provide jury trial where such trial was waived in original proceedings. — Where defendant seeks to retry, in an habitual offender proceeding, the question of voluntariness of guilty pleas he made a decade ago, and, although the validity of the prior convictions upon which the habitual offender charge is based is subject to attack, the purpose of the statute is not to provide a defendant with a trial by jury on previous convictions where the defendant waived such a trial in the original criminal proceedings. State v. Martinez, 92 N.M. 256, 586 P.2d 1085 (1978) (decided under 31-18-20 NMSA 1978).

Sequence of crimes and convictions is element of the state's case and not a defense to be raised and established by the defendant; the state's failure to establish the sequence of the crimes is therefor a failure of proof. State v. Valenzuela, 94 N.M. 285, 609 P.2d 1241 (Ct. App. 1979), aff'd, 94 N.M. 340, 610 P.2d 744 (1980) (decided under former 31-18-7 NMSA 1978).

Determining when subsequent act occurred relevant. — When a question of the sequence of crimes and convictions is raised, the only relevant determination is the factual question of when the subsequent act occurs. Thus, "sequence" depends upon evidence actually presented to the jury. State v. Valenzuela, 94 N.M. 285, 609 P.2d 1241 (Ct. App. 1979), aff'd, 94 N.M. 340, 610 P.2d 744 (1980) (decided under former 31-18-7 NMSA 1978).

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, 95 N.M. 246, 620 P.2d 1271 (1980).

Where state's exhibits establish prima facie case establishing valid guilty plea, the defendant must then produce evidence that supports the asserted invalidity of these pleas. State v. Garcia, 95 N.M. 246, 620 P.2d 1271 (1980).

Where defendant claims a guilty plea was invalid, the state makes a prima facie case establishing a valid guilty plea upon proof that defendant has been convicted of a crime. State v. Garcia, 95 N.M. 246, 620 P.2d 1271 (1980).

Issue of whether prior convictions are constitutionally valid is defense to the habitual offender charge. Defendant was entitled to present evidence in support of this defense. Whether the defense is a matter to be decided by the court or the jury will depend on the issue raised by the defense. State v. Dawson, 91 N.M. 70, 570 P.2d 608 (Ct. App. 1977).

Collateral attack on validity of prior convictions permissible. — Where defendant's appeal attacks the validity of two prior convictions on grounds: (1) that he did not have a preliminary examination in connection with the two prior convictions, and (2) that the

first conviction was for a misdemeanor rather than a felony, such a collateral attack is permissible. State v. Darrah, 76 N.M. 671, 417 P.2d 805 (1966).

State not required to allege and prove validity of prior conviction. — This section does not require the state to prove the validity of the prior convictions. The state makes a prima facie case upon proof that defendant has been convicted of a prior felony. State v. Dawson, 91 N.M. 70, 570 P.2d 608 (Ct. App. 1977).

Where defendant moved for a directed verdict, contending that the state had failed to prove an essential element of the habitual offender charge, the assertedly missing essential element being that the prior convictions were valid, the motion was correctly denied. Validity of the prior convictions is a matter of defense. Until defendant raised an issue as to the validity of the prior convictions, validity was not an issue in the case. The state did not have the burden of proving the validity of the prior convictions. State v. Gallegos, 91 N.M. 107, 570 P.2d 938 (Ct. App. 1977).

Evidence of prior convictions prima facie. — In a habitual offender proceeding, state exhibits showing the prior convictions make a prima facie case as to their prior convictions. State v. Garcia, 92 N.M. 730, 594 P.2d 1186 (Ct. App. 1978), cert. denied, 92 N.M. 675, 591 P.2d 286 (1979).

When validity of prior convictions becomes proper issue. — Until the defendant raises an issue as to the validity of prior convictions, "validity" is not an issue in the case. State v. O'Neil, 91 N.M. 727, 580 P.2d 495 (Ct. App. 1978) (decided under former 31-18-5 NMSA 1978).

Asserted invalidity of prior convictions is defense to habitual offender charge. State v. O'Neil, 91 N.M. 727, 580 P.2d 495 (Ct. App. 1978) (decided under former 31-18-7 NMSA 1978).

Invalidity of a prior conviction is a defense in a habitual offender proceeding and it is defendant's obligation to present evidence in support of this defense. State v. Garcia, 92 N.M. 730, 594 P.2d 1186 (Ct. App. 1978), cert. denied, 92 N.M. 675, 591 P.2d 286 (1979).

Validity of prior guilty pleas is an issue to be decided by the court in an habitual offender proceeding. State v. O'Neil, 91 N.M. 727, 580 P.2d 495 (Ct. App. 1978) (decided under former 31-18-7 NMSA 1978).

The view that all issues of validity are to be decided by the jury in an habitual offender proceeding cannot be subscribed to, particularly where the attack on the prior convictions goes to the validity of defendant's guilty pleas. State v. Martinez, 92 N.M. 256, 586 P.2d 1085 (1978) (decided under former 31-18-7 NMSA 1978).

Burden in habitual offender proceeding on defendant to produce evidence that a guilty plea in a previous proceeding was not voluntary or intelligent. State v. Garcia, 92

N.M. 730, 594 P.2d 1186 (Ct. App. 1978), cert. denied, 92 N.M. 675, 591 P.2d 286 (1979).

State not required to carry burden on validity of plea where record silent. — A trial court errs in placing an affirmative burden on the state when the "record is silent" concerning the validity of prior guilty pleas. State v. O'Neil, 91 N.M. 727, 580 P.2d 495 (Ct. App. 1978) (decided under former 31-18-7 NMSA 1978).

Burdens of production of evidence and of persuasion distinguished. — See same catchline in notes to 31-18-17 NMSA 1978.

Noncompliance with Rule 21(e), N.M.R. Crim. P. (now see Rule 5-303 NMRA) is not basis for attacking validity of guilty pleas to prior felonies in habitual offender proceedings. State v. Gallegos, 91 N.M. 107, 570 P.2d 938 (Ct. App. 1977).

Judgment of sister state admissible. — Admission of an Oklahoma judgment of two prior felonies was proper. The judgment was not inadmissible hearsay, and its admission was not a violation of the constitutional right to confront witnesses. State v. Whiteshield, 91 N.M. 96, 570 P.2d 927 (Ct. App.), cert. denied, 91 N.M. 4, 569 P.2d 414 (1977).

Effect of filing notice of appeal. — Where defendant was charged by supplemental information with being the same person who had been convicted of two felonies and who therefore should be sentenced as an habitual offender, and the jury found that the defendant was the same person who committed both offenses, defendant's contention that the trial court lost jurisdiction after the notice of appeal was filed on the second felony conviction and could not hear the issue to be tried on the supplemental information was without merit. The trial court had jurisdiction to impose sentence, since sentencing, in some prescribed statutory form, was a mandatory requirement of the Criminal Code - appeal or no appeal. If the appeal of the second conviction was affirmed the enhanced sentence would stand. In the event of reversal, the conviction and sentence would be vacated. State v. Lujan, 90 N.M. 778, 568 P.2d 614 (Ct. App. 1977).

Claim not made in trial court not considered on appeal. — Defendant claimed on appeal that the charge against him for being an habitual offender was defective for failure to name a specific subsection of the statute, but since no such claim was made in the trial court, it would not be considered on appeal. State v. Jordan, 88 N.M. 230, 539 P.2d 620 (Ct. App. 1975).

Procedural requirements of this section were met and record showed that supplemental information, which sought an enhanced sentence, was read in open court with defendant present, that defendant admitted to being the person convicted as charged in the supplemental information, and that this occurred when defendant was represented by counsel who, immediately after the enhanced sentence was imposed, informed the court that defendant desired to appeal and requested that a bond be set

pending the outcome of the appeal. State v. Madrid, 83 N.M. 603, 495 P.2d 383 (Ct. App. 1972).

III. SENTENCES.

Duty of court to impose sentence enhancement. — The court has an affirmative duty to impose the appropriate level of sentence enhancement once the factual issues of identity and prior convictions are resolved against the respondent. State v. Davis, 104 N.M. 229, 719 P.2d 807 (1986).

Jurisdiction of trial court to sentence is not exhausted until sentence is pronounced, and will carry over from term to term. Pavlich v. State, 79 N.M. 473, 444 P.2d 984 (1968).

Enhanced sentence may be imposed only in last felony case. — Even though identity is determined in a separate cause, the enhanced sentence may only be imposed in the last case in which the accused was convicted of a felony in this state. State v. Tipton, 77 N.M. 1, 419 P.2d 216 (1966).

Regardless of whether the identity is determined in a separate case or in a separate proceeding in the felony case following conviction therein, if such identity is established, the enhanced sentence required by the Habitual Criminal Act may only be imposed in the felony case. Lott v. Cox, 75 N.M. 102, 401 P.2d 93 (1965) (decided under former law).

Sentence imposed in habitual criminal proceeding void. — Where defendant's identity as the person previously convicted of two felonies was established in a separate proceeding, and the enhanced sentence was also imposed, the sentence was a nullity and the commitment issued therein is void, as the sentence should have been imposed in the last felony case. State v. Tipton, 77 N.M. 1, 419 P.2d 216 (1966).

Defendant may be returned for imposition of proper sentence. — Where defendant has been legally convicted, but no judgment or sentence has been imposed, and defendant's identity as an habitual offender has been established and he was sentenced, defendant's restraint is illegal because sentence was imposed in the wrong case. In such a situation, defendant may be returned to the trial court for imposition of a proper sentence. State v. Tipton, 77 N.M. 1, 419 P.2d 216 (1966).

A sentence in a cause charging violation of the habitual offender statute by a defendant who pleaded guilty to two murder charges is void and he should be remanded for sentencing in the murder cases. Miller v. Cox, 75 N.M. 65, 400 P.2d 480 (1965).

Previous regular sentences vacated and enhanced sentences imposed. — Where regular sentences were imposed upon defendants prior to the time their status as habitual offenders was determined, the regular sentences are to be vacated and the

enhanced sentences are to be imposed. State v. Baker, 90 N.M. 291, 562 P.2d 1145 (Ct. App. 1977).

Although the sentence of the court in the felony case was incomplete until the resentence, as the previous sentence was not vacated and the mandatory statutory increased punishment imposed as required by law, there is no reason, constitutional or otherwise, why the court which imposed sentence may not correct what it did wrongly by vacating the sentence for breaking and entering and imposing the mandatory sentence in place of the one vacated. State v. Gonzales, 84 N.M. 275, 502 P.2d 300 (Ct. App.), cert. denied, 84 N.M. 271, 502 P.2d 296 (1972).

Statute does not require that sentence be first imposed in the felony conviction and then vacated before the increased punishment prescribed by the habitual offender statute may be imposed. State v. Bonner, 81 N.M. 471, 468 P.2d 636 (Ct. App. 1970).

There is no requirement of law that the punishment for the felony of which accused was convicted be first imposed and then vacated in order to impose the increased punishment prescribed by the habitual offender statute. Lott v. Cox, 75 N.M. 102, 401 P.2d 93 (1965) (decided under former law).

Arrangement of manner in which enhanced sentence will be served. — In imposing the new enhanced sentences, the trial court's arrangement of the manner in which the new enhanced sentences will be served is not limited by the arrangement for serving the regular sentences which should have been vacated. State v. Baker, 90 N.M. 291, 562 P.2d 1145 (Ct. App. 1977) (decided under former law).

Change from suspended sentence to sentence to be served. — Inasmuch as the trial court had no authority to suspend the enhanced sentence, a change from a suspended sentence to a sentence to be served when sentence as a habitual offender was imposed was proper. State v. Baker, 90 N.M. 291, 562 P.2d 1145 (Ct. App. 1977) (decided under former law).

31-18-21. Consecutive sentences; inmates and persons at large.

A. Whenever an inmate in a penal institution of this state or of any county therein is sentenced for committing any felony while he is an inmate, the sentence imposed shall be consecutive to the sentence being served, and his period of parole shall be that set according to the provisions of Section 31-21-10 NMSA 1978.

B. Any person, who commits a crime while at large under a suspended or deferred sentence or probation or parole, and who is convicted and sentenced therefor, shall serve the sentence consecutive to the remainder of the term, including remaining parole time, under which he was released unless otherwise ordered by the court in sentencing for the new crime.

History: 1953 Comp., § 40A-29-34, enacted by Laws 1977, ch. 216, § 10.

ANNOTATIONS

Intent of legislature. — Construing Subsection A of this section together with the other sentencing statutes in the Criminal Sentencing Act leads to the inescapable conclusion that the legislature intended to impose harsher and more certain punishment on inmates who commit crimes while incarcerated. State v. Davis, 2003-NMSC-022, 134 N.M. 172, 74 P.3d 1064.

The legislature intended sentencing courts to stack the sentences of inmates who are convicted of crimes while incarcerated. State v. Davis, 2003-NMSC-022, 134 N.M. 172, 74 P.3d 1064.

Prison disciplinary measures do not bar subsequent prosecution in a criminal action for violation of a penal statute prohibiting the same act which was the basis of the person's discipline. Washington v. Rodriguez, 82 N.M. 428, 483 P.2d 309 (Ct. App. 1971).

Consecutive sentences proper. — Court may, at its discretion, impose consecutive sentences. State v. Frederick, 74 N.M. 42, 390 P.2d 281 (1964).

Sentencing judge has no discretion under this section regarding whether a sentence is to be served consecutively or concurrently. The legislature's use of the word "shall" in Subsection A makes consecutive sentencing mandatory. State v. Davis, 2003-NMSC-022, 134 N.M. 172, 74 P.3d 1064.

Section alters common-law rule. — The common-law rule is that in the absence of statute two or more sentences are to be served concurrently unless otherwise ordered by the court. This section alters the common-law rule only as to crimes committed while at large under a sentence for a prior crime. Deats v. State, 84 N.M. 405, 503 P.2d 1183 (Ct. App. 1972).

Unless court orders otherwise, section postpones stated beginning date of new sentence until the prior sentence is completed. Herring v. State, 81 N.M. 21, 462 P.2d 468 (Ct. App. 1969).

Sentence imposed upon defendant while he was on parole from prior sentence ran consecutive to prior sentence although trial court stated beginning date for new sentence but did not order that it run concurrently with prior sentence. Herring v. State, 81 N.M. 21, 462 P.2d 468 (Ct. App. 1969).

Although the beginning date of the new sentences imposed following conviction of forgery was stated in the commitment of defendant on parole, that beginning date was postponed by this section where the trial court did not order otherwise; further, the record showed that the court did not intend the sentences for the three forgeries to run concurrently with any other sentence imposed upon defendant. State v. Upshaw, 79 N.M. 484, 444 P.2d 995 (Ct. App. 1968).

Effect of return of defendant to penitentiary before trial. — Defendant's assertion that the district court lost jurisdiction over him because he was "released" to the penitentiary for parole violation before being tried did not raise any issue of illegality. The parole authorities could revoke defendant's parole and return him to the penitentiary for a parole violation, and this section clearly contemplates the conviction and sentence of a person for a crime committed while at large under parole. State v. Ford, 81 N.M. 556, 469 P.2d 535 (Ct. App. 1970).

"Presentence" confinement credit not allowed. — This section mandates that a sentence for a felony committed while serving a sentence in a penal institution run consecutive to the prior sentence. It is impossible to grant "presentence" confinement credit concurrent with time served on the prior sentence and comply with this section, which requires that the sentences run consecutively. State v. Facteau, 109 N.M. 748, 790 P.2d 1029 (1990).

Discretionary award of presentence confinement credit for offense committed while on probation. — Since defendant was outside of a penal institution on parole when he committed a second offense (possession of drug paraphernalia), the sentencing judge had discretion under Subsection B to make defendant's sentence run concurrent or consecutive to any sentence defendant was then serving for a parole violation, including the authority to award presentence confinement credit on the facts of the case. State v. Irvin, 114 N.M. 597, 844 P.2d 847 (Ct. App. 1992).

Law reviews. — For article, "The Proposed New Mexico Criminal Code," see 1 Nat. Resources J. 122 (1961).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Sentencing for new offenses committed while accused was on parole or conditional release as concurrent or consecutive, 116 A.L.R. 811.

31-18-22. Special incarceration alternative program.

A. The corrections department shall develop and implement a special incarceration alternative program for certain adult male and adult female felony offenders pursuant to this section. The program shall provide substance abuse counseling and treatment, general education diploma preparatory courses, manual labor assignments, physical training and drills, training in decision making and personal development and pre-release skills training. The programs shall be conducted in a strict disciplinary environment. Emphasis shall be given to rehabilitation of alcohol and substance abusers. The corrections department shall require that program participants complete a structured, ninety-day program.

B. Participation in the program shall be limited to those offenders sentenced on or after July 1, 1990. Offenders ineligible to participate in the program are offenders:

(1) sentenced to death;

(2) who have received a life sentence;

(3) with a record of prior confinement for a felony conviction;

(4) convicted of murder in the first or second degree, child abuse resulting in death or great bodily harm, criminal sexual penetration in the first or second degree or criminal sexual contact with a minor;

(5) convicted of an offense carrying a mandatory sentence that cannot be suspended or deferred;

(6) who have participated in a special incarceration alternative program in the past;

(7) who are more than thirty years of age at time of sentencing; or

(8) who do not volunteer to participate in the program and who do not agree to the special conditions of probation for successful program participants.

C. The corrections department shall develop and adopt regulations to provide for the screening of all convicted felons sentenced to the custody of the corrections department. The regulations shall provide that the screening occurs within thirty days of sentencing. Persons deemed suitable under the regulations adopted pursuant to this subsection shall not be denied eligibility for participation in the program solely due to physical disability.

D. If the sentencing court accepts the recommendation of the corrections department that the offender is suitable for participation in a special incarceration alternative program, the court shall resentence the offender to provide that, in the event the offender successfully completes the program, the remainder of the sentence shall be suspended and the offender shall be placed on probation for the remainder of the term. The sentencing court shall be notified in writing by the corrections department of the offender's successful completion of the special incarceration alternative program.

E. The corrections department may contract for the design, construction and lease of a facility to house a special incarceration alternative program with public or private agencies, entities or persons capable of providing financing or construction of such a facility. The facility shall be operated by the corrections department.

F. Appropriate post-institutional treatment shall be made available by the corrections department to the offender.

History: Laws 1990, ch. 51, § 1.

31-18-23. Three violent felony convictions; mandatory life imprisonment; exception.

A. When a defendant is convicted of a third violent felony, and each violent felony conviction is part of a separate transaction or occurrence, and at least the third violent felony conviction is in New Mexico, the defendant shall, in addition to the sentence imposed for the third violent conviction when that sentence does not result in death, be punished by a sentence of life imprisonment. The life imprisonment sentence shall be subject to parole pursuant to the provisions of Section 31-21-10 NMSA 1978.

B. The sentence of life imprisonment shall be imposed after a sentencing hearing, separate from the trial or guilty plea proceeding resulting in the third violent felony conviction, pursuant to the provisions of Section 31-18-24 NMSA 1978.

C. For the purpose of this section, a violent felony conviction incurred by a defendant before he reaches the age of eighteen shall not count as a violent felony conviction.

D. When a defendant has a felony conviction from another state, the felony conviction shall be considered a violent felony for the purposes of the Criminal Sentencing Act [Chapter 31, Article 18 NMSA 1978] if that crime would be considered a violent felony in New Mexico.

E. As used in the Criminal Sentencing Act:

(1) "great bodily harm" means an injury to the person that creates a high probability of death or that causes serious disfigurement or that results in permanent loss or impairment of the function of any member or organ of the body; and

(2) "violent felony" means:

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

(b) shooting at or from a motor vehicle resulting in great bodily harm, as provided in Subsection B of Section 30-3-8 NMSA 1978;

(c) kidnapping resulting in great bodily harm inflicted upon the victim by his captor, as provided in Subsection B of Section 30-4-1 NMSA 1978; and

(d) criminal sexual penetration, as provided in Subsection C or Paragraph (5) or (6) of Subsection D of Section 30-9-11 NMSA 1978; and

(e) robbery while armed with a deadly weapon resulting in great bodily harm as provided in Section 30-16-2 NMSA 1978 and Subsection A of Section 30-1-12 NMSA 1978.

History: 1978 Comp., § 31-18-23, enacted by Laws 1994, ch. 24, § 2; 1996, ch. 79, § 3.

ANNOTATIONS

The 1996 amendment, effective July 1, 1996, substituted "sentence" for "punishment" and "when" for "and" in the first sentence of Subsection A, substituted "(5) or (6)" for "(4) or (5)" in Subparagraph E(2)(d), and made a stylistic change in Subparagraph E(2)(e).

31-18-24. Violent felony sentencing procedure.

A. The court shall conduct a separate sentencing proceeding to determine any controverted question of fact regarding whether the defendant has been convicted of three violent felonies. Either party to the action may demand a jury trial.

B. In a jury trial, the sentencing proceeding shall be conducted as soon as practicable by the original trial judge before the original trial jury. In a nonjury trial, the sentencing shall be conducted as soon as practicable by the original trial judge. In the case of a plea of guilty, the sentencing proceeding shall be conducted as soon as practicable by the original trial judge or by a jury upon demand of the defendant.

C. In a jury sentencing proceeding, the judge shall give appropriate instructions and allow arguments. The jury shall retire to determine the verdict. In a nonjury sentencing proceeding, or upon a plea of guilty where no jury has been demanded, the judge shall allow argument and determine the verdict.

History: 1978 Comp., § 31-18-24, enacted by Laws 1994, ch. 24, § 3.

31-18-25. Two violent sexual offense convictions; mandatory life imprisonment; exception.

A. When a defendant is convicted of a second violent sexual offense, and each violent sexual offense conviction is part of a separate transaction or occurrence, and at least the second violent sexual offense conviction is in New Mexico, the defendant shall, in addition to the punishment imposed for the second violent sexual offense conviction, be punished by a sentence of life imprisonment. The life imprisonment sentence shall be subject to parole pursuant to the provisions of Section 31-21-10 NMSA 1978.

B. Notwithstanding the provisions of Subsection A of this section, when a defendant is convicted of a second violent sexual offense, and each violent sexual offense conviction is part of a separate transaction or occurrence, and the victim of each violent sexual offense was less than thirteen years of age at the time of the offense, and at least the second violent sexual offense conviction is in New Mexico, the defendant shall be punished by a sentence of life imprisonment without the possibility of parole.

C. The sentence of life imprisonment shall be imposed after a sentencing hearing, separate from the trial or guilty plea proceeding resulting in the second violent sexual offense conviction, pursuant to the provisions of Section 31-18-26 NMSA 1978.

D. For the purposes of this section, a violent sexual offense conviction incurred by a defendant before he reaches the age of eighteen shall not count as a violent sexual offense conviction.

E. When a defendant has a felony conviction from another state, the felony conviction shall be considered a violent sexual offense for the purposes of the Criminal Sentencing Act [Chapter 31, Article 18 NMSA 1978] if the crime would be considered a violent sexual offense in New Mexico.

F. As used in the Criminal Sentencing Act, "violent sexual offense" means:

(1) criminal sexual penetration in the first degree, as provided in Subsection C of Section 30-9-11 NMSA 1978; or

(2) criminal sexual penetration in the second degree, as provided in Subsection D of Section 30-9-11 NMSA 1978.

History: 1978 Comp., § 31-18-25, enacted by Laws 1996, ch. 79, § 1; 1997, ch. 140, § 1.

ANNOTATIONS

The 1997 amendment, effective July 1, 1997, added Subsection B; redesignated former Subsections B through E as C through F; and rewrote Subsection F.

Multiple enhancements authorized. — This section authorizes the imposition of multiple enhancements for multiple current convictions. State v. McClendon, 2001-NMSC-023, 130 N.M. 551, 28 P.3d 1092.

31-18-26. Two violent sexual offense convictions; sentencing procedure.

A. The court shall conduct a separate sentencing proceeding to determine any controverted question of fact regarding whether the defendant has been convicted of two violent sexual offenses. Either party to the sentencing proceeding may demand a jury sentencing proceeding.

B. A jury sentencing proceeding shall be conducted as soon as practicable by the original trial judge before the original trial jury. A nonjury sentencing proceeding shall be conducted as soon as practicable by the original trial judge. In the case of a plea of guilty, the sentencing proceeding shall be conducted as soon as practicable by the original trial judge or by the original trial jury, upon demand of the defendant.

C. In a jury sentencing proceeding, the judge shall give appropriate instructions and allow arguments. In a nonjury sentencing proceeding, or upon a plea of guilty when the

defendant has not demanded a jury, the judge shall allow arguments and determine the verdict.

History: 1978 Comp., § 31-18-26, enacted by Laws 1996, ch. 79, § 2.

ANNOTATIONS

Construction. — Although the statutory language "as soon as practicable" in Subsection B means that the life enhancement proceeding must be conducted without undue delay, the legislature did not intend to impose a specific time limitation on the commencement of life enhancement proceedings. State v. Massengill, 2003-NMCA-024,133 N.M. 263, 62 P.3d 354, cert. denied, 133 N.M. 126, 61 P.3d 835 (2003).

Continuance. — In a prosecution of defendant for criminal sexual penetration and abuse of a child by endangerment, defendant's argument that the trial court erred by granting a continuance of a life enhancement sentencing proceeding was rejected on appeal, where defendant failed to demonstrate that he suffered actual prejudice in connection with the continuance of the life enhancement proceeding or that the delay violated his rights to due process or a speedy trial. State v. Massengill, 2003-NMCA-024,133 N.M. 263, 62 P.3d 354, cert. denied, 133 N.M. 126, 61 P.3d 835 (2003).

ARTICLE 18A
Sentencing Guidelines

(Repealed by Laws 1994, ch. 19, § 4.)

31-18A-1 to 31-18A-9. Repealed.

ANNOTATIONS

Repeals. — Laws 1994, ch. 19, § 4, repeals 31-18A-1 to 31-18A-9 NMSA 1978, as enacted by Laws 1988, ch. 116, §§ 1 to 9, the Sentencing Guidelines Act, effective July 1, 1994. For provisions of former sections, see 1990 Replacement Pamphlet.

ARTICLE 18B
Hate Crimes

31-18B-1. Short title.

This act [31-18B-1 to 31-18B-5 NMSA 1978] may be cited as the "Hate Crimes Act".

History: Laws 2003, ch. 384, § 1.

ANNOTATIONS

Effective dates. — Laws 2003, ch. 384, § 7 makes the act effective on July 1, 2003.

31-18B-2. Definitions.

As used in the Hate Crimes Act [31-18B-1 NMSA 1978]:

A. "age" means sixty years of age or older;

B. "gender identity" means a person's self-perception, or perception of that person by another, of the person's identity as a male or female based upon the person's appearance, behavior or physical characteristics that are in accord or opposed to the person's physical anatomy, chromosomal sex or sex at birth;

C. "handicapped status" means that the person has a physical or mental impairment that substantially limits one or more of that person's functions, such as caring for himself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working;

D. "motivated by hate" means the commission of a crime with the intent to commit the crime because of the actual or perceived race, religion, color, national origin, ancestry, age, handicapped status, gender, sexual orientation or gender identity of the victim, whether or not the offender's belief or perception was correct; and

E. "sexual orientation" means heterosexuality, homosexuality or bisexuality, whether actual or perceived.

History: Laws 2003, ch. 384, § 2.

ANNOTATIONS

Effective dates. — Laws 2003, ch. 384, § 7 makes the act effective on July 1, 2003.

31-18B-3. Hate crimes; noncapital felonies, misdemeanors or petty misdemeanors committed because of the victim's actual or perceived race, religion, color, national origin, ancestry, age, handicapped status, gender, sexual orientation or gender identity; alteration of basic sentence.

A. When a separate finding of fact by the court or jury shows beyond a reasonable doubt that an offender committed a noncapital felony motivated by hate, the basic sentence of imprisonment prescribed for the offense in Section 31-18-15 NMSA 1978 may be increased by one year. An increase in the basic sentence of imprisonment pursuant to the provisions of this subsection shall be in addition to an increase in a basic sentence prescribed for the offense in Section 31-18-17 NMSA 1978. A sentence imposed pursuant to the provisions of this subsection may include an alternative

sentence that requires community service, treatment, education or any combination thereof. The court may suspend or defer any or all of the sentence or grant a conditional discharge, unless otherwise provided by law.

B. If a finding was entered in a previous case that the offender was convicted for committing a crime that was motivated by hate, and if a separate finding of fact by the court or jury shows beyond a reasonable doubt that in the instant case the offender committed a noncapital felony that was motivated by hate, the basic sentence of imprisonment prescribed for the offense in Section 31-18-15 NMSA 1978 may be increased by two years. An increase in the basic sentence of imprisonment pursuant to the provisions of this subsection shall be in addition to an increase in a basic sentence prescribed for the offense in Section 31-18-17 NMSA 1978. A sentence imposed pursuant to the provisions of this subsection may include an alternative sentence that requires community service, treatment, education or any combination thereof. The court may suspend or defer any or all of the sentence, or grant a conditional discharge unless otherwise provided by law.

C. If the case is tried before a jury and if a prima facie case has been established showing that in the commission of the offense the offender was motivated by hate, the court shall submit the issue to the jury by special interrogatory. If the case is tried by the court and if a prima facie case has been established showing that in the commission of the offense the offender was motivated by hate, the court shall decide the issue and shall make a separate finding of fact regarding the issue. If the court or jury determines that the offender is guilty of the crime and finds beyond a reasonable doubt that the offender was motivated by hate, the court shall include that determination in the judgment and sentence.

D. When a petty misdemeanor or a misdemeanor is motivated by hate, the basic sentence of imprisonment prescribed for the offense in Section 31-19-1 NMSA 1978 may include an alternative sentence that requires community service, treatment, education or any combination thereof. The court may suspend or defer any or all of the sentence or grant a conditional discharge, unless otherwise provided by law.

History: Laws 2003, ch. 384, § 3.

ANNOTATIONS

Effective dates. — Laws 2003, ch. 384, § 7 makes the act effective on July 1, 2003.

Decisions under former 31-18-16.1 NMSA 1978. — In light of the similarity of this section and former Section 31-18-16.1 NMSA 1978, annotations decided under former 31-18-16.1 NMSA 1978 have been included in the annotations in this section.

It is solely within province of legislature to establish penalties for criminal behavior. State v. Lack, 98 N.M. 500, 650 P.2d 22 (Ct. App. 1982).

Failure to give defendant notice of enhancement. — Robbery defendant was entitled to notice of the state's intent to seek enhancement under this section, and failure to give him such notice was reversible error. State v. Smith, 110 N.M. 534, 797 P.2d 984 (Ct. App. 1990).

Where a robbery defendant was not properly notified that the state would seek old-age enhancement of his sentence under this section before he pled and was adjudicated guilty, the state was not precluded from seeking enhancement upon remand of his case for further proceedings. State v. Smith, 110 N.M. 534, 797 P.2d 984 (Ct. App. 1990).

31-18B-4. Hate crimes; data collection.

Every district attorney and every state, county and municipal law enforcement agency, to the maximum extent possible, shall provide the federal bureau of investigation with data concerning the commission of a crime motivated by hate, in accordance with guidelines established pursuant to the federal Hate Crime Statistics Act.

History: Laws 2003, ch. 384, § 4.

ANNOTATIONS

Effective dates. — Laws 2003, ch. 384, § 7 makes the act effective on July 1, 2003.

Federal Hate Crime Statistics Act — For federal Hate Crime Statistics Act, see notes following 28 U.S.C.S. § 534.

31-18B-5. Hate crimes; law enforcement training.

A. No later than December 31, 2003, the New Mexico law enforcement academy board shall develop and incorporate into the basic law enforcement training required, pursuant to the Law Enforcement Training Act [29-7-1 NMSA 1978], a course of instruction at least two hours in length concerning the detection, investigation and reporting of a crime motivated by hate.

B. The New Mexico law enforcement academy board shall develop a course of instruction, learning and performance objectives and training standards, in conjunction with appropriate groups and individuals that have an interest in and expertise regarding crimes motivated by hate. The groups and individuals shall include law enforcement agencies, law enforcement academy instructors, experts on crimes motivated by hate and members of the public.

C. In-service law enforcement training, as required pursuant to Section 29-7-7.1 NMSA 1978, shall include at least two hours of instruction that conform with the requirements set forth in Subsection B of this section.

D. Each certified regional law enforcement training facility shall incorporate into its basic law enforcement training and in-service law enforcement training a course of training described in Subsection B of this section that is comparable to or exceeds the standards of the course of instruction developed by the New Mexico law enforcement academy board.

History: Laws 2003, ch. 384, § 5.

ANNOTATIONS

Effective dates. — Laws 2003, ch. 384, § 7 makes the act effective on July 1, 2003.

ARTICLE 19
Sentencing Authority for Misdemeanors

31-19-1. Sentencing authority[;] misdemeanors; imprisonment and fines; probation.

A. Where the defendant has been convicted of a crime constituting a misdemeanor, the judge shall sentence the person to be imprisoned in the county jail for a definite term less than one year or to the payment of a fine of not more than one thousand dollars ($1,000) or to both such imprisonment and fine in the discretion of the judge.

B. Where the defendant has been convicted of a crime constituting a petty misdemeanor, the judge shall sentence the person to be imprisoned in the county jail for a definite term not to exceed six months or to the payment of a fine of not more than five hundred dollars ($500) or to both such imprisonment and fine in the discretion of the judge.

C. When the court has deferred or suspended sentence, it shall order the defendant placed on supervised or unsupervised probation for all or some portion of the period of deferment or suspension.

History: 1953 Comp., § 40A-29-4, enacted by Laws 1963, ch. 303, § 29-4; and recompiled as 1953 Comp., § 40A-29-35, by Laws 1977, ch. 216, § 16; 1981, ch. 18, § 1; 1984, ch. 106, § 1.

ANNOTATIONS

Cross references. — For meaning of "Criminal Code," see 30-1-1 NMSA 1978 and note thereto.

For misdemeanor penalty under Motor Vehicle Code, see 66-8-7 NMSA 1978.

Section was not applicable where defendant violated former 64-10-1, 1953 Comp., which was not a Criminal Code misdemeanor. State v. Sawyers, 79 N.M. 557, 445 P.2d 978 (Ct. App. 1968).

Section 30-1-6 NMSA 1978 and this section refer generally to the sentence for misdemeanors; former 64-10-1, 1953 Comp., provided a specific sentence for that misdemeanor. If the general statute, standing alone, would include the same matter as the special statute and thus conflict with the special statute, the special statute controls, since it is considered an exception to the general statute. State v. Sawyers, 79 N.M. 557, 445 P.2d 978 (Ct. App. 1968).

Prosecution for violation of 25-3-15 NMSA 1978 regulation of meat inspection board. — In a prosecution for violation of 25-3-15 NMSA 1978, declaring slaughter without inspection and sale of uninspected meat to be misdemeanors, and 77-2-22 NMSA 1978, declaring violation of a regulation of the meat inspection board to be a petty misdemeanor, the trial court's sentencing authority for the offense is this section. State v. Pina, 90 N.M. 181, 561 P.2d 43 (Ct. App. 1977).

Confinement for more than one year in custody of corrections department. — Defendant whose continuous sentence was for more than one year was properly sentenced to the custody of the corrections department rather than the county jail, as the place of confinement, under this section, 31-20-2A and 33-2-39 NMSA 1978, depends on the length of confinement. State v. Musgrave, 102 N.M. 148, 692 P.2d 534 (Ct. App. 1984).

Maximum period of probation. — The maximum period of probation that may be assessed in misdemeanor or petty misdemeanor cases is the maximum allowable period of incarceration for that crime, irrespective of whether a defendant is sentenced in district court or in a lower tribunal. State v. Candelaria, 113 N.M. 288, 825 P.2d 221 (Ct. App. 1991).

Jury trial in misdemeanor cases. — Those misdemeanors triable in district court do not provide for a trial by jury unless such crime was of the type which enjoyed and permitted trial by jury at the time of the adoption of N.M. Const., art. II, § 12. 1964 Op. Att'y Gen. No. 64-37.

Place of confinement is county jail. — The place of confinement for misdemeanors under the Criminal Code is the county jail under this section. State v. Sawyers, 79 N.M. 557, 445 P.2d 978 (Ct. App. 1968).

Magistrate court may order restitution. — The magistrate court may, as part of its sentencing power, order a Criminal Code or Motor Vehicle Code violator to make restitution. 1979 Op. Att'y Gen. No. 79-18.

Specific sentence held lawful. — A sentence of 364 days in a county detention center, suspended with the exception of eighteen days to be served on the defendant’s

days off from work or on weekends, with the remainder of the sentence to be served on unsupervised probation, is in accord with this section and is therefore appropriate and legal. State v. Orquiz, 2003-NMCA-089, 134 N.M. 157, 74 P.3d 91.

Law reviews. — For article, "The New Mexico Children's Code: Some Remaining Problems," see 10 N.M.L. Rev. 341 (1980).

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).

For article, "Unintentional homicides caused by risk-creating conduct: Problems in distinguishing between depraved mind murder, second degree murder, involuntary manslaughter, and noncriminal homicide in New Mexico," 20 N.M.L. Rev. 55 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 27, 29, 825.

Admissibility of expert testimony as to appropriate punishment for convicted defendant, 47 A.L.R.4th 1069.

Appealability of order suspending imposition or execution of sentence, 51 A.L.R.4th 939.

ARTICLE 20
Sentencing

31-20-1. Sentence of corporations.

The court may sentence any corporation, club, organization or unincorporated association which has been convicted of a crime to pay a fine authorized by the Criminal Code [30-30-1 NMSA 1978].

History: 1953 Comp., § 40A-29-12, enacted by Laws 1963, ch. 303, § 29-12; and recompiled as 1953 Comp., § 40A-29-36 by Laws 1977, ch. 216, § 16.

ANNOTATIONS

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. — 18B Am. Jur. 2d Corporations § 2146.

Applicability of criminal statute to corporation as affected by character of punishment or penalty imposed, 80 A.L.R.3d 1220.

19 C.J.S. Corporations §§ 736 to 739.

31-20-2. Place of imprisonment; commitments.

A. Persons sentenced to imprisonment for a term of one year or more shall be imprisoned in a corrections facility designated by the corrections department, unless a new trial is granted or a portion of the sentence is suspended so as to provide for imprisonment for not more than eighteen months; then the imprisonment may be in such place of incarceration, other than a corrections facility under the jurisdiction of the corrections department, as the sentencing judge, in his discretion, may prescribe; provided that a sentence of imprisonment for one year or more but not more than eighteen months shall be subject to the provisions of Subsections D and E of this section and shall not be imposed unless the requirements set forth in Subsection D of this section are satisfied.

B. All commitments, judgments and orders of the courts of this state for the imprisonment or release of persons in the penitentiary shall run to the corrections department, but nothing contained in this section shall invalidate or impair the validity of any commitment, judgment or order of any court in this state directed to the secretary of corrections, the warden of the penitentiary of New Mexico or to the penitentiary of New Mexico, and all such commitments, judgments and orders shall be treated and construed as running to the corrections department.

C. There is created within the corrections department an "intake and classification center". The intake and classification center shall have the following duties:

(1) process all inmates sentenced or committed for purposes of diagnosis to the corrections department;

(2) classify inmates for housing assignments;

(3) develop an individualized plan for participation by each inmate in programs, work assignments and special needs;

(4) monitor each inmate's progress during incarceration and reclassify or modify classification assignments as may be necessary, taking into consideration the overall needs of the inmate population, institutional and facility requirements and the individual inmate's needs;

(5) with the approval of the secretary of corrections, may transfer inmates of the penitentiary to an institution under the control of another state if that state has entered into a corrections control agreement with New Mexico; and

(6) with the approval of the secretary of corrections, may transfer inmates to any facility, including the forensic hospital under the jurisdiction of the department of health.

D. A sentence of one year or more but not more than eighteen months and providing for imprisonment in a place of incarceration other than a corrections facility under the jurisdiction of the corrections department pursuant to Subsection A of this section, which shall be known as the local sentencing option, shall not be imposed unless:

(1) the place of incarceration is located within the county in which the crime was committed; and

(2) the governing authority in charge of the place of incarceration has entered into a joint powers agreement with the corrections department setting forth:

(a) the amount of money the corrections department shall pay for offenders sentenced to a term of one year or more but not more than eighteen months and the number of offenders which may be sentenced to such terms; and

(b) any other provisions deemed appropriate and agreed to by the local governing body and the corrections department.

E. If a judge imposes a sentence of one year or more but not more than eighteen months and provides for imprisonment in a place of incarceration other than a corrections facility under the jurisdiction of the corrections department:

(1) the local governing body or its agent shall have the ability to petition that judge when the capacity of the place of incarceration is filled or when any problem develops concerning that offender requesting the judge to issue an order committing the offender to the corrections department for completion of the remainder of his sentence. A hearing on a petition pursuant to this paragraph shall be held within three days of the filing of the petition. Notwithstanding any other provision of law, the judge shall retain jurisdiction over the offender for the purpose of implementing the local sentencing option; and

(2) the local governing body or its agent shall keep the district judges for the judicial district in which the place of incarceration is located informed as to the capacity for the sentencing of offenders in accordance with the local sentencing option. No judge shall sentence an offender in accordance with the local sentencing option if that sentence will result in exceeding the number of offenders set forth in the joint powers agreement.

F. The corrections department shall file an annual report with the legislature which shall contain the number of joint powers agreements in operation pursuant to this section, copies of those agreements, the number of offenders currently incarcerated pursuant to those agreements and any other relevant information relating to the implementation of this section.

G. The corrections department may enter into contracts with public or private detention facilities for the purpose of housing inmates lawfully committed to the corrections department. Any facility with which the department contracts shall meet or exceed corrections department standards prior to the housing of any inmates within the facility and shall meet certification requirements for prisons within eighteen months of entering into such contracts. The contractor shall adhere to all appropriate corrections department policies and procedures and shall agree to have staff trained at the corrections department trained at the corrections department training academy.

History: 1953 Comp., § 40A-29-13, enacted by Laws 1963, ch. 303, § 29-13; 1972, ch. 71, § 3; 1973, ch. 383, § 1; and recompiled as 1953 Comp., § 40A-29-37, by Laws 1977, ch. 216, § 16; 1978, ch. 106, § 1; 1981, ch. 9, § 1; 1987, ch. 51, § 1; 1993, ch. 81, § 1.

ANNOTATIONS

Cross references. — For Interstate Corrections Compact, see 31-5-17 and 31-5-18 NMSA 1978.

For contracts with the United States attorney general for the housing of convicted offenders, see 31-5-19 NMSA 1978.

For execution of death sentence, see 31-14-1 to 31-14-16 NMSA 1978.

For judgment of imprisonment for more than one year to be in corrections facility, see 33-2-19 NMSA 1978.

For determination of sentence upon several commitments, see 33-2-39 NMSA 1978.

The 1993 amendment, effective July 1, 1993, substituted "contained in this section" for "herein contained" and "secretary of corrections" for "superintendent" in Subsection B; substituted "department of health" for "health and environment department" in Subsection C(6); substituted "this section" for "this act" in two places in Subsection F; and added Subsection G.

The provisions of Subsection D are mandatory, not discretionary. State v. Ruiz, 109 N.M. 437, 786 P.2d 51 (1989).

Once the defendant's plea is accepted and judgment entered, court has four options: (1) it can sentence the defendant and execute the sentence, committing him to prison; (2) it can commit the defendant for a 60-day diagnostic term; (3) it can sentence the defendant and suspend the execution of the sentence; or (4) it can enter an order deferring the imposition of the sentence. State v. Kenneman, 98 N.M. 794, 653 P.2d 170 (Ct. App. 1982) (decided under former law).

Rights not created. — Provisions relating to mechanisms by which corrections officials can arrange to transfer inmates needing psychiatric care to an appropriate facility were not meant to create rights enforceable by inmates against state officials; thus, this section did not create a liberty interest subject to due process protections. Riddle v. Mondragon, 83 F.3d 1197 (10th Cir. 1996).

Order committing defendant to state hospital for indeterminate period not valid sentence. — An order directing that the defendant be transported to the state hospital for an indeterminate period and then be returned to the district court for sentencing is not a valid sentence permitted by law, nor does it constitute a final judgment and sentence for purposes of an appeal. State v. Garcia, 99 N.M. 466, 659 P.2d 918 (Ct. App. 1983).

Effect of commitment flaws on judgment. — Valid judgment is not to be nullified by the flaws in the commitment. Shankle v. Woodruff, 64 N.M. 88, 324 P.2d 1017 (1958).

Effect of misnomer. — Prisoners were not denied habeas corpus where they were sentenced to the "New Mexico penitentiary" instead of "to the penitentiary of New Mexico" because the misnomer, if one existed, was a clerical error which did not affect any substantial right of the appellants. Carter v. New Mexico, 358 F.2d 710 (10th Cir.), cert. denied, 385 U.S. 873, 87 S. Ct. 146, 17 L. Ed. 2d 100 (1966).

Effect of section where one-year maximum sentence. — Where defendant has a valid maximum sentence of not more than one year, under 33-2-19 NMSA 1978 or this section, the proper place of his confinement is the state penitentiary. State v. Sawyers, 79 N.M. 557, 445 P.2d 978 (Ct. App. 1968) (decided under prior law).

Calculation of sentence. — Under 33-2-19 NMSA 1978, defendant's sentence to one year would be calculated as a sentence of less than one year after crediting his pre-sentence time served; thus, the law did not require the court to sentence him to prison, and his sentence to jail was legal. State v. Brown, 1999-NMSC-004, 126 N.M. 642, 974 P.2d 136.

Transfer from New Mexico to Texas. — Because a transfer of prisoners from New Mexico to Texas does not affect the duration of a sentence, a transfer must impose an atypical or a significant hardship before it can be held to create a liberty interest under state law. Jordan v. Bowles, _____F.3d____(10th Cir. 1997).

Contracting with counties for housing of inmates. — Corrections department cannot contract with counties for the housing of inmates committed to the department. 1987 Op. Att'y Gen. No. 87-53.

Confinement in county jail held improper. — District court lacked authority to order defendant confined in the county jail, where defendant's "sentence" was the one-year term imposed by the judgment of the district court, not the 363 days remaining to be

served on that sentence after imposition of the sentence. State v. Ruiz, 109 N.M. 437, 786 P.2d 51 (1989).

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. — 21 Am. Jur. 2d Criminal Law §§ 24 et seq., 825; 32 Am. Jur. 2d False Imprisonment § 16; 60 Am. Jur. 2d Penal and Correctional Institutions, § 13; 75B Am. Jur. 2d Trial § 1828.

When, under terms of Federal Youth Corrections Act (18 USCS §§ 5005 et seq.), must prisoner serving youth corrections sentence be segregated from adult prison population, 59 A.L.R. Fed. 746.

24 C.J.S. Criminal Law §§ 1589, 1590.

31-20-3. Order deferring or suspending sentence; diagnostic commitment.

Upon entry of a judgment of conviction of any crime not constituting a capital or first degree felony, any court having jurisdiction when it is satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may either:

A. enter an order deferring the imposition of sentence;

B. sentence the defendant and enter an order suspending in whole or in part the execution of the sentence; or

C. commit the convicted person, if convicted of a felony and not committed for diagnostic purposes within the twelve-month period immediately preceding that conviction, to the department of corrections [corrections department] for an indeterminate period not to exceed sixty days for purposes of diagnosis, with direction that the court be given a report when the diagnosis is complete as to what disposition appears best when the interest of the public and the individual are evaluated.

History: 1953 Comp., § 40A-29-15, enacted by Laws 1963, ch. 303, § 29-15; 1971, ch. 204, § 4; and recompiled as 1953 Comp., § 40A-29-39, by Laws 1977, ch. 216, § 16; 1985, ch. 159, § 1.

ANNOTATIONS

Cross references. — For restrictions upon suspended sentences, see former 31-18-4 NMSA 1978.

Bracketed material. — The bracketed material in Subsection C was inserted by the compiler, as Laws 1977, ch. 257, § 4, abolished the department of corrections. Laws 1977, ch. 257, § 14, transferred all employees, equipment, etc., of this department to the criminal justice department. Laws 1980, ch. 150, § 3, changed the name of this department to the "corrections and criminal rehabilitations department." Laws 1981, ch. 73, § 1, changed the name of this department to the "corrections department." See 9-3-3 NMSA 1978. The bracketed material was not enacted by the legislature and is not part of the law.

Constitutionality. — Laws 1909, ch. 32, § 1 (repealed), giving court power to suspend sentences, did not encroach upon constitutional power of execution to grant reprieves and pardons. Ex parte Bates, 20 N.M. 542, 151 P. 698 (1915) (decided under former law).

It is solely within province of legislature to establish penalties for criminal behavior. State v. Lack, 98 N.M. 500, 650 P.2d 22 (Ct. App. 1982).

Once the defendant's plea is accepted and judgment entered, court has four options: (1) it can sentence the defendant and execute the sentence, committing him to prison; (2) it can commit the defendant for a 60-day diagnostic term; (3) it can sentence the defendant and suspend the execution of the sentence; or (4) it can enter an order deferring the imposition of the sentence. State v. Kenneman, 98 N.M. 794, 653 P.2d 170 (Ct. App. 1982) (decided under prior law).

Deferred sentence modified to conditional discharge. — Modification from a deferred sentence to a conditional discharge was an authorized sentence reduction under this section and Rule 5-801. State v. Herbstman, 1999-NMCA-014, 126 N.M. 683, 974 P.2d 177.

Mandatory sentencing does not violate doctrine of separation of powers contained in N.M. Const., art. III, § 1. State v. Mabry, 96 N.M. 317, 630 P.2d 269 (1981).

Effect of excepting sentencing for capital or first-degree felony. — The exception of capital or first-degree felonies from the list of the offenses for which the court may defer or suspend all or a portion of a sentence does not make sentencing for capital or first-degree felonies unconstitutional as cruel and unusual punishment. State v. Garcia, 100 N.M. 120, 666 P.2d 1267 (Ct. App. 1983).

Sentencing scheme for suspension and deferment is not unconstitutionally vague. State v. Kenneman, 98 N.M. 794, 653 P.2d 170 (Ct. App. 1982).

Jurisdiction to increase punishment by new sentence. — A trial court is without power to set aside a valid sentence after the defendant has been committed thereunder, and impose a new or different sentence increasing the punishment. A judgment which attempts to do so is void and the original judgment remains in force. State v. Baros, 78 N.M. 623, 435 P.2d 1005 (1968).

Suspended or deferred sentence within court's discretion. — Of the sentencing alternatives available, a suspended or deferred sentence is within the discretion of the trial court. State v. Madrigal, 85 N.M. 496, 513 P.2d 1278 (Ct. App.), cert. denied, 85 N.M. 483, 513 P.2d 1265 (1973).

Suspension matter of clemency. — Suspension of a sentence is a matter of clemency committed to the discretion of the trial court. Ewing v. State, 80 N.M. 558, 458 P.2d 810 (Ct. App. 1969).

Suspension not a matter of right. — Suspension or deferment of sentence is not a matter of right but is an act of clemency and committed to the discretion of the trial court. State v. Serrano, 76 N.M. 655, 417 P.2d 795 (1966).

Suspension within court's discretion. — The suspension of execution of a sentence, or any portion thereof, is not a matter of right in the defendant, but is a matter of clemency committed to the discretion of the sentencing court in the criminal proceedings. State v. Knight, 78 N.M. 482, 432 P.2d 838 (1967).

No authority to defer until conviction. — The court has no power or authority to defer a sentence and impose obligations of probation upon a person charged with a crime, until that person is convicted of the crime. State v. Apodaca, 80 N.M. 155, 452 P.2d 489 (Ct. App. 1969).

Express adjudication of guilt not needed. — An express adjudication of conviction, or finding of guilt, is not necessary if it is apparent from other matters in the record that the court made a judicial determination of conviction or guilt. State v. Apodaca, 80 N.M. 155, 452 P.2d 489 (Ct. App. 1969).

Effect of nolo contendere plea. — Upon the acceptance of the plea of nolo contendere and entry of "judgment and sentence," by which the court deferred sentence and imposed conditions of probation, there was a determination of guilt, or a pronouncement of judgment. State v. Apodaca, 80 N.M. 155, 452 P.2d 489 (Ct. App. 1969).

Effect of sentence deferral. — An order deferring sentence in no way represents a suspension or a final sentence, at least for purposes of jurisdiction. Where deferral is ordered for the purpose of additional evaluation as recommended by department of corrections, a statutory sentence subsequently imposed is not a second sentence, but the first sentence imposed in the case. There is no second sentence raising a double jeopardy issue and no absence of authority in the trial court to impose the statutory sentence. State v. Wood, 86 N.M. 731, 527 P.2d 494 (Ct. App.), cert. denied, 86 N.M. 730, 527 P.2d 493 (1974).

No abuse of discretion. — Trial court did not abuse its discretion by not adopting report of the psychiatrist or in not requesting diagnosis and recommendation from the department of corrections (now corrections division) as pertaining to defendant who

pleaded guilty to count of contributing to delinquency of a minor. State v. Hogan, 83 N.M. 608, 495 P.2d 388 (Ct. App. 1972).

Sentence not unjust or improper. — Where the sentence in this case was in accordance with law, an appellate court cannot say it was unjust or improper in the circumstances because recommendations for a more lenient sentence were not followed or by imposing the statutory sentence on a 17-year-old first offender. State v. Madrigal, 85 N.M. 496, 513 P.2d 1278 (Ct. App.), cert. denied, 85 N.M. 483, 513 P.2d 1265 (1973).

Difference between suspension and deferral is that suspension involves a sentence imposed while deferral does not. With suspension, the sentence having been imposed, the court cannot later alter the sentence upwards. With deferral, no sentence having been imposed, the court may give any sentence it could originally have given. State v. Kenneman, 98 N.M. 794, 653 P.2d 170 (Ct. App. 1982).

Invalid grounds of sentence deferral. — A trial court may not defer sentencing after a conviction on condition that the defendant serve a certain period of time in a county jail and abide by terms of a probation agreement. State v. Lopez, 99 N.M. 791, 664 P.2d 989 (Ct. App. 1982).

Constitutional to impose three-year sentence when sentencing originally deferred for two years. — The imposition of a three-year sentence when sentencing was originally deferred for two years does not violate the prohibition on double jeopardy, when the first sentence imposed is when the defendant's probation is revoked. State v. Kenneman, 98 N.M. 794, 653 P.2d 170 (Ct. App. 1982).

Suspension order must include any restrictions. — Restrictions to be imposed upon conduct of person under suspended sentence were to be specified in order of suspension. Ex parte Selig, 29 N.M. 430, 223 P. 97 (1924); Ex parte Hamm, 24 N.M. 33, 172 P. 190, 1918D L.R.A. 694 (1918) (decided under prior law).

Suspended sentence void. — A court which is not encompassed in this statute does not have the authority to suspend a sentence and any suspension of a sentence by those courts is void. 1955-56 Op. Att'y Gen. No. 55-6163 (decided under former law).

Indefinite deferral not allowed. — In the case of a defendant in a felony case who is convicted or pleads guilty, a district judge may not enter an order stating that the judgment and sentence of the court is "deferred indefinitely." 1959-60 Op. Att'y Gen. No. 60-31 (opinion rendered under prior law).

Requirement to leave jurisdiction void. — A suspended sentence, whether valid or invalid as to the right of the court to suspend, is absolutely a void sentence when imposed with the condition that the defendant leave and remain away from the jurisdiction. 1955-56 Op. Att'y Gen. No. 55-6163 (decided under former law).

Effect where good behavior required. — The words "good behavior," as used in order suspending sentence during good behavior, meant conduct conformable to law, and required no higher standard of conduct than the law demanded. Ex parte Hamm, 24 N.M. 33, 172 P. 190, 1918D L.R.A. 694 (1918) (decided under former law).

Jurisdiction after seven years. — Where defendant entered plea of nolo contendere to charge of contributing to delinquency of a minor and sentence was deferred until further order of court, lapse of almost seven years time did not deprive court of jurisdiction to impose sentence. State v. Sorrows, 63 N.M. 277, 317 P.2d 324 (1957) (decided under former law).

Reasonable investigation contemplated. — The statutes permitting the court to suspend or defer a sentence contemplate that reasonable investigation be made by the court in cases where probation is indicated, but no procedure is prescribed for such investigation, nor does the statute specify the character or quantum of evidence necessary to warrant the suspension or deferral of sentence. State v. Serrano, 76 N.M. 655, 417 P.2d 795 (1966).

Effect of refusal to hear testimony. — The refusal of the trial court to hear the offered testimony upon application for suspension, or deferral of sentence, does not justify reversal since the statute makes no requirement that the contemplated investigation shall include a trial, or hearing, nor does the statute by implication, or otherwise, grant the defendant the right to introduce testimony in support of his request. State v. Serrano, 76 N.M. 655, 417 P.2d 795 (1966).

Presumption where no reason for denial given. — Where defendant's counsel asked the court to place defendant on probation before sentence was imposed, and no reasons were given by the court for denying probation, it is presumed the court considered the question of probation before sentencing defendant to the penitentiary. State v. Follis, 81 N.M. 690, 472 P.2d 655 (Ct. App. 1970).

Sentencing where released person apprehended. — If the suspension of the sentence is void and the person after sentence is released, the sentence may then be imposed at any time the person is apprehended. The defendant falls into the category of an escaped convict at the time he is released after a void sentence suspension. 1955-56 Op. Att'y Gen. No. 55-6163 (decided under former law).

Payment of transportation costs for diagnostic evaluation. — The state is required to pay transportation costs for prisoners committed for diagnostic evaluation under this section. 1972 Op. Att'y Gen. No. 72-20.

Credits allowed on unsuspended portion of sentence. — Good time credits shall be allowed to be deducted from the maximum unsuspended portion of a sentence for purposes of determining entitlement of right to release from imprisonment where other provisions of the law do not circumscribe the minimum imprisonment to be served. Coutts v. Cox, 75 N.M. 761, 411 P.2d 347 (1966).

Magistrate court may order restitution. — The magistrate court may, as part of its sentencing power, order a Criminal Code or Motor Vehicle Code violator to make restitution. 1979 Op. Att'y Gen. No. 79-18.

Additional sentences for firearm use and habitual offender status cannot be served concurrently. State v. Mayberry, 97 N.M. 760, 643 P.2d 629 (Ct. App. 1982).

Partial suspension with probation authorized. — A sentencing judge has the authority to suspend a sentence in part and then order probation for all or some of the portion which is suspended. State v. Sinyard, 100 N.M. 694, 675 P.2d 426 (Ct. App. 1983).

Court authorized to suspend or defer sentence for second heroin trafficking conviction. — A life sentence is not mandatory for a second conviction of trafficking in heroin and the court has the authority to suspend or defer the sentence imposed. State v. Sanchez, 97 N.M. 521, 641 P.2d 1068 (1982) (decided before 1980 amendment of 30-31-20 NMSA 1978).

Order committing defendant to state hospital for indeterminate period not valid sentence. — An order directing that the defendant be transported to the state hospital for an indeterminate period and then be returned to the district court for sentencing is not a valid sentence permitted by law, nor does it constitute a final judgment and sentence for purposes of an appeal. State v. Garcia, 99 N.M. 466, 659 P.2d 918 (Ct. App. 1983).

As the legislature has imposed a 60-day maximum limitation on diagnostic commitments, and the court is without authority to impose a second diagnostic commitment or an indefinite commitment in the same cause. State v. Garcia, 99 N.M. 466, 659 P.2d 918 (Ct. App. 1983).

Diagnostic commitment not required prior to imposing sentence. — The court is not required to order a diagnostic commitment prior to imposing sentence. State v. Watchman, 111 N.M. 727, 809 P.2d 641 (Ct. App. 1991), overruled in part on other grounds, State v. Hosteen, 1996-NMCA-084, 122 N.M. 228, 923 P.2d 595.

Diagnostic evaluation not merited. — Where the state argued that a 60-day evaluation was not necessary because the trial court had before it evidence of nine years of psychological evaluations, as well as the testimony of two mental health experts, it was within the court's discretion, based on the information before it, to conclude that a diagnostic evaluation was not merited. State v. Mireles, 2004-NMCA-100, 136 N.M. 337, 98 P.3d 727, cert. denied, 2004-NMCERT-008, 136 N.M. 492, 100 P.3d 197.

Law reviews. — For article, " 'To Purify the Bar': A Constitutional Approach to Non-Professional Misconduct," see 5 Nat. Resources J. 299 (1965).

For comment, "Criminal Procedure - Preventive Detention in New Mexico," see 4 N.M.L. Rev. 247 (1974).

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 comment, "Definitive Sentencing in New Mexico: The 1977 Criminal Sentencing Act," see 9 N.M.L. Rev. 131 (1978-79).

For annual survey of New Mexico law relating to criminal law, see 13 N.M.L. Rev. 323 (1983).

For article, "Unintentional homicides caused by risk-creating conduct: Problems in distinguishing between depraved mind murder, second degree murder, involuntary manslaughter, and noncriminal homicide in New Mexico," 20 N.M.L. Rev. 55 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law § 896 et seq.

Constitutionality of statute conferring on court power to suspend sentence, 26 A.L.R. 399, 101 A.L.R. 402.

Are sentences on different counts to be regarded as for a single term or for separate terms as regards suspension of sentence, 107 A.L.R. 634.

Imposition or enforcement of sentence which has been suspended without authority, 141 A.L.R. 1225.

Loss of jurisdiction by delay in imposing sentence, 98 A.L.R.3d 605.

Admissibility of expert testimony as to appropriate punishment for convicted defendant, 47 A.L.R.4th 1069.

24 C.J.S. Criminal Law §§ 1550 to 1552.

31-20-4. Application of order deferring or suspending sentence.

An order deferring or suspending sentence may be limited to one or more counts or indictments, but, in the absence of express limitation, it shall extend to the entire judgment.

History: 1953 Comp., § 40A-29-16, enacted by Laws 1963, ch. 303, § 29-16; and recompiled as 1953 Comp., § 40A-29-40, by Laws 1977, ch. 216, § 16.

ANNOTATIONS

Suspension or deferment not matter of right. — The suspension or deferment of a sentence is not a matter of right but is an act of clemency within the trial court's discretion. State v. Follis, 81 N.M. 690, 472 P.2d 655 (Ct. App. 1970).

Contradictory judgment renders improper sentence. — Where the trial court deferred a sentence of imprisonment and imposed sentence of a fine for the same offense, either the deferral or the fine is subject to being stricken as an improper sentence, and the execution of either part of the sentence renders the remaining part void. State v. Aragon, 93 N.M. 132, 597 P.2d 317 (1979).

When probation requirements ineffective. — Once a deferred sentence becomes void, the probation requirements are no longer in effect. State v. Aragon, 93 N.M. 132, 597 P.2d 317 (1979).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law § 898.

31-20-5. Placing defendant on probation.

A. When a person has been convicted of a crime for which a sentence of imprisonment is authorized and when the magistrate, metropolitan or district court has deferred or suspended sentence, it shall order the defendant to be placed on probation for all or some portion of the period of deferment or suspension if the defendant is in need of supervision, guidance or direction that is feasible for the corrections department to furnish. Except for sex offenders as provided in Section 31-20-5.2 NMSA 1978, the total period of probation for district court shall not exceed five years and the total period of probation for the magistrate or metropolitan courts shall be no longer than the maximum allowable incarceration time for the offense or as otherwise provided by law.

B. If a defendant is required to serve a period of probation subsequent to a period of incarceration:

(1) the period of probation shall be served subsequent to any required period of parole, with the time served on parole credited as time served on the period of probation and the conditions of probation imposed by the court deemed as additional conditions of parole; and

(2) in the event that the defendant violates any condition of that parole, the parole board shall cause him to be brought before it pursuant to the provisions of Section 31-21-14 NMSA 1978 and may make any disposition authorized pursuant to that section and, if parole is revoked, the period of parole served in the custody of a correctional facility shall not be credited as time served on probation.

History: 1953 Comp., § 40A-29-17, enacted by Laws 1963, ch. 303, § 29-17; and recompiled as 1953 Comp., § 40A-29-41, by Laws 1977, ch. 216, § 16; 1984, ch. 106, § 2; 1985, ch. 75, § 1; 2003 (1st S.S.), ch. 1, § 6.

ANNOTATIONS

The 2003 (1st S.S.) amendment, effective February 3, 2004, substituted “corrections department to furnish. Except for sex offenders as provided in Section 31-20-5.2 NMSA 1978” for “field services division of the corrections department to furnish; provided, however” near the middle of Subsection A.

Legislative intent. — Legislature clearly intended in this section to give the sentencing judge authority to withhold the imposition of probation upon suspending a sentence. Probation was not "automatic" where defendant's sentence was suspended and this is further buttressed by the permissive language of 31-20-6 NMSA 1978. State v. Soria, 82 N.M. 509, 484 P.2d 351 (Ct. App. 1971).

Probation required. — This section provides that where a defendant receives a deferred or suspended sentence, the court must order probation. State v. Leslie, 2004-NMCA-106, 136 N.M. 244, 96 P.3d 805.

Deferred or suspended sentence always entails mandatory probation with conditions attached. State v. Leslie, 2004-NMCA-106, 136 N.M. 244, 96 P.3d 805.

Probation is part of suspended or deferred sentence. State v. Baca, 2005-NMCA-001, 136 N.M. 667, 104 P.3d 533, cert. denied, 2004-NMCERT-012, 136 N.M. 665, 103 P.3d 1097.

Difference between suspension and deferral is that suspension involves a sentence imposed while deferral does not. With suspension, the sentence having been imposed, the court cannot later alter the sentence upwards. With deferral, no sentence having been imposed, the court may give any sentence it could originally have given. State v. Kenneman, 98 N.M. 794, 653 P.2d 170 (Ct. App. 1982).

Five-year probation limitation applies in aggregate. — Both the internal wording of this section and the legislative history suggest that the five-year limitation applies in the aggregate. State v. Devigne, 96 N.M. 561, 632 P.2d 1199 (Ct. App. 1981).

The total period of probation that may be imposed on a defendant for convictions that occurred at one trial is five years, even though the aggregate sum of the suspended sentences exceeds five years. State v. Devigne, 96 N.M. 561, 632 P.2d 1199 (Ct. App. 1981).

Maximum period of probation that court may impose as sentencing is a total of five years, regardless of the number of convictions, not that five years is the total amount of time a defendant can serve on probation, regardless of the number of violations. State v. Baca, 2005-NMCA-001, 136 N.M. 667, 104 P.3d 533, cert. denied, 2004-NMCERT-012, 136 N.M. 665, 103 P.3d 1097.

Effect where no fixed period of probation specified. — When a defendant is placed on probation, without a fixed period being specified, then that period of probation is the maximum set by this section. State v. Baca, 90 N.M. 280, 562 P.2d 841 (Ct. App. 1977).

Probation may not exceed maximum sentence. — Trial court erred in setting six-year probation period for defendant who pleaded guilty to two fourth-degree felony charges where sentences were to be served concurrently, since the maximum sentence for a fourth-degree felony was a penitentiary term of five years, and the period of probation could not exceed that of the maximum sentence prescribed by law for the commission of the crime for which he was convicted. State v. Crespin, 90 N.M. 434, 564 P.2d 998 (Ct. App. 1977).

This section limits the maximum length of probation to the maximum imprisonment which could have been imposed. State v. Gonzales, 96 N.M. 556, 632 P.2d 1194 (Ct. App. 1981).

Maximum period for misdemeanors. — The maximum period of probation that may be assessed in misdemeanor or petty misdemeanor cases is the maximum allowable period of incarceration for that crime, irrespective of whether a defendant is sentenced in district court or in a lower tribunal. State v. Candelaria, 113 N.M. 288, 825 P.2d 221 (Ct. App. 1991).

Partial suspension with probation authorized. — A sentencing judge has the authority to suspend a sentence in part and then order probation for all or some of the portion which is suspended. State v. Sinyard, 100 N.M. 694, 675 P.2d 426 (Ct. App. 1983).

Court may suspend defendant's 18-month term, impose five-year probation. — The trial court's judgment in suspending part of defendant's term of incarceration and imposing a five-year term of supervised probation was upheld by this section, even though defendant had been convicted of a fourth-degree felony with a basic term of incarceration of 18 months. State v. Encinias, 104 N.M. 740, 726 P.2d 1174 (Ct. App. 1986).

Parole term not part of maximum sentence for determining probation. — The term of parole included in the original sentence is not to be utilized in determining the maximum length of probation under a suspended sentence. State v. Gonzales, 96 N.M. 556, 632 P.2d 1194 (Ct. App. 1981).

When probation requirements ineffective. — Once a deferred sentence becomes void, the probation requirements are no longer in effect. State v. Aragon, 93 N.M. 132, 597 P.2d 317 (1979).

When probationary part of sentence void. — Where the court ordered a defendant placed on probation without deferring or suspending any of his sentences, this action is not within the bounds prescribed by law, and therefore, the probationary part of

defendant's sentence is void. State v. Nolan, 93 N.M. 472, 601 P.2d 442 (Ct. App.), cert. denied, 93 N.M. 683, 604 P.2d 821 (1979).

Parole time to be credited in all cases. — The legislature clearly intended that the parole time served prior to a period of probation would be credited in all cases; there is nothing in the statute indicating that it is to be applied only in those cases where the sentencing order is not specific in ordering that probation be served after the term of incarceration. Furthermore, the trial court may not ignore the mandate of the legislature in crafting a sentence. State v. Muniz, 119 N.M. 634, 894 P.2d 411 (Ct. App. 1995).

The trial court does not have the authority to order that a probation period be served consecutively to a parole period without the credit that is awarded by statute. State v. Muniz, 119 N.M. 634, 894 P.2d 411 (Ct. App. 1995).

Time served on probation not credited as time served on parole. — Because the court sentenced defendant to jail and not to prison, parole was not authorized; and, although Subsection B allows the time served on parole to be credited as time served on probation, no provision exists allowing the time served on probation to be credited as time served on parole. State v. Brown, 1999-NMSC-004, 126 N.M. 642, 974 P.2d 136.

When court may revoke suspension. — The court has the power to revoke the suspension of sentence and to thereupon invoke the same, upon proof being made of the violation of the conditions of probation. State v. Baca, 80 N.M. 527, 458 P.2d 602 (Ct. App. 1969).

Subsequent criminal conviction not necessary. — A conviction of a subsequent criminal offense is not necessary to the revocation of suspension and the invocation of a prior suspended sentence. State v. Baca, 80 N.M. 527, 458 P.2d 602 (Ct. App. 1969).

Degree of proof of violation. — The degree of proof required to support a finding of a violation of probation is met when the evidence establishes a violation of the conditions of probation with such reasonable certainty as to satisfy the conscience of the court of the truth of the violation. It does not have to be established beyond a reasonable doubt. State v. Baca, 80 N.M. 527, 458 P.2d 602 (Ct. App. 1969).

Statutory handling for probation violation. — Because the terms of probation are defined by the probation statutes, a probation violation must be handled as prescribed in 31-21-15 NMSA 1978. State v. Leslie, 2004-NMCA-106, 136 N.M. 244, 96 P.3d 805.

Violation of probation must be established with reasonable certainty so as to satisfy the conscience of the court as to the truth of the violation; however, a violation of probation need not be established beyond a reasonable doubt. State v. Martinez, 84 N.M. 295, 502 P.2d 320 (Ct. App. 1972).

No power to defer until conviction. — The court has no power or authority to defer a sentence and impose obligations of probation upon a person charged with a crime, until

that person is convicted of the crime. State v. Apodaca, 80 N.M. 155, 452 P.2d 489 (Ct. App. 1969).

Express adjudication of guilt not necessary. — An express adjudication of conviction, or finding of guilt, is not necessary if it is apparent from other matters in the record that the court made a judicial determination of conviction or guilt. State v. Apodaca, 80 N.M. 155, 452 P.2d 489 (Ct. App. 1969).

Effect of nolo contendere plea. — Upon the acceptance of the plea of nolo contendere and entry of "judgment and sentence," by which the court deferred sentence and imposed conditions of probation, there was a determination of guilt, or a pronouncement of judgment. State v. Apodaca, 80 N.M. 155, 452 P.2d 489 (Ct. App. 1969).

Suspension or deferment not matter of right. — Suspension or deferment of a sentence is not a matter of right but is an act of clemency. State v. Baca, 90 N.M. 280, 562 P.2d 841 (Ct. App. 1977).

No amendment of judgment or sentence allowed. — Where district court, when it sentenced defendant to six months in county jail and suspended the balance of the sentence without probation, issued a valid original judgment and sentence, accordingly could not amend that judgment and sentence to add the conditions of probation, since a valid sentence may not be amended by increasing the penalty. State v. Soria, 82 N.M. 509, 484 P.2d 351 (Ct. App. 1971).

Effect where probation conditions not in deferred sentence; amendment. — In determining whether there is a violation of probation, an appellate court must look to the trial court's order. If the deferred sentence does not set out the conditions of probation, there are no conditions to be violated and conditions may not be added by amendment subsequent to imposition of a valid original judgment. State v. Martinez, 84 N.M. 295, 502 P.2d 320 (Ct. App. 1972).

Conditions of probation should be made clear in judgment. State v. Martinez, 84 N.M. 295, 502 P.2d 320 (Ct. App. 1972).

Probation violation necessary to revoke probation. — The trial court has authority to revoke defendant's probation and impose the penitentiary sentence; however, to do so, a violation of probation must be established. State v. Martinez, 84 N.M. 295, 502 P.2d 320 (Ct. App. 1972).

Incarceration after violation not required. — Neither this section nor 31-21-15 NMSA 1978 require the trial court to impose incarceration if the defendant violates the conditions of his probation. State v. Mares, 119 N.M. 48, 888 P.2d 930 (1994).

Reasonable investigation contemplated. — The statutes permitting the court to suspend or defer a sentence contemplate that reasonable investigation be made by the

court in cases where probation is indicated, but no procedure is prescribed for such investigation, nor does the statute specify the character or quantum of evidence necessary to warrant the suspension or deferral of sentence. State v. Serrano, 76 N.M. 655, 417 P.2d 795 (1966).

Probation where no reason for denial given. — Where defendant's counsel asked the court to place defendant on probation before sentence was imposed, and no reasons were given by the court for denying probation, it is presumed the court considered the question of probation before sentencing defendant to the penitentiary. State v. Follis, 81 N.M. 690, 472 P.2d 655 (Ct. App. 1970).

Habeas corpus action moot where petitioner on probation. — Because petitioner had begun serving his mandatory period of probation under this section, his incarceration was complete; therefore, his habeas corpus action, alleging that amended regulations affecting his good time credits were impermissible, ex post facto laws, was moot, since such credits cannot be applied to a probationary term. Aragon v. Shanks, 144 F.3d 690 (10th Cir.), cert. denied, 525 U.S. 1005, 119 S. Ct. 518, 142 L. Ed. 2d 430 (1998).

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. — 21 Am. Jur. 2d Criminal Law § 904 et seq.

Power to impose sentence with direction that after defendant shall have served part of time he be placed on probation for the remainder of term, 147 A.L.R. 656.

Probation conditioned on restitution in connection with application for, or receipt of, public relief, 80 A.L.R.3d 1280.

Criminal liability under state laws in connection with application for, or receipt of, public welfare payments, 22 A.L.R.4th 534.

24 C.J.S. Criminal Law §§ 1549 to 1552, 1554, 1557, 1559.

31-20-5.1. Misdemeanor compliance programs; counties may establish; fees.

A. A county may create a "misdemeanor compliance program" to monitor defendants' compliance with the conditions of probation imposed by a district or magistrate court. The program shall be limited to participation by persons who have been convicted of a misdemeanor criminal offense specified in the Criminal Code [30-30-1 NMSA 1978], convicted of driving while under the influence of intoxicating liquor or drugs or convicted of driving while the person's driver's license is suspended or revoked

pursuant to the Motor Vehicle Code [66-1-1 NMSA 1978]. A county's program shall comply with guidelines established by the administrative office of the courts.

B. As a condition of probation, the district or magistrate court may require the defendant to pay a fee of not less than fifteen dollars ($15.00) nor more than thirty dollars ($30.00) per month to the county for the term of his probation. Money collected by the county pursuant to this subsection shall be used only to operate the misdemeanor compliance program.

History: Laws 2000, ch. 49, § 1.

ANNOTATIONS

Effective dates. — Laws 2000, ch. 49, § 2 makes the act effective July 1, 2000.

31-20-5.2. Sex offenders; period of probation; terms and conditions of probation.

A. When a district court defers imposition of a sentence for a sex offender, or suspends all or any portion of a sentence for a sex offender, the district court shall include a provision in the judgment and sentence that specifically requires the sex offender to serve an indeterminate period of supervised probation for a period of not less than five years and not in excess of twenty years. A sex offender's period of supervised probation may be for a period of less than twenty years if, at a review hearing provided for in Subsection B of this section, the state is unable to prove that the sex offender should remain on probation. Prior to placing a sex offender on probation, the district court shall conduct a hearing to determine the terms and conditions of supervised probation for the sex offender. The district court may consider any relevant factors, including:

(1) the nature and circumstances of the offense for which the sex offender was convicted or adjudicated;

(2) the nature and circumstances of a prior sex offense committed by the sex offender;

(3) rehabilitation efforts engaged in by the sex offender, including participation in treatment programs while incarcerated or elsewhere;

(4) the danger to the community posed by the sex offender; and

(5) a risk and needs assessment regarding the sex offender, developed by the sex offender management board of the New Mexico sentencing commission or another appropriate entity, to be used by appropriate district court personnel.

B. A district court shall review the terms and conditions of a sex offender's supervised probation at two and one-half year intervals. When a sex offender has served the initial five years of supervised probation, the district court shall also review the duration of the sex offender's supervised probation at two and one-half year intervals. When a sex offender has served the initial five years of supervised probation, at each review hearing the state shall bear the burden of proving to a reasonable certainty that the sex offender should remain on probation.

C. The district court may order a sex offender placed on probation to abide by reasonable terms and conditions of probation, including:

(1) being subject to intensive supervision by a probation officer of the corrections department;

(2) participating in an outpatient or inpatient sex offender treatment program;

(3) a probationary agreement by the sex offender not to use alcohol or drugs;

(4) a probationary agreement by the sex offender not to have contact with certain persons or classes of persons; and

(5) being subject to alcohol testing, drug testing or polygraph examinations used to determine if the sex offender is in compliance with the terms and conditions of his probation.

D. The district court shall notify the sex offender's counsel of record of an upcoming probation hearing for a sex offender, and the sex offender's counsel of record shall represent the sex offender at the probation hearing. When a sex offender's counsel of record provides the court with good cause that the counsel of record should not represent the sex offender at the probation hearing and the sex offender is subsequently unable to obtain counsel, the district court shall notify the chief public defender of the upcoming probation hearing and the chief public defender shall make representation available to the sex offender at that hearing.

E. If the district court finds that a sex offender has violated the terms and conditions of his probation, the district court may revoke his probation or may order additional terms and conditions of probation.

F. As used in this section, "sex offender" means a person who is convicted of, pleads guilty to or pleads nolo contendere to any one of the following offenses:

(1) kidnapping, as provided in Section 30-4-1 NMSA 1978, when committed with intent to inflict a sexual offense upon the victim;

(2) criminal sexual penetration in the first, second or third degree, as provided in Section 30-9-11 NMSA 1978;

(3) criminal sexual contact of a minor in the second or third degree, as provided in Section 30-9-13 NMSA 1978;

(4) sexual exploitation of children in the second degree, as provided in Section 30-6A-3 NMSA 1978; or

(5) sexual exploitation of children by prostitution in the first or second degree, as provided in Section 30-6A-4 NMSA 1978.

History: Laws 2003 (1st S.S.), ch. 1, § 7.

ANNOTATIONS

Effective dates. — Laws 2003 (1st S.S.), ch. 1 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on February 3, 2004, 90 days after adjournment of the legislature.

31-20-6. Conditions of order deferring or suspending sentence.

The magistrate, metropolitan or district court shall attach to its order deferring or suspending sentence reasonable conditions as it may deem necessary to ensure that the defendant will observe the laws of the United States and the various states and the ordinances of any municipality. The defendant upon conviction shall be required to reimburse a law enforcement agency or local crime stopper program for the amount of any reward paid by the agency or program for information leading to his arrest, prosecution or conviction, but in no event shall reimbursement to the crime stopper program preempt restitution to victims pursuant to the provisions of Section 31-17-1 NMSA l978. The defendant upon conviction shall be required to pay the actual costs of his supervised probation service to the adult probation and parole division of the corrections department or appropriate responsible agency for deposit to the corrections department intensive supervision fund not exceeding one thousand eight hundred dollars ($1,800) annually to be paid in monthly installments of not less than twenty-five dollars ($25.00) and not more than one hundred fifty dollars ($150), as set by the appropriate district supervisor of the adult probation and parole division, based upon the financial circumstances of the defendant. The defendant's payment of the supervised probation costs shall not be waived unless the court holds an evidentiary hearing and finds that the defendant is unable to pay the costs. If the court waives the defendant's payment of the supervised probation costs and the defendant's financial circumstances subsequently change so that the defendant is able to pay the costs, the appropriate district supervisor of the adult probation and parole division shall advise the court and the court shall hold an evidentiary hearing to determine whether the waiver should be rescinded. The court may also require the defendant to:

A. provide for the support of persons for whose support he is legally responsible;

B. undergo available medical or psychiatric treatment and enter and remain in a specified institution when required for that purpose;

C. be placed on probation under the supervision, guidance or direction of the adult probation and parole division for a term not to exceed five years;

D. serve a period of time in volunteer labor to be known as "community service". The type of labor and period of service shall be at the sole discretion of the court; provided that a person receiving community service shall be immune from any civil liability other than gross negligence arising out of the community service, and a person who performs community service pursuant to court order or a criminal diversion program shall not be entitled to wages, shall not be considered an employee and shall not be entitled to workers' compensation, unemployment benefits or any other benefits otherwise provided by law. As used in this subsection, "community service" means labor that benefits the public at large or a public, charitable or educational entity or institution;

E. make a contribution of not less than ten dollars ($10.00) and not more than one hundred dollars ($100), to be paid in monthly installments of not less than five dollars ($5.00), to a local crime stopper program or a local drug abuse resistance education program that operates in the territorial jurisdiction of the court; and

F. satisfy any other conditions reasonably related to his rehabilitation.

History: 1953 Comp., § 40A-29-18, enacted by Laws 1963, ch. 303, § 29-18; and recompiled as 1953 Comp., § 40A-29-42, by Laws 1977, ch. 216, § 16; 1977, ch. 217, § 1; 1981, ch. 285, § 2; 1983, ch. 159, § 1; 1984, ch. 106, § 3; 1985, ch. 23, § 15; 1985, ch. 75, § 2; 1987, ch. 139, § 2; 1988, ch. 62, § 1; 1997, ch. 215, § 1; 2004, ch. 38, § 1.

ANNOTATIONS

Cross references. — For Crime Victims Reparation Act, see 31-22-1 to 31-22-24 NMSA 1978.

The 1997 amendment substituted "adult probation and parole division" for "field services division" twice in the third sentence of the introductory paragraph and in Subsection C, and substituted "crime stopper program or a local drug abuse resistance education program that operates in the territorial jurisdiction of the court" for "crime stopper program that operates in the territorial jurisdiction of the court and is approved by the crime stoppers commission" at the end of the first sentence in Subsection E. Laws 1997, ch. 215 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective June 20, 1997, 90 days after adjournment of the legislature. See Volume 14 NMSA 1978 for "Adjournment Dates of Sessions of Legislature" table.

The 2004 amendment, effective July 1, 2004, amended the first paragraph to change one thousand twenty dollars ($1,020) to one thousand eight hundred dollars ($1,800), fifteen dollars ($15.00) to twenty-five dollars ($25.00), eighty-five dollars ($85.00) to one

hundred fifty dollars ($150), delete "or the local supervisor of the responsible agency on the basis of changed financial circumstances, as may be required" and insert in its place: "based upon the financial circumstances of the defendant. The defendant's payment of the supervised probation costs shall not be waived unless the court holds an evidentiary hearing and finds that the defendant is unable to pay the costs. If the court waives the defendant's payment of the supervised probation costs and the defendant's financial circumstances subsequently change so that the defendant is able to pay the costs, the appropriate district supervisor of the adult probation and parole division shall advise the court and the court shall hold an evidentiary hearing to determine whether the waiver should be rescinded. The court may also require the defendant to:" and amended Subsection E to delete "If there is no program in that area, the contribution shall be made to the crime stoppers commission".

Legislative intent. — Legislature clearly intended in 31-20-5 NMSA 1978 to give the sentencing judge authority to withhold the imposition of probation upon suspending a sentence. Probation was not "automatic" where defendant's sentence was suspended and this is further buttressed by the permissive language of this section. State v. Soria, 82 N.M. 509, 484 P.2d 351 (Ct. App. 1971).

It is solely within province of legislature to establish penalties for criminal behavior. State v. Lack, 98 N.M. 500, 650 P.2d 22 (Ct. App. 1982).

Difference between suspension and deferral is that suspension involves a sentence imposed while deferral does not. With suspension, the sentence having been imposed, the court cannot later alter the sentence upwards. With deferral, no sentence having been imposed, the court may give any sentence it could originally have given. State v. Kenneman, 98 N.M. 794, 653 P.2d 170 (Ct. App. 1982).

General purposes of probation are education and rehabilitation, without the requirement of serving the suspended period of incarceration. Probation is not meant to be painless. State v. Donaldson, 100 N.M. 111, 666 P.2d 1258 (Ct. App. 1983).

In placing a criminal under strict conditions of probation and under probation supervision, the policy of the State of New Mexico and the obligation of the courts of New Mexico are to place guarded trust in the probationer to consciously conduct himself in a manner to prove he can remain free from criminal activity. State v. Baca, 2004-NMCA-049, 135 N.M. 490, 90 P.3d 509.

Supervised probation authorized. — A New Mexico district court has statutory authority to place a convicted defendant on supervised probation. State v. Baca, 2004-NMCA-049, 135 N.M. 490, 90 P.3d 509.

Deferred or suspended sentence always entails mandatory probation with conditions attached. State v. Leslie, 2004-NMCA-106, 136 N.M. 244, 96 P.3d 805.

Section 31-20-13 A NMSA 1978 expressly incorporates probation statutes that apply to a person serving a deferred sentence. State v. Leslie, 2004-NMCA-106, 136 N.M. 244, 96 P.3d 805.

Standards for assessing conditions of probation. — The trial court, at the time of sentencing, is allowed to consider a wide range of options to assure defendant's rehabilitation, and the conditions of probation will not be set aside unless: (1) They have no reasonable relation to the offense for which the defendant was convicted; (2) relate to activity which is not itself criminal in nature; and (3) require or forbid conduct which is not reasonably related to deterring future criminality. State v. Taylor, 104 N.M. 88, 717 P.2d 64 (Ct. App.), cert. denied, 104 N.M. 237, 719 P.2d 815 (1986).

Requiring the defendant to execute promissory notes to the victims of his fraud and embezzlement was reasonably related to his rehabilitation and was a proper condition of his probation. State v. Jensen, 1998-NMCA-034, 124 N.M. 726, 955 P.2d 195.

Guidelines for review of imposition of probation. — A trial court has broad discretion in imposing probation upon a convicted defendant, and the court's discretion will not be set aside on review unless the terms and conditions of probation: (1) have no reasonable relationship to the offense for which defendant was convicted; (2) relate to activity which is not itself criminal in nature; and (3) require or forbid conduct which is not reasonably related to deterring future criminality. State v. Donaldson, 100 N.M. 111, 666 P.2d 1258 (Ct. App. 1983).

Maximum period of probation for misdemeanors. — The maximum period of probation that may be assessed in misdemeanor or petty misdemeanor cases is the maximum allowable period of incarceration for that crime, irrespective of whether a defendant is sentenced in district court or in a lower tribunal. State v. Candelaria, 113 N.M. 288, 825 P.2d 221 (Ct. App. 1991).

No power to defer until conviction. — The court has no power or authority to defer a sentence and impose obligations of probation upon a person charged with a crime, until that person is convicted of the crime. State v. Apodaca, 80 N.M. 155, 452 P.2d 489 (Ct. App. 1969).

Express adjudication not necessary. — An express adjudication of conviction, or finding of guilt, is not necessary if it is apparent from other matters in the record that the court made a judicial determination of conviction or guilt. State v. Apodaca, 80 N.M. 155, 452 P.2d 489 (Ct. App. 1969).

Court may suspend defendant's 18-month term, impose five-year probation. — The trial court's judgment in suspending part of defendant's term of incarceration and imposing a five-year term of supervised probation was upheld by this section, even though defendant had been convicted of a fourth-degree felony with a basic term of incarceration of 18 months. State v. Encinias, 104 N.M. 740, 726 P.2d 1174 (Ct. App. 1986).

Trial court may impose conditions of probation authorized by law; conditions of probation unauthorized by law are void. State v. Ayala, 95 N.M. 464, 623 P.2d 584 (Ct. App. 1981).

Provision for costs controls over 31-12-6 NMSA 1978. — The legislature having made a specific provision for costs as a condition of probation in Subsection A that specific provision controls over the general provision of 31-12-6 NMSA 1978. State v. Ayala, 95 N.M. 464, 623 P.2d 584 (Ct. App. 1981).

Assessment of costs against defendant upon deferred sentence permitted. — The authorization in 31-12-6 NMSA 1978 that cost may be adjudged against the defendant, based on a conviction, permits assessment of costs against a defendant whose sentence is deferred. State v. Ayala, 95 N.M. 464, 623 P.2d 584 (Ct. App. 1981).

Application of increased probation costs limited. — Increased probation costs, i.e., any amount in excess of $200 annually, can only constitutionally be applied to offenses which occur on or after June 19, 1981, at least to the extent the 1981 amendment to this section is relied upon as authority for the increased probation costs. 1981 Op. Att'y Gen. No. 81-15.

Increased probation terms limited. — The increased probation term of five years authorized by the 1981 amendment, i.e., any term in excess of four years for a third degree felony or any term in excess of two years for a fourth degree felony, can only constitutionally be applied to a third or fourth degree felony which occurs on or after June 19, 1981. 1981 Op. Att'y Gen. No. 81-15.

Parole costs limited. — Parole costs authorized by 31-21-10 NMSA 1978 can only constitutionally be applied to prisoners who are placed on parole for crimes committed on or after June 19, 1981, at least to the extent the 1981 amendment to this section is relied on as authority for parole costs. 1981 Op. Att'y Gen. No. 81-15.

Defendant cannot challenge amount or method of paying costs when objections initially waived. — Having requested the court's exercise of discretion, and having waived all objections to an assessment of costs in lieu of a fine, the defendant may not later challenge either the amount or method of payment ordered. State v. Padilla, 98 N.M. 349, 648 P.2d 807 (Ct. App. 1982).

Subsections A and F (now see Subsection G), do not authorize jury and bailiff costs in prosecuting a defendant as a condition of probation. State v. Ayala, 95 N.M. 464, 623 P.2d 584 (Ct. App. 1981).

Jury and bailiff costs are part of expense of maintaining system of courts and the administration of justice and may not be assessed against a defendant if they were assessed independently of any condition of probation. State v. Ayala, 95 N.M. 464, 623 P.2d 584 (Ct. App. 1981).

Required contribution to sheriff's department unauthorized. — A probation condition requiring the defendant to contribute $500 to a county sheriff's department was unauthorized and therefore void. On remand, the trial court had to reconsider imposition of a fine not to exceed $500. State v. Dominguez, 115 N.M. 445, 853 P.2d 147 (Ct. App. 1993).

Warrantless search condition is fairly and reasonably placed in probation order to facilitate the probation officer's important supervisory and protective duties to help assure that the probationer assumes his responsibility---a responsibility both to the probationer himself and to society to stay on a path of rehabilitation. State v. Baca, 2004-NMCA-049, 135 N.M. 490, 90 P.3d 509.

Warrantless probation searches cannot be without a proper showing of an adequate degree of likelihood of criminal activity. State v. Baca, 2004-NMCA-049, 135 N.M. 490, 90 P.3d 509.

And such searches can and must be supported by reasonable suspicion as defined in New Mexico law to be an awareness of specific articulable facts, judged objectively, that would lead a reasonable person to believe criminal activity occurred or was occurring. State v. Baca, 2004-NMCA-049, 135 N.M. 490, 90 P.3d 509.

Exigent circumstances are not required in connection with warrantless probation search supported by reasonable suspicion. State v. Baca, 2004-NMCA-049, 135 N.M. 490, 90 P.3d 509.

For rehabilitation and community safety purposes, probation officers have the right to conduct warrantless searches without the added requirement of exigent circumstances. State v. Baca, 2004-NMCA-049, 135 N.M. 490, 90 P.3d 509.

Condition of probation requiring prior narcotics offender to submit to search is reasonably related the probationer's prior criminal conduct and is aimed at deterring or discovering subsequent criminal offenses. State v. Gardner, 95 N.M. 171, 619 P.2d 847 (Ct. App. 1980).

Statutory handling for probation violation. — Because the terms of probation are defined by the probation statutes, a probation violation must be handled as prescribed in 31-21-15 NMSA 1978. State v. Leslie, 2004-NMCA-106, 136 N.M. 244, 96 P.3d 805.

When jurisdiction to vacate and revoke suspension exists. — The power of a district court to vacate and revoke an order of suspension exists only when some one or more of such terms or conditions specified in the order of suspension have been breached. State v. Baros, 78 N.M. 623, 435 P.2d 1005 (1968).

Proof of violation needed. — The court has the power to revoke the suspension of sentence and to thereupon invoke the same, upon proof being made of the violation of the conditions of probation. State v. Baca, 80 N.M. 527, 458 P.2d 602 (Ct. App. 1969).

Subsequent criminal conviction not necessary. — A conviction of a subsequent criminal offense is not necessary to the revocation of suspension and the invocation of a prior suspended sentence. State v. Baca, 80 N.M. 527, 458 P.2d 602 (Ct. App. 1969).

Degree of proof. — The degree of proof required to support a finding of a violation of probation is met when the evidence establishes a violation of the conditions of probation with such reasonable certainty as to satisfy the conscience of the court of the truth of the violation. It does not have to be established beyond a reasonable doubt. State v. Baca, 80 N.M. 527, 458 P.2d 602 (Ct. App. 1969).

Violation of probation must be established with reasonable certainty so as to satisfy the conscience of the court as to the truth of the violation; however, a violation of probation need not be established beyond a reasonable doubt. State v. Martinez, 84 N.M. 295, 502 P.2d 320 (Ct. App. 1972).

Sufficiency of terms. — Where the trial judge imposed as a condition of probation that defendant report to the probation office as directed by the probation office and ordered that the conditions and terms of probation are made conditions and terms of the deferred sentence, the fact that the times when defendant was to report to the probation office, and that the terms of the probation office were not spelled out in the deferred sentence, did not show that such times and terms were not conditions of probation imposed by the trial court and the conditions of probation were sufficiently stated. State v. Martinez, 84 N.M. 295, 502 P.2d 320 (Ct. App. 1972).

Where no amendment of judgment or sentence allowed. — Where district court, when it sentenced defendant to six months in county jail and suspended the balance of the sentence without probation, issued a valid original judgment and sentence, accordingly could not amend that judgment and sentence to add the conditions of probation, since a valid sentence may not be amended by increasing the penalty. State v. Soria, 82 N.M. 509, 484 P.2d 351 (Ct. App. 1971).

Community service may be condition of probation for gambling. — No one would dispute that criminal activity is anti-social by nature; ergo, community service as a condition of probation is not unrelated to the offense of gambling. State v. Padilla, 98 N.M. 349, 648 P.2d 807 (Ct. App. 1982).

Limit on charitable contributions required of defendant. — Absent a clear legislative determination to the contrary, state judges do not have the power to require a defendant to pay money to a charitable organization unaggrieved by the defendant's offense. 1987 Op. Att'y Gen. No. 87-09.

Jury trial limited to identity question. — In proceedings to revoke a suspended sentence, the right to a jury trial is limited to the question of identity. State v. Raines, 78 N.M. 579, 434 P.2d 698 (Ct. App. 1967).

Law reviews. — For comment, "Definitive Sentencing in New Mexico: The 1977 Criminal Sentencing Act," see 9 N.M.L. Rev. 131 (1978-79).

For annual survey of New Mexico law relating to criminal procedure, see 12 N.M.L. Rev. 271 (1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law § 907 et seq.

Validity of probation on condition of leaving state or locality, 70 A.L.R. 100.

Propriety of requirement, as condition of probation, that defendant refrain from use of intoxicants, 19 A.L.R.4th 1251.

Propriety, under 18 U.S.C.S. § 3651, of district court's requiring contribution of money or services to charity or to community service as condition of suspending sentence and granting probation, 66 A.L.R. Fed. 825.

Propriety, in criminal case, of Federal District Court order restricting defendant's right to re-enter or stay in United States, 94 A.L.R. Fed. 619.

31-20-7. Repealed.

ANNOTATIONS

Repeals. — Laws 1985, ch. 75, § 3 repeals 31-20-7 NMSA 1978, as amended by Laws 1977, ch. 216, § 16, relating to the length of period of deferment or suspension of sentence, effective April 1, 1985. For provisions of former section, see 1978 original pamphlet.

Compiler's notes. — Laws 1993, ch. 283, § 2 enacted a new 31-20-7 NMSA 1978. However, that section has been compiled as 31-20-13 NMSA 1978 in order to avoid confusion with repealed section 31-20-7 NMSA 1978 which has been construed or cited in a number of New Mexico decisions.

31-20-8. Effect of termination of period of suspension without revocation of order.

Whenever the period of suspension expires without revocation of the order, the defendant is relieved of any obligations imposed on him by the order of the court and has satisfied his criminal liability for the crime. He shall thereupon be entitled to a certificate from the court so reciting such facts, and upon presenting the same to the governor, the defendant may, in the discretion of the governor, be granted a pardon or a certificate restoring such person to full rights of citizenship.

History: 1953 Comp., § 40A-29-21, enacted by Laws 1963, ch. 303, § 29-21; and recompiled as 1953 Comp., § 40A-29-44, by Laws 1977, ch. 216, § 16.

ANNOTATIONS

Order of unsatisfactory completion not authorized. — A trial court is without jurisdiction to enter an order of unsatisfactory completion after the probation period ends. State v. Lara, 2000-NMCA-073, 129 N.M. 391, 9 P.3d 74.

Difference between suspension and deferral is that suspension involves a sentence imposed while deferral does not. With suspension, the sentence having been imposed, the court cannot later alter the sentence upwards. With deferral, no sentence having been imposed, the court may give any sentence it could originally have given. State v. Kenneman, 98 N.M. 794, 653 P.2d 170 (Ct. App. 1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Right to assistance of counsel at proceedings to revoke probation, 44 A.L.R.3d 306.

Loss of jurisdiction by delay in imposing sentence, 98 A.L.R.3d 605.

Pardoned or expunged conviction as "prior offense" under state statute or regulation enhancing punishment for subsequent conviction, 97 A.L.R.5th 293.

31-20-9. Completion of total term of deferment.

Whenever the period of deferment expires, the defendant is relieved of any obligations imposed on him by the order of the court and has satisfied his criminal liability for the crime, the court shall enter a dismissal of the criminal charges.

History: 1953 Comp., § 40A-29-22, enacted by Laws 1963, ch. 303, § 29-22; and recompiled as 1953 Comp., § 40A-29-45, by Laws 1977, ch. 216, § 16.

ANNOTATIONS

Difference between suspension and deferral is that suspension involves a sentence imposed while deferral does not. With suspension, the sentence having been imposed, the court cannot later alter the sentence upwards. With deferral, no sentence having been imposed, the court may give any sentence it could originally have given. State v. Kenneman, 98 N.M. 794, 653 P.2d 170 (Ct. App. 1982).

Legislature authorized to define court's jurisdiction over sentencing. — It is within the power of the legislature alone to define the court's jurisdiction over the sentencing of offenders. State v. Travarez, 99 N.M. 309, 657 P.2d 636 (Ct. App. 1983).

Court lacks jurisdiction in probation revocation matter when period of deferred sentence expires. — This section relieves the defendant of any obligations imposed on

him by order of the court when the period of his deferred sentence expires, and he is deemed then to have satisfied his liability for the crime. The trial court thereafter lacks jurisdiction to proceed in a probation revocation matter. State v. Travarez, 99 N.M. 309, 657 P.2d 636 (Ct. App. 1983).

Restoration of right to vote. — A person seeking restoration of franchise after a suspended sentence must go to the governor for relief, but a dismissal order under this section is intended to restore the right to vote automatically. 1973 Op. Att'y Gen. No. 73-44.

Restoration of firearms privileges. — A defendant who receives a deferred sentence is not subject to the criminal sanctions imposed by 30-7-16 NMSA 1978, governing receipt, transportation or possession of firearms by felons. Firearms privileges are automatically restored when a person successfully completes the period of a deferred sentence. 1988 Op. Att'y Gen. No. 88-03.

Sex offender registration. — When a deferred sentence expires and charges are dismissed, a conviction is not eradicated: thus, a defendant convicted under the Sex Offender Registration and Notification Act, 29-11A-1 through 29-11A-8 NMSA 1978, is still subject to the registration requirements of that act. State v. Brothers, 2002-NMCA-110, 133 N.M. 36, 59 P.3d 1268, cert. denied, 133 N.M. 30, 59 P.3d 1262 (2002).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Pardoned or expunged conviction as "prior offense" under state statute or regulation enhancing punishment for subsequent conviction, 97 A.L.R.5th 293.

31-20-10. Character of order.

An order deferring or suspending sentence for the purposes of appeal shall be deemed a final judgment.

History: 1953 Comp., § 40A-29-23, enacted by Laws 1963, ch. 303, § 29-23; and recompiled as 1953 Comp., § 40A-29-46, by Laws 1977, ch. 216, § 16.

ANNOTATIONS

It is solely within province of legislature to establish penalties for criminal behavior. State v. Lack, 98 N.M. 500, 650 P.2d 22 (Ct. App. 1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Reduction by appellate court of punishment imposed by trial court, 29 A.L.R. 313, 89 A.L.R. 295.

Acceptance of probation, parole or suspension of sentence as waiver of error or right to appeal or to move for new trial, 117 A.L.R. 929.

Appealability of order suspending imposition or execution of sentence, 51 A.L.R.4th 939.

31-20-11. Credit for time pending appellate review.

A person convicted of a felony in the district court and held in official confinement while awaiting the outcome of an appeal, writ of error to, or writ of certiorari from, a state or federal appellate court or prior to his release as a result of postconviction proceedings or habeas corpus, shall be given credit for the period spent in confinement against any sentence finally imposed for that offense.

History: 1953 Comp., § 40A-29-24, enacted by Laws 1967, ch. 221, § 1; and recompiled as 1953 Comp., § 40A-29-47, by Laws 1977, ch. 216, § 16.

ANNOTATIONS

Section operates prospectively. — This section was enacted in 1967 and operates prospectively only. Defendant's motion for retroactive application provided no grounds for post-conviction relief under Rule 1-093 NMRA. State v. Montoya, 79 N.M. 353, 443 P.2d 743 (1968).

"Official confinement". — Official confinement, in this section, includes an electronic monitoring program (EMP) within a community custody program. State v. Frost, 2003-NMCA-002, 133 N.M. 45, 60 P.3d 492, cert. denied, 133 N.M.126, 61 P.3d 835 (2002).

Credit given for time served on original invalid conviction. — A prisoner, after being awarded a new trial and having again been convicted of the crime originally charged, is entitled to credit for time he spent in custody from the time of his first conviction. 1969 Op. Att'y Gen. No. 69-114.

Judgment suspending firearm enhancement provision of original sentence void, and no credit accrued. — Since a judgment purporting to suspend a firearm enhancement provision of an original sentence is void, where the defendant is not sentenced to serve any time of official confinement, he cannot be said to have served any portion thereof and he cannot be held to have accrued a right to a credit against the enhanced portion of his sentence as later imposed. Double jeopardy does not attach, and a resentencing for the mandatory enhancement provision of 31-18-16 NMSA 1978 must stand. State v. Aguilar, 98 N.M. 510, 650 P.2d 32 (Ct. App. 1982).

No credit allowed for void conviction when defendant convicted again. — Defendant discharged on writ of habeas corpus after his sentence was held void was not entitled to credit for time served for void conviction when he was convicted again for same crime. State v. Sedillo, 79 N.M. 9, 439 P.2d 226 (1968).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Computation of incarceration time under work-release or "hardship" sentences, 28 A.L.R.4th 1265.

31-20-12. Credit for time prior to conviction.

A person held in official confinement on suspicion or charges of the commission of a felony shall, upon conviction of that or a lesser included offense, be given credit for the period spent in presentence confinement against any sentence finally imposed for that offense.

History: 1953 Comp., § 40A-29-25, enacted by Laws 1967, ch. 221, § 2; and recompiled as 1953 Comp., § 40A-29-48, by Laws 1977, ch. 216, § 16.

ANNOTATIONS

Constitutionality. — New Mexico's good time credit statutory scheme does not offend the constitutional guarantee of equal protection of the law; it is reasonable not to award good time credits for presentence confinement to detainees who are presumed innocent and therefore are not yet subject to rehabilitation efforts or to compulsory labor requirements, especially when they are held without systematic evaluation in county jails lacking rehabilitation programs. State v. Aqui, 104 N.M. 345, 721 P.2d 771, cert. denied, 479 U.S. 917, 107 S. Ct. 321, 93 L. Ed. 2d 294 (1986).

Failure to allow good time credit for presentence confinement does not subject a prisoner to double jeopardy. Enright v. State, 104 N.M. 672, 726 P.2d 349 (1986).

New Mexico's statutory scheme, which does not allow good time credit for presentence confinement, does not offend the equal protection and due process guarantees of the New Mexico and United States constitutions. Enright v. State, 104 N.M. 672, 726 P.2d 349 (1986).

Equal protection does not compel retroactive application. — The equal protection guarantee of the state and federal constitutions does not compel a retroactive application of the provisions of this section, which gives credit for time served prior to conviction. State v. Sedillo, 79 N.M. 255, 442 P.2d 213 (Ct. App. 1968).

Failure to give retroactive effect did not violate equal protection provisions of the state and federal constitutions. State v. Dalrymple, 79 N.M. 670, 448 P.2d 182 (Ct. App. 1968).

No violation due to newly created right. — There is no denial of equal protection of the laws in failing to give retroactive effect to a newly created right which allows credit for presentence confinement. State v. Thomas, 79 N.M. 346, 443 P.2d 516 (Ct. App. 1968).

Statute inapplicable to sentence before its effective date. — This act became effective in 1967. The statute is not applicable to a sentence which was imposed upon defendant in 1963. To so apply it would require that it be given retrospective effect. State v. Padilla, 78 N.M. 702, 437 P.2d 163 (Ct. App. 1968).

No retroactive effect where presentence confinement preceded effective dates. — Where defendant's presentence confinement time occurred prior to the effective date of this section, the statute is not to be given retroactive effect. State v. Luna, 79 N.M. 307, 442 P.2d 797 (Ct. App. 1968).

Application of section prospective only. — All persons convicted of a felony or of a lesser included offense, as of March 31, 1967, are to be given credit against any sentence imposed for that offense for all time spent in presentence confinement. This section is prospective only, and does not apply to those convicted before that date. 1973 Op. Att'y Gen. No. 73-66.

Purpose of section. — The purpose of this section is to give some relief to persons who, because of an inability to obtain bail, are held in custody. State v. Howard, 108 N.M. 560, 775 P.2d 762 (Ct. App. 1989).

Section has been strictly interpreted, with resulting benefits to the defendant. State v. Ramzy, 98 N.M. 436, 649 P.2d 504 (Ct. App. 1982).

Compliance with 31-18-21 NMSA 1978. — Section 31-18-21 NMSA 1978 mandates that a sentence for a felony committed while serving a sentence in a penal institution run consecutive to the prior sentence. It is impossible to grant "presentence" confinement credit concurrent with time served on the prior sentence and comply with that section, which requires that the sentences run consecutively. State v. Facteau, 109 N.M. 748, 790 P.2d 1029 (1990).

Sentence must have been direct result of felony committed. — This section allows for presentence confinement credit only if the sentence was a direct result of the felony committed. State v. Facteau, 109 N.M. 748, 790 P.2d 1029 (1990).

Discretion of court to determine time credited. — It is for the trial court to determine at the time of sentencing, from relevant documents or other evidence to be made a part of the record, the specific presentence confinement to be credited against any sentence finally imposed for offenses on which an accused has been held. Stewart v. State, 112 N.M. 653, 818 P.2d 854 (Ct. App. 1991).

Credit for multiple DWI offenses. — Because the legislature provides in 66-8-102 NMSA 1978 that, for a first DWI offender, time spent in jail prior to conviction is to be credited against the offender's sentence, and because fourth and subsequent offenders are felons, who are also granted such credit pursuant to this section, the legislature's silence as to second and third offenses implies an intent to afford courts discretion to grant credit to third and fourth offenders. State v. Martinez, 1998-NMSC-023, 126 N.M. 39, 966 P.2d 747.

Court may revise sentence to give credit. — Rule 93, N.M.R. Civ. P. (now see Rule 1-093 NMRA), specifically authorizes the trial court to correct a sentence. McCroskey v. State, 82 N.M. 49, 475 P.2d 49 (Ct. App. 1970).

No time limit for request for credit. — The authorization contained in Rule 93, N.M.R. Civ. P. (now see 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, 82 N.M. 49, 475 P.2d 49 (Ct. App. 1970).

Credit to equal presentence confinement period. — A defendant is entitled to one day's credit against his total sentence for each day spent in presentence confinement. Regardless of whether the sentences for multiple felonies are to run concurrently or consecutively, credit is given only for that period actually spent in presentence confinement. State v. Howard, 108 N.M. 560, 775 P.2d 762 (Ct. App. 1989).

How credit should be granted. — A one-day credit should be granted for every 24 hours, or fraction thereof. For example, if someone is arrested at 10:00 p.m. and released at 9:30 a.m. the next morning, he or she should only get a one-day credit because the confinement is less than 24 hours. If, on the other hand, someone is arrested at 8:00 a.m. and released at 9:30 a.m. the following day, the confinement would amount to a two-day credit because the confinement exceeded a 24 hour period. State v. Miranda, 108 N.M. 789, 779 P.2d 976 (Ct. App. 1989).

No multiplication by number of sentences. — Presentence confinement credit is not to be multiplied by the number of different sentences imposed. State v. Miranda, 108 N.M. 789, 779 P.2d 976 (Ct. App. 1989).

Consecutive and concurrent sentences. — An offender who receives consecutive sentences is entitled to presentence incarceration credit only once against the aggregate of all the sentences, while an offender sentenced to concurrent terms in effect receives credit against each sentence. State v. Miranda, 108 N.M. 789, 779 P.2d 976 (Ct. App. 1989).

"Double credit". — Where defendant was out on bond for aggravated battery, arrested for a second crime of domestic violence, had his bond revoked, and was incarcerated until his trials on the separate charges, and was convicted on both charges, he did not have a right to presentence credit for the entire time of his presentence incarceration against both consecutive sentences. State v. Romero, 2002-NMCA-106, 132 N.M. 745, 55 P.3d 441, cert. denied, N.M. , P.3d (2002).

Presentence confinement must be for crime charged. — This section was not applicable to prisoner who pleaded guilty to a misdemeanor committed in the state penitentiary while he was serving a prior sentence, and sought credit on his sentence for the days which elapsed between the day he was served with a warrant for his arrest and the day when judgment and sentence was entered on his plea of guilty, as confinement during this period was pursuant to his prior sentence. State v. Brewton, 83 N.M. 50, 487 P.2d 1355 (Ct. App. 1971).

The decisive factor in allowing credit for presentence confinement in a case is whether the confinement was actually related to the charges of that particular case. It is not

necessary that the confinement be related exclusively to the charges in question. State v. Ramzy, 98 N.M. 436, 649 P.2d 504 (Ct. App. 1982).

This section does not authorize credit for presentence confinement that is not actually related to the charges of the particular offense. State v. Laskay, 103 N.M. 799, 715 P.2d 72 (Ct. App. 1986).

The determinative issue for presentence confinement credit is whether the basis for the confinement was actually related to the charge upon which the final conviction and sentence are based. State v. Miranda, 108 N.M. 789, 779 P.2d 976 (Ct. App. 1989).

Confinement for multiple offenses. — It is not necessary that the confinement in question relate exclusively to the charges against which a defendant seeks credit. Since the defendant in this case was in a Texas jail on both a Texas charge and a New Mexico warrant, he was entitled to credit in New Mexico. State v. Barrios, 116 N.M. 580, 865 P.2d 1224 (Ct. App. 1993).

Credit for time served on invalidated guilty plea. — The defendant was entitled to time served pursuant to a sentence on an invalidated guilty plea even though the counts on which she was convicted at trial were different from the counts to which she had pleaded guilty; there was a causal connection between the charges on which the defendant was convicted and the sentence pursuant to the invalidated plea. State v. Wittgenstein, 119 N.M. 565, 893 P.2d 461 (Ct. App. 1995).

If transfer of confinement unrelated to charge in question, no confinement credit. — Where the defendant is already confined on an unrelated charge and there is a transfer of the place of confinement, the actual confinement being unrelated to the charge in question, the trial court is correct in denying the defendant's motion for presentence confinement credit. State v. Orona, 98 N.M. 668, 651 P.2d 1312 (Ct. App. 1982).

Presentence confinement credit properly awarded. — The trial court had discretion to award defendant presentence confinement credit for that time spent in custody after his parole was revoked based on the drug paraphernalia charge for which he was ultimately sentenced in this case. State v. Irvin, 114 N.M. 597, 844 P.2d 847 (Ct. App. 1992).

Hospitalization after being taken into custody. — The fact that defendant was hospitalized following his being taken into custody did not preclude award of presentence confinement credit for the time spent in the hospital. State v. Watchman, 111 N.M. 727, 809 P.2d 641 (Ct. App. 1991), overruled in part on other grounds, State v. Hosteen, 1996-NMCA-084, 122 N.M. 228, 923 P.2d 595.

Confinement in mental hospital after arrest constitutes "official confinement". — Defendant was committed under 31-9-1 NMSA 1978 to the state hospital and confined therein for 463 days after being found incapable of assisting in his defense on pending

felony charges, lacking in the mental capacity to stand trial, and in need of care, custody and treatment in a mental hospital, with provision that he be at all times under maximum security conditions and not be released without further written order of the court, it was held that defendant had been under official confinement on charges of committing a felony and was therefore entitled under this statute to credit against his sentence for presentence confinement time spent in the hospital. State v. La Badie, 87 N.M. 391, 534 P.2d 483 (Ct. App. 1975).

Confinement in a mental hospital after arrest constitutes "official confinement," as outlined in this section. State v. Miranda, 108 N.M. 789, 779 P.2d 976 (Ct. App. 1989).

Voluntary treatment program not "confinement" under this section. — Presentence confinement credit against a felony DWI jail sentence may not be given for time spent in an inpatient alcohol treatment program, where the state did not require defendant's participation in the program and exercised no control over him while he was in the program. State v. Clah, 1997-NMCA-091, 124 N.M. 6, 946 P.2d 210.

House arrest as "official confinement". — Time spent outside of jail may qualify as "official confinement" for the purposes of receiving presentence confinement credit under this section when: (1) a court has entered an order releasing the defendant from a facility but has imposed limitations on the defendant's freedom of movement, or the defendant is in the actual or constructive custody of state or local law enforcement or correctional officers; and (2) the defendant is punishable for a crime of escape if there is an unauthorized departure from the place of confinement or other non-compliance with the court's order. State v. Fellhauer, 1997-NMCA-064, 123 N.M. 476, 943 P.2d 123.

Condition that a drunk driving defendant remain at his home at all times except to attend alcohol counseling, work, or religious services was a sufficient limitation on his freedom of movement to meet the first subprong of the *Fellhauer* test and to therefore entitle him to presentence credit for time spent under house arrest. State v. Guillen, 2001-NMCA-079, 130 N.M. 803, 32 P.3d 812.

When no credit authorized by section. — If a past confinement is not in connection with the present offense charged, this section does not authorize a credit. State v. Barefield, 92 N.M. 768, 595 P.2d 406 (Ct. App. 1979).

Defendant was not entitled to 11 months of presentence confinement credit against his sentence for escape from the penitentiary, where he was serving time on a burglary charge when he escaped, where he was captured and was immediately incarcerated to continue to serve time on his burglary charge, and where he was later sentenced to an additional nine years for the escape to run consecutively to his original charge. State v. Facteau, 109 N.M. 748, 790 P.2d 1029 (1990).

Conditions of confinement not relevant. — When the defendant had not appeared for sentencing following a guilty plea, was later found in California serving a sentence for another crime, and a New Mexico detainer was lodged against him as a result of

which the conditions of his confinement became more onerous, he was not entitled to credit for the time served in California after lodging of the detainer since his confinement there was not due to the New Mexico charges. State v. Ruiz, 120 N.M. 420, 902 P.2d 575 (Ct. App. 1995).

Law reviews. — For note, "Home Alone: Why House Arrest Doesn't Qualify for Presentence Confinement Credit in New Mexico - State v. Fellhauer," see 28 N.M.L. Rev. 519 (1998).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Time which convict spends in hospital as credit on his sentence, 62 A.L.R. 246.

Right of state or federal prisoner to credit for time served in another jurisdiction before delivery to state or federal authorities, 18 A.L.R.2d 511.

Right to credit for time served under void sentence, 35 A.L.R.2d 1283.

Computation of incarceration time under work-release or "hardship" sentences, 28 A.L.R.4th 1265.

Validity, construction, and application of concurrent-sentence doctrine - state cases, 56 A.L.R.5th 385.

31-20-13. Conditional discharge order; exception.

A. When a person who has not been previously convicted of a felony offense is found guilty of a crime for which a deferred or suspended sentence is authorized, the court may, without entering an adjudication of guilt, enter a conditional discharge order and place the person on probation on terms and conditions authorized by Sections 31-20-5 and 31-20-6 NMSA 1978. A conditional discharge order may only be made available once with respect to any person.

B. If the person violates any of the conditions of probation, the court may enter an adjudication of guilt and proceed as otherwise provided by law.

C. The court shall not enter a conditional discharge order for a person found guilty of driving a motor vehicle while under the influence of intoxicating liquor or drugs, pursuant to the provisions of Section 66-8-102 NMSA 1978.

History: Laws 1993, ch. 283, § 2 enacted as 31-20-7 NMSA 1978 and recompiled as 31-20-13 NMSA 1978; 1994, ch. 15, § 1.

ANNOTATIONS

The 1994 amendment, effective February 25, 1994, added "exception" at the end of the section heading, added the second sentence in Subsection A and added Subsection C.

Compiler's notes. — Laws 1993, ch. 283, § 2 enacted this section as a new 31-20-7 NMSA 1978. However, this section has been compiled as 31-20-13 NMSA 1978 in order to avoid confusion with repealed section 31-20-7 NMSA 1978 which has been construed or cited in a number of New Mexico decisions.

Legislative intent. — The legislature's intent is that a defendant receive credit for time served on supervised probation under the terms of a conditional discharge. State v. Leslie, 2004-NMCA-106, 136 N.M. 244, 96 P.3d 805.

This section provides an exception for certain first-time felons whose convictions meet requirements in addition to the eligibility requirements for a deferred or suspended sentence. State v. Leslie, 2004-NMCA-106, 136 N.M. 244, 96 P.3d 805.

Subsection A of this section expressly incorporates probation statutes that apply to a person serving a deferred sentence. State v. Leslie, 2004-NMCA-106, 136 N.M. 244, 96 P.3d 805.

Person who is eligible to receive conditional discharge is by definition one who is entitled to a deferred sentence. State v. Leslie, 2004-NMCA-106, 136 N.M. 244, 96 P.3d 805.

Deferred sentence modified to conditional discharge. — Modification from a deferred sentence to a conditional discharge was an authorized sentence reduction under this section and Rule 5-801 NMRA. State v. Herbstman, 1999-NMCA-014, 126 N.M. 683, 974 P.2d 177.

Sex offender registration. — A person granted a conditional discharge under this section is not required to register as a sex offender. State v. Herbstman, 1999-NMCA-014, 126 N.M. 683, 974 P.2d 177.

Notice requiring defendant to register as a sex offender pursuant to 29-11A-7 NMSA 1978 did not need to be placed in a conditional discharge order. State v. Herbstman, 1999-NMCA-014, 126 N.M. 683, 974 P.2d 177.

Appealability of order. — A conditional discharge order in a felony prosecution is sufficiently final to be appealable, but a similar order in a criminal contempt prosecution is not, at least when the order does not require any action or behavior on the part of the contemnor other than to obey the law in the future. State v. Durant, 2000-NMCA-066, 129 N.M. 345, 7 P.3d 495.

ARTICLE 20A
Capital Felony Sentencing

31-20A-1. Capital felony; sentencing procedure.

A. At the conclusion of all capital felony cases heard by jury, and after proper charge from the court and argument of counsel, the jury shall retire to consider a verdict of guilty or not guilty without any consideration of punishment. In nonjury capital felony cases, the judge shall first consider a finding of guilty or not guilty without any consideration of punishment.

B. Upon a verdict by the jury or judge that the defendant is guilty of a capital felony, or upon a plea of guilty to a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized herein. In a jury trial, the sentencing proceeding shall be conducted as soon as practicable by the original trial judge before the original trial jury. In a nonjury trial the sentencing proceeding shall be conducted as soon as practicable by the original trial judge. In the case of a plea of guilty to a capital felony, the sentencing proceeding shall be conducted as soon as practicable by the original trial judge or by a jury upon demand of a party.

C. In the sentencing proceeding, all evidence admitted at the trial shall be considered and additional evidence may be presented as to the circumstances of the crime and as to any aggravating or mitigating circumstances pursuant to Sections 6 [31-20A-5 NMSA 1978] and 7 [31-20A-6 NMSA 1978] of this act.

D. In a jury sentencing proceeding, the judge shall give appropriate instructions and allow arguments and the jury shall retire to determine the punishment to be imposed. In a nonjury sentencing proceeding, or upon a plea of guilty, where no jury has been demanded, the judge shall allow argument and determine the punishment to be imposed.

History: Laws 1979, ch. 150, § 2.

ANNOTATIONS

Cross references. — For sentencing authority for capital felonies, see 31-18-14 NMSA 1978.

New Mexico's capital punishment statutory provisions are constitutional. State v. Garcia, 99 N.M. 771, 664 P.2d 969, cert. denied, 462 U.S. 1112, 103 S. Ct. 2464, 77 L. Ed. 2d 1341 (1983).

The capital punishment statutes are not unconstitutional on the grounds that they neither require any specific finding by the jury on mitigating circumstances nor provide

any standard by which the jury determines that the aggravating circumstances outweigh the mitigating circumstances. State v. Gilbert, 100 N.M. 392, 671 P.2d 640 (1983), cert. denied, 465 U.S. 1073, 104 S. Ct. 1492, 79 L. Ed. 2d 753 (1984).

The bifurcated trial to one jury on the issues of guilt and sentencing does not operate to deny due process of law and equal protection. State v. Gilbert, 100 N.M. 392, 671 P.2d 640 (1983), cert. denied, 465 U.S. 1073, 104 S. Ct. 1492, 79 L. Ed. 2d 753 (1984).

New Mexico's capital felony sentencing provisions are constitutional. State v. Cheadle, 101 N.M. 282, 681 P.2d 708 (1983), cert. denied, 466 U.S. 945, 104 S. Ct. 1930, 80 L. Ed. 2d 475 (1984).

Constitutionality of mandatory life sentence. — The mandatory imposition of a life sentence upon the conviction of first-degree murder where the death penalty is not sought does not constitute cruel and unusual punishment. State v. Escamilla, 107 N.M. 510, 760 P.2d 1276 (1988).

Circumstances of crime. — The trial court did not err in admitting testimony and evidence which related directly to the circumstances of the defendant's crime. State v. Clark, 1999-NMSC-035, 128 N.M. 119, 990 P.2d 793.

Victim impact testimony. — Victim impact testimony, brief in nature and narrow in scope and purpose, is admissible under Subsection C of this section, as a circumstance of the crime. State v. Clark, 1999-NMSC-035, 128 N.M. 119, 990 P.2d 793.

The effective date of the victim's rights laws did not affect the admission of victim impact evidence in a death penalty case. States are free to admit this type of evidence following the United States Supreme Court's ruling in Payne v. Tennessee, 501 U.S. 808 (1991), and Subsection C of this section and 31-20A-2B NMSA 1978 already provide authority for the admission of this type of evidence. State v. Allen, 2000-NMSC-002, 128 N.M. 482, 994 P.2d 728, cert. denied, 530 U.S. 1218, 120 S. Ct. 2225, 147 L. Ed. 2d 256 (2000).

The Rules of Evidence requiring relevance and the balancing of unfair prejudice also apply to testimony and exhibits that are introduced in a capital felony sentencing proceeding for the purpose of showing victim impact. State v. Allen, 2000-NMSC-002, 128 N.M. 482, 994 P.2d 728, cert. denied, 530 U.S. 1218, 120 S. Ct. 2225, 147 L. Ed. 2d 256 (2000).

Defendant was not unfairly prejudiced by impact evidence that included a videotaped depiction of the victim prior to her death in addition to the testimony of two witnesses. State v. Allen, 2000-NMSC-002, 128 N.M. 482, 994 P.2d 728, cert. denied, 530 U.S. 1218, 120 S. Ct. 2225, 147 L. Ed. 2d 256 (2000).

Testimony of the victim's mother regarding actions of defendant while he was awaiting trial should not have been admitted as victim impact testimony because it was not

relevant to the crimes for which he was standing trial. State v. Jacobs, 2000-NMSC-026, 129 N.M. 448, 10 P.3d 127.

Use of six alternate jurors violates section. — Stipulation whereby a sentencing proceeding was conducted before six of the original trial jurors and six alternates violated the procedures for capital felony sentencing so that defendant was entitled to a new sentencing proceeding, pursuant to 31-20A-4E NMSA 1978. State v. Finnell, 101 N.M. 732, 688 P.2d 769, cert. denied, 469 U.S. 918, 105 S. Ct. 297, 83 L. Ed. 2d 232 (1984).

Law reviews. — For article, "Constitutionality of the New Mexico Capital Punishment Statute," see 11 N.M.L. Rev. 269 (1981).

For article, "Sufficiency of Provocation for Voluntary Manslaughter in New Mexico: Problems in Theory and Practice," see 12 N.M.L. Rev. 747 (1982).

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

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

For article, "Unintentional homicides caused by risk-creating conduct: Problems in distinguishing between depraved mind murder, second degree murder, involuntary manslaughter, and noncriminal homicide in New Mexico," 20 N.M.L. Rev. 55 (1990).

For annual survey of New Mexico Criminal Procedure, see 20 N.M.L. Rev. 285 (1990).

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.

When does delay in imposing sentence violate speedy trial provision, 86 A.L.R.4th 340.

Propriety, under Federal Constitution, of evidence or argument concerning deterrent effect of death penalty, 78 A.L.R. Fed. 553.

31-20A-2. Determination of sentence.

A. Capital sentencing deliberations shall be guided by the following considerations:

(1) whether aggravating circumstances exist as enumerated in Section 6 [31-20A-5 NMSA 1978] of this act;

(2) whether mitigating circumstances exist as enumerated in Section 7 [31-20A-6 NMSA 1978] of this act; and

(3) whether other mitigating circumstances exist.

B. After weighing the aggravating circumstances and the mitigating circumstances, weighing them against each other, and considering both the defendant and the crime, the jury or judge shall determine whether the defendant should be sentenced to death or life imprisonment.

History: Laws 1979, ch. 150, § 3.

ANNOTATIONS

Constitutionality. — Subsection B of this section, directing the jury to weigh aggravating and mitigating circumstances, consider the defendant and the crime, and then determine the sentence, is not vague and indefinite, and thus does not violate a defendant's due process and equal protection rights. State v. Clark, 1999-NMSC-035, 128 N.M. 119, 990 P.2d 793.

Aggravating circumstances need not be beyond reasonable doubt. — There is no requirement that the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt. State v. Finnell, 101 N.M. 732, 688 P.2d 769, cert. denied, 469 U.S. 918, 105 S. Ct. 297, 83 L. Ed. 2d 232 (1984).

Victim impact testimony. — Victim impact testimony is consistent with the Capital Felony Sentencing Act because it constitutes additional evidence as to the circumstances of the crime under 31-20A-1C NMSA 1978 and Subsection B of this section. State v. Clark, 1999-NMSC-035, 128 N.M. 119, 990 P.2d 793.

The effective date of the victim's rights laws did not affect the admission of victim impact evidence in a death penalty case. States are free to admit this type of evidence following the United States Supreme Court's ruling in *Payne v. Tennessee*, 501 U.S. 808 (1991), and 31-20A-1C NMSA 1978 and Subsection B of this section already provide authority for the admission of this type of evidence. State v. Allen, 2000-NMSC-002, 128 N.M. 482, 994 P.2d 728, cert. denied, 530 U.S. 1218, 120 S. Ct. 2225, 147 L. Ed. 2d 256 (2000).

The Rules of Evidence requiring relevance and the balancing of unfair prejudice also apply to testimony and exhibits that are introduced in a capital felony sentencing proceeding for the purpose of showing victim impact. State v. Allen, 2000-NMSC-002, 128 N.M. 482, 994 P.2d 728, cert. denied, 530 U.S. 1218, 120 S. Ct. 2225, 147 L. Ed. 2d 256 (2000).

Defendant was not unfairly prejudiced by impact evidence that included a videotaped depiction of the victim prior to her death in addition to the testimony of two witnesses. State v. Allen, 2000-NMSC-002, 128 N.M. 482, 994 P.2d 728, cert. denied, 530 U.S. 1218, 120 S. Ct. 2225, 147 L. Ed. 2d 256 (2000).

Lack of mitigating circumstances. — Defendant's failure to show any mitigating circumstances, in and of itself, is not an aggravating circumstance. State v. Allen, 2000-

NMSC-002, 128 N.M. 482, 994 P.2d 728, cert. denied, 530 U.S. 1218, 120 S. Ct. 2225, 147 L. Ed. 2d 256 (2000).

Law reviews. — For article, "Constitutionality of the New Mexico Capital Punishment Statute," see 11 N.M.L. Rev. 269 (1981).

For comment, "State v. Jacobs: A Comment on One State's Choice to Restrict Victim Impact Evidence at Death Penalty Sentencing," see 31 N.M.L. Rev. 539 (2001).

31-20A-2.1. Prohibition against capital punishment of mentally retarded persons; presentencing hearing.

A. As used in this section, "mentally retarded" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior. An intelligence quotient of seventy or below on a reliably administered intelligence quotient test shall be presumptive evidence of mental retardation.

B. The penalty of death shall not be imposed on any person who is mentally retarded.

C. Upon motion of the defense requesting a ruling that the penalty of death be precluded under this section, the court shall hold a hearing, prior to conducting the sentencing proceeding under Section 31-20A-3 NMSA 1978. If the court finds, by a preponderance of the evidence, that the defendant is mentally retarded, it shall sentence the defendant to life imprisonment. A ruling by the court that evidence of diminished intelligence introduced by the defendant does not preclude the death penalty under this section shall not restrict the defendant's opportunity to introduce such evidence at the sentencing proceeding or to argue that that evidence should be given mitigating significance. If the sentencing proceeding is conducted before a jury, the jury shall not be informed of any ruling denying a defendant's motion under this section.

History: 1978 Comp., § 31-20A-2.1, enacted by Laws 1991, ch. 30, § 1.

ANNOTATIONS

Jury trial right, pretrial hearing, and conclusiveness of retardation. — Sixth Amendment right to jury trial is not violated by procedure described in subsection C of statute, since mental retardation is factual issue that reduces rather than increases maximum punishment for guilty verdict; pretrial hearing is permissible to determination mental retardation; and retardation is conclusive mitigating factor for sentencing jury. State v. Flores, 2004-NMSC-021, 135 N.M. 759, 93 P.3d 1264.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Propriety of imposing capital punishment on mentally retarded individuals, 20 A.L.R.5th 177.

Law reviews. – For article, "Disability Advocacy and the Death Penalty: The Road from *Penry* to *Atkins*," see 33 N.M.L. Rev. 173 (2003).

For article, "Adolescence, Mental Retardation, and the Death Penalty: The Siren Call of *Atkins v. Virginia*," see 33 N.M.L. Rev. 183 (2003).

For article, "*Atkins*, Adolescence, and the Maturity Heuristic: Rationales for a Categorical Exemption for Juveniles from Capital Punishment," see 33 N.M.L. Rev. 207 (2003).

For article, "*Atkins v. Virginia*: A Psychiatric Can of Worms," see 33 N.M.L. Rev. 255 (2003).

For article, "What *Atkins* Could Mean for People with Mental Illness," see 33 N.M.L. Rev. 293 (2003).

For article, "'Life Is in Mirrors, Death Disappears': Giving Life to *Atkins*," see 33 N.M.L. Rev. 315 (2003).

For article, "Straight Is the Gate: Capital Clemency in the United States from *Gregg* to *Atkins*," see 33 N.M.L. Rev. 349 (2003).

31-20A-3. Court sentencing.

In a jury sentencing proceeding in which the jury unanimously finds beyond a reasonable doubt and specifies at least one of the aggravating circumstances enumerated in Section 6 [31-20A-5 NMSA 1978] of this act, and unanimously specifies the sentence of death pursuant to Section 3 [31-20A-2 NMSA 1978] of this act, the court shall sentence the defendant to death. Where a sentence of death is not unanimously specified, or the jury does not make the required finding, or the jury is unable to reach a unanimous verdict, the court shall sentence the defendant to life imprisonment. In a nonjury sentencing proceeding and in cases involving a plea of guilty, where no jury has been demanded, the judge shall determine and impose the sentence, but he shall not impose the sentence of death except upon a finding beyond a reasonable doubt and specification of at least one of the aggravating circumstances enumerated in Section 6 [31-20A-5 NMSA 1978] of this act.

History: Laws 1979, ch. 150, § 4.

ANNOTATIONS

Finding of mental retardation. — Because a jury finding that the defendant has mental retardation conclusively bars the death penalty, this section controls. State v. Flores, 2004-NMSC-021, 135 N.M. 759, 93 P.3d 1264.

Constitutionality. — This section does not violate the separation of powers doctrine and did not deny the defendant due process and equal protection of the laws. State v. Clark, 1999-NMSC-035, 128 N.M. 119, 990 P.2d 793.

Specific verdict in absence of unanimity not required. — This section does not require that the jury return a specific verdict if unanimity is absent. State v. Clark, 108 N.M. 288, 772 P.2d 322, cert. denied, 493 U.S. 923, 110 S. Ct. 291, 107 L. Ed. 2d 271 (1989), overruled on other grounds, State v. Henderson, 1996-NMCA-089, 109 N.M. 655, 789 P.2d 603.

The statutory provision directing the court to sentence the defendant to life imprisonment, "where a sentence of death is not unanimously specified, or the jury does not make the required finding, or the jury is unable to reach a unanimous verdict" is directed to the trial court, not the sentencing jury. State v. Clark, 108 N.M. 288, 772 P.2d 322, cert. denied, 493 U.S. 923, 110 S. Ct. 291, 107 L. Ed. 2d 271 (1989), overruled on other grounds, State v. Henderson, 1996-NMCA-089, 109 N.M. 655, 789 P.2d 603.

Law reviews. — For article, "Constitutionality of the New Mexico Capital Punishment Statute," see 11 N.M.L. Rev. 269 (1981).

31-20A-4. Review of judgment and sentence.

A. The judgment of conviction and sentence of death shall be automatically reviewed by the supreme court of the state of New Mexico.

B. In addition to the other matters on appeal, the supreme court shall rule on the validity of the death sentence.

C. The death penalty shall not be imposed if:

(1) the evidence does not support the finding of a statutory aggravating circumstance;

(2) the evidence supports a finding that the mitigating circumstances outweigh the aggravating circumstances;

(3) the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor; or

(4) the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

D. No error in the sentencing proceeding shall result in the reversal of the conviction of a capital felony. If the trial court is reversed on appeal because of error only in the sentencing proceeding, the supreme court shall remand solely for a new sentencing

proceeding. The new sentencing proceeding ordered and mandated shall apply only to the issue of punishment.

E. In cases of remand for a new sentencing proceeding, all exhibits and a transcript of all testimony and other evidence admitted in the prior trial and sentencing proceeding shall be admissible in the new sentencing proceeding, and:

(1) if the sentencing proceeding was before a jury, a new jury shall be impaneled for the new sentencing proceeding;

(2) if the sentencing proceeding was before a judge, the original trial judge shall conduct the new sentencing proceeding; or

(3) if the sentencing proceeding was before a judge and the original trial judge is unable or unavailable to conduct a new sentencing proceeding, then another judge shall be designated to conduct the new sentencing proceeding and the parties are entitled to disqualify the new judge on the grounds set forth in Section 38-3-9 NMSA 1978 before the newly designated judge exercises any discretion.

History: Laws 1979, ch. 150, § 5.

ANNOTATIONS

Guidelines adopted for review under this section. — See State v. Garcia, 99 N.M. 771, 664 P.2d 969 (1983).

Waiver of review. — The supreme court is required to directly review the defendant's sentence of death. However, a competent defendant may knowingly, voluntarily, and intelligently waive his right to any further review of his case. State v. Clark, 1999-NMSC-035, 128 N.M. 119, 990 P.2d 793.

Victim impact testimony. — Victim impact testimony does not violate Subsection C(3)'s prohibition against capital punishment imposed under the influence of "passion, prejudice or any other arbitrary factor". State v. Clark, 1999-NMSC-035, 128 N.M. 119, 990 P.2d 793.

Proportionality review. — In similar cases, considering both the crime and defendant, a defendant convicted of first-degree murder under a specific aggravating circumstance should not be put to death if another defendant, convicted of murder under the same aggravating circumstance, is given life imprisonment, unless there is some justification. State v. Garcia, 99 N.M. 771, 664 P.2d 969 (1983).

The trial court did not err in restricting the defendant's offer of proportionality evidence, because proportionality review is unquestionably a matter for the supreme court. State v. Clark, 1999-NMSC-035, 128 N.M. 119, 990 P.2d 793.

Comparison with other cases. — In reviewing a sentence under the proportionality guidelines established in State v. Garcia, 99 N.M. 771, 664 P.2d 969 (1983), the supreme court will compare other New Mexico cases in which a capital defendant has been convicted of capital murder under the same aggravating circumstances, and then received either the sentence of death or life imprisonment. The court will, however, review this issue only when raised. State v. Clark, 108 N.M. 288, 772 P.2d 322, cert. denied, 493 U.S. 923, 110 S. Ct. 291, 107 L. Ed. 2d 271 (1989), overruled on other grounds, State v. Henderson, 1996-NMCA-089, 109 N.M. 655, 789 P.2d 603.

Defendant's argument that the proportionality guidelines should be broadened to include comparison with cases in which the death penalty could have been sought but was not, as well as cases in which the death penalty was sought but which ended either in a plea of guilty to a noncapital offense or with the jury's failure to find the existence of the alleged statutory aggravating circumstance, would not be considered, where defendant did not allege, or make any showing, that his sentence would be disproportionate if compared to this pool of cases. State v. Clark, 108 N.M. 288, 772 P.2d 322, cert. denied, 493 U.S. 923, 110 S. Ct. 291, 107 L. Ed. 2d 271 (1989), overruled on other grounds, State v. Henderson, 1996-NMCA-089, 109 N.M. 655, 789 P.2d 603.

District court must accept jury imposed death sentence. — Once a jury has unanimously agreed on a sentence of death in conformance with this article, 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, 102 N.M. 558, 698 P.2d 428 (1985).

Objections to jury instructions regarding aggravating circumstance cannot be raised for the first time on appeal. State v. Cheadle, 101 N.M. 282, 681 P.2d 708 (1983), cert. denied, 466 U.S. 945, 104 S. Ct. 1930, 80 L. Ed. 2d 475 (1984).

Use of evidence inadmissible at trial. — Evidence inadmissible at trial as unfairly prejudicial or as evidence of other crimes may be considered in a hearing to determine probable cause to proceed with death-penalty proceedings. State v. Smith, 1997-NMSC-017, 123 N.M. 52, 933 P.2d 851.

Aggravating circumstances not outweighed by mitigating circumstances. — Mitigating circumstances, including evidence of defendant's alleged traumatic experience in Vietnam, did not outweigh the aggravating circumstances of his crimes of murder and kidnapping. State v. Clark, 108 N.M. 288, 772 P.2d 322, cert. denied, 493 U.S. 923, 110 S. Ct. 291, 107 L. Ed. 2d 271 (1989), overruled on other grounds, State v. Henderson, 1996-NMCA-089, 109 N.M. 655, 789 P.2d 603.

Supreme Court determines death sentence proportionality. — The determination of death sentence proportionality is a matter to be addressed by the Supreme Court on appeal and is, by implication, within the Supreme Court's exclusive constitutional jurisdiction over death sentence appeals. Determinations of this type require review of the facts in the trial record pertaining to the crime, including evidence of aggravation

and mitigation which is not fully developed until after conviction. State v. Wyrostek, 117 N.M. 514, 873 P.2d 260 (1994).

Death sentence upheld. — Under proportionality review, death sentence for deliberate murder was neither excessive nor disproportionate. State v. Cheadle, 101 N.M. 282, 681 P.2d 708 (1983), cert. denied, 466 U.S. 945, 104 S. Ct. 1930, 80 L. Ed. 2d 475 (1984).

Death sentence held neither excessive nor disproportionate. — See State v. Garcia, 99 N.M. 771, 664 P.2d 969 (1983); State v. Clark, 1999-NMSC-035, 128 N.M. 119, 990 P.2d 793.

Law reviews. — For article, "Constitutionality of the New Mexico Capital Punishment Statute," see 11 N.M.L. Rev. 269 (1981).

For note, "Only the Supreme Court Can Determine Whether the Death Sentence Would be Excessive or Disproportionate: *State v. Wyrostek,*" see 25 N.M.L. Rev. 271 (1995).

For comment, "State v. Jacobs: A Comment on One State's Choice to Restrict Victim Impact Evidence at Death Penalty Sentencing," see 31 N.M.L. Rev. 539 (2001).

31-20A-5. Aggravating circumstances.

The aggravating circumstances to be considered by the sentencing court or jury pursuant to the provisions of Section 31-20A-2 NMSA 1978 are limited to the following:

A. the victim was a peace officer who was acting in the lawful discharge of an official duty when he was murdered;

B. the murder was committed with intent to kill in the commission of or attempt to commit kidnaping, criminal sexual contact of a minor or criminal sexual penetration;

C. the murder was committed with the intent to kill by the defendant while attempting to escape from a penal institution of New Mexico;

D. while incarcerated in a penal institution in New Mexico, the defendant, with the intent to kill, murdered a person who was at the time incarcerated in or lawfully on the premises of a penal institution in New Mexico. As used in this subsection "penal institution" includes facilities under the jurisdiction of the corrections and criminal rehabilitation department [corrections department] and county and municipal jails;

E. while incarcerated in a penal institution in New Mexico, the defendant, with the intent to kill, murdered an employee of the corrections and criminal rehabilitation department [corrections department];

F. the capital felony was committed for hire; and

G. the capital felony was murder of a witness to a crime or any person likely to become a witness to a crime, for the purpose of preventing report of the crime or testimony in any criminal proceeding, or for retaliation for the victim having testified in any criminal proceeding.

History: Laws 1979, ch. 150, § 6; 1981, ch. 23, § 1.

ANNOTATIONS

Bracketed material. — The bracketed material in Subsections D and E was inserted by the compiler, as Laws 1981, ch. 73, § 1, changed the name of the former corrections and criminal rehabilitation department, referred to in Subsections D and E, to the corrections department. See 9-3-3 NMSA 1978. The bracketed material was not enacted by the legislature and is not part of the law.

Legislative intent. — The legislature has demonstrated its intent to protect corrections officers and jailers and to deter crimes against them during the course of their duties of maintaining order in penal facilities. State v. Young, 2004-NMSC-015, 135 N.M. 458, 90 P.3d 477.

This section provides sufficiently clear and objective standards that provide specific and detailed guidance and that make the process for imposing the death sentence rationally reviewable. State v. Garcia, 99 N.M. 771, 664 P.2d 969 (1983).

Subsection A concerns penalty for crime against peace officer, and therefore, 33-1-10 NMSA 1978 and 33-3-28 NMSA 1978 serve as powerful indicators of the legislature's intent in Subsection A of this section. State v. Young, 2004-NMSC-015, 135 N.M. 458, 90 P.3d 477.

Legislature intended broad interpretation of Subsection A's aggravating circumstance to advance the purpose of protecting those who maintain order. State v. Young, 2004-NMSC-015, 135 N.M. 458, 90 P.3d 477.

Subsection A is not duplicative of Subsection E. State v. Young, 2004-NMSC-015, 135 N.M. 458, 90 P.3d 477.

And Subsection D is not duplicative of Subsection A because Subsection D of this section also applies to individuals other than corrections officers, including visitors and other inmates. State v. Young, 2004-NMSC-015, 135 N.M. 458, 90 P.3d 477.

"Peace officer" in Subsection A includes jailers and corrections officers while they are engaged in the duties for which the legislature designated them to be peace officers in 33-3-28 NMSA 1978 and 33-1-10 NMSA 1978. State v. Young, 2004-NMSC-015, 135 N.M. 458, 90 P.3d 477.

By designating corrections officers and jailers as peace officers under certain circumstances, the legislature intended to provide them with the extra protection and added deterrent value of Subsection A of this section. State v. Young, 2004-NMSC-015, 135 N.M. 458, 90 P.3d 477.

The legislature intended to include corrections officers and jailers as peace officers in Subsection A of this section. State v. Young, 2004-NMSC-015, 135 N.M. 458, 90 P.3d 477.

There is an intent on the part of the legislature to treat corrections officers, jailers, and any employee of a local jail whose principal duty is to hold inmates in custody as peace officers for purposes of Subsection A of this section when these individuals are murdered during the discharge of duties conferring peace officer status. State v. Young, 2004-NMSC-015, 135 N.M. 458, 90 P.3d 477.

Definition of "peace officer" in 30-1-12 C NMSA 1978 is not directly applicable to Subsection A of this section because that definition applies only to the Criminal Code. State v. Young, 2004-NMSC-015, 135 N.M. 458, 90 P.3d 477.

Defendant need not know victim was police officer. — The aggravating circumstance of killing a peace officer, as outlined in Subsection A, can constitutionally support the imposition of the death sentence even where the jury does not find that a defendant knew that his victim was a peace officer. State v. Compton, 104 N.M. 683, 726 P.2d 837, cert. denied, 479 U.S. 890, 107 S. Ct. 291, 93 L. Ed. 2d 265 (1986).

Community service officers are peace officers under this section. State v. Ogden, 118 N.M. 234, 880 P.2d 845, cert. denied, 513 U.S. 936, 115 S. Ct. 336, 130 L. Ed. 2d 294 (1994).

Subsection B allows jury to consider any or all listed crimes as separate aggravating circumstances. State v. Guzman, 100 N.M. 756, 676 P.2d 1321, cert. denied, 467 U.S. 1256, 104 S. Ct. 3548, 82 L. Ed. 2d 851 (1984).

When the evidence shows that more than one aggravating circumstance exists under Subsection B, any and all of the listed crimes may be considered as separate aggravating circumstances. The use of multiple instructions in these circumstances is proper. State v. Jacobs, 2000-NMSC-026, 129 N.M. 448, 10 P.3d 127.

Subsection D applies to anyone lawfully on premises of a penal institution, not just certified corrections officers. State v. Young, 2004-NMSC-015, 135 N.M. 458, 90 P.3d 477.

And completeness of corrections officer's training had no effect on officer's lawful presence at the correctional facility. Where the officer was an employee of the facility and was authorized by the facility administrators to be on the premises at the time of his killing, the officer was lawfully present at the facility within the plain meaning

of Subsection D of this section. State v. Young, 2004-NMSC-015, 135 N.M. 458, 90 P.3d 477.

Legislative purpose of aggravating circumstance in Subsection D of this section is to deter inmates from committing murder. State v. Young, 2004-NMSC-015, 135 N.M. 458, 90 P.3d 477.

Subsection E and Subsection D are designed to defer murders committed by inmates. State v. Young, 2004-NMSC-015, 135 N.M. 458, 90 P.3d 477.

Guadalupe County correctional facility is a penal institution within the plain language of this section. The fact that the correctional facility housed inmates from the department of corrections rather than county inmates is immaterial both for the definition of “local jail” in 33-3-28 NMSA 1978 and the definition of “penal institution” in this section. State v. Young, 2004-NMSC-015, 135 N.M. 458, 90 P.3d 477.

Probable cause established that deceased was peace officer. — By establishing that the Guadalupe County correctional facility had a contract with the County, that deceased was employed by the correctional facility as a corrections officer, and that he was performing the duties of a corrections officer at the time of his death, the state established probable cause to believe that deceased was a peace officer within the meaning of Subsection A of this section. State v. Young, 2004-NMSC-015, 135 N.M. 458, 90 P.3d 477.

Murder in the commission of kidnapping. — The fact that all of the elements of the crime of kidnapping were satisfied before the murder occurred did not preclude a finding that the victim was murdered in the commission of kidnapping. The evidence substantially supported a finding that the kidnapping continued throughout the course of defendant's other crimes and until the time of the victim's death. State v. Allen, 2000-NMSC-002, 128 N.M. 482, 994 P.2d 728, cert. denied, 530 U.S. 1218, 120 S. Ct. 2225, 147 L. Ed. 2d 256 (2000).

Although evidence was presented that defendant initiated the kidnapping well before and separately from the commission of other felonies, the kidnapping continued until the time of the victim's death; thus, there was sufficient evidence for the jury to find that the victim was murdered during the commission of a kidnapping. State v. Jacobs, 2000-NMSC-026, 129 N.M. 448, 10 P.3d 127.

Elements of crime and elements of aggravating circumstance distinguished. — Simply because there are sufficient elements present to prove more than one crime in the same transaction does not mean that more than one aggravating circumstance has been proven. While the same elements may be present in both instances, establishing the elements of an aggravating circumstance is not the same thing as establishing the elements of a crime. State v. Henderson, 109 N.M. 655, 789 P.2d 603 (1990), overruled on other grounds, Clark v. Tarsey, 118 N.M. 486, 882 P.2d 527 (1994).

Invalidation of one where more than one aggravating circumstance. — When two or more aggravating circumstances are found, the invalidation of one will not invalidate the sentencing proceeding unless the invalidation is due to constitutionally protected conduct. State v. Cheadle, 101 N.M. 282, 681 P.2d 708 (1983), cert. denied, 466 U.S. 945, 104 S. Ct. 1930, 80 L. Ed. 2d 475 (1984).

Failure to allege aggravating circumstances. — Death penalty proceedings are not precluded where the indictment does not allege the existence of aggravating circumstances. Since aggravating circumstances are not elements of the crime of murder, an indictment is not deficient for failure to allege them. State v. Morton, 107 N.M. 478, 760 P.2d 170 (Ct. App. 1988).

Lack of mitigating circumstances. — Defendant's failure to show any mitigating circumstances, in and of itself, is not an aggravating circumstance. State v. Allen, 2000-NMSC-002, 128 N.M. 482, 994 P.2d 728, cert. denied, 530 U.S. 1218, 120 S. Ct. 2225, 147 L. Ed. 2d 256 (2000).

Death penalty sentencing is the subject of its own statute, which defines a limited number of aggravating circumstances, and the absence of mitigating circumstances is simply not one of them. State v. Roper, 2001-NMCA-093, 131 N.M. 189, 34 P.3d 133, cert. quashed, 131 N.M. 619, 41 P.3d 345 (2001).

Hiding, then shooting victim, supports death sentence. — Defendant's death penalty sentence was not disproportionate or excessive where defendant walked from his hotel room to a position of hiding and, when the opportunity presented itself, he shot his victim, a police officer, through the heart. State v. Compton, 104 N.M. 683, 726 P.2d 837, cert. denied, 479 U.S. 890, 107 S. Ct. 291, 93 L. Ed. 2d 265 (1986).

Subsection G not overbroad. — There is no merit to the argument that the aggravating circumstance of murder of a witness to a crime for the purpose of preventing the reporting of that crime is overbroad and unconstitutional. In order to prove the existence of this aggravating circumstance the state must prove that the killing was motivated by a desire to escape criminal prosecution for an earlier felony committed against the victim or some other person. The need for proof of motivation is sufficient to distinguish between this aggravating circumstance and that of a killing committed during the commission of a kidnapping, the second statutory aggravating circumstance submitted to the jury in defendant's case. Clark v. Tansy, 118 N.M. 486, 882 P.2d 527 (1994).

"Murder of witness" aggravating circumstance properly applied. — to defendant, who murdered a child he had kidnapped in order to prevent her from testifying against him. State v. Clark, 108 N.M. 288, 772 P.2d 322, cert. denied, 493 U.S. 923, 110 S. Ct. 291, 107 L. Ed. 2d 271 (1989), overruled on other grounds, State v. Henderson, 1996-NMCA-089, 109 N.M. 655, 789 P.2d 603.

Evidence showing that defendant raped and murdered his victim, and then attempted to avoid detection by destroying evidence at the scene that would tie him to the crime, was sufficient to establish the aggravating circumstance of murder of a witness. State v. Henderson, 109 N.M. 655, 789 P.2d 603 (1990), overruled on other grounds, Clark v. Tarsey, 118 N.M. 486, 882 P.2d 527 (1994).

Evidence did not establish the statutory aggravating circumstance of killing in the commission of a kidnaping, where it was not clear that defendant intended to kill his victim during the commission of a kidnaping and it was more likely that he intended to kill the victim because she was a potential witness against him. State v. Henderson, 109 N.M. 655, 789 P.2d 603 (1990), overruled on other grounds, Clark v. Tarsey, 118 N.M. 486, 882 P.2d 527 (1994).

Evidence that the defendant went to the victim's house with the intent to rob her and formed the intent to kill her only after he discovered that the police were outside was sufficient to show there was probable cause that the aggravating circumstance of killing of a witness existed. State v. Willis, 1997-NMSC-014, 123 N.M. 55, 933 P.2d 854.

Evidence, including statements that defendant made to his wife to the effect that he had raped a girl and killed her to prevent her from reporting the rape, was sufficient to support the aggravating circumstance of murder of a witness. State v. Allen, 2000-NMSC-002, 128 N.M. 482, 994 P.2d 728, cert. denied, 530 U.S. 1218, 120 S. Ct. 2225, 147 L. Ed. 2d 256 (2000).

"Murder of witness" not properly applied. — The "murder of a witness" aggravating circumstance was not properly applied since there was no evidence that the defendant intended to kill his son as a witness to other crimes of the defendant, and there was evidence supporting the theory that the defendant suffered from the paranoid hallucination that he was being pursued by the devil and that he killed his son because he believed the devil had entered his son's body. State v. Smith, 1997-NMSC-017, 123 N.M. 52, 933 P.2d 851.

Use of factors at pretrial hearing. — At a pretrial hearing to consider whether the state may seek the death penalty, the state could show there was probable cause that the aggravating circumstance of killing a witness was present, and the state was not required to prove the aggravating circumstance beyond a reasonable doubt. State v. Willis, 1997-NMSC-014, 123 N.M. 55, 933 P.2d 854.

Law reviews. — For article, "Constitutionality of the New Mexico Capital Punishment Statute," see 11 N.M.L. Rev. 269 (1981).

For annual survey of New Mexico Criminal Procedure, see 20 N.M.L. Rev. 285 (1990).

For survey of 1990-91 criminal procedure and evidence, see 22 N.M.L. Rev. 713 (1992).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that murder was heinous, cruel, depraved, or the like - post-Gregg cases, 63 A.L.R.4th 478.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that murder was committed to avoid arrest or prosecution, to effect escape from custody, to hinder governmental function or enforcement of law, and the like - post-Gregg cases, 64 A.L.R.4th 755.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that in committing murder, defendant created risk of death or injury to more than one person, to many persons, and the like - post-Gregg cases, 64 A.L.R.4th 837.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that defendant was previously convicted of or committed other violent offense, had history of violent conduct, posed continuing threat to society, and the like - post-Gregg cases, 65 A.L.R.4th 838.

Sufficiency of evidence, for purpose of death penalty, to establish statutory aggravating circumstance that murder was committed for pecuniary gain, as consideration or in expectation of receiving something of monetary value, and the like - post-Gregg cases, 66 A.L.R.4th 417.

Sufficiency of evidence, for death penalty purposes, to establish statutory aggravating circumstance that murder was committed in course of committing, attempting, or fleeing from other offense, and the like - post-Gregg cases, 67 A.L.R.4th 887.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that defendant committed murder while under sentence of imprisonment, in confinement or correctional custody, and the like - post-Gregg cases, 67 A.L.R.4th 942.

Vulnerability of victim as aggravating factor under state sentencing guidelines, 73 A.L.R.5th 383.

31-20A-6. Mitigating circumstances.

The mitigating circumstances to be considered by the sentencing court or the jury pursuant to the provisions of Section 3 [31-20A-2 NMSA 1978] of this act shall include but not be limited to the following:

A. the defendant has no significant history of prior criminal activity;

B. the defendant acted under duress or under the domination of another person;

C. the defendant's capacity to appreciate the criminalty [criminality] of his conduct or to conform his conduct to the requirements of the law was impaired;

D. the defendant was under the influence of mental or emotional disturbance;

E. the victim was a willing participant in the defendant's conduct;

F. the defendant acted under circumstances which tended to justify, excuse or reduce the crime;

G. the defendant is likely to be rehabilitated;

H. the defendant cooperated with authorities; and

I. the defendant's age.

History: Laws 1979, ch. 150, § 7.

ANNOTATIONS

Constitutionality. — Failure of the Capital Felony Sentencing Act to provide any definition for the mitigating circumstances in this section does not make the act unconstitutionally vague and indefinite. State v. Clark, 1999-NMSC-035, 128 N.M. 119, 990 P.2d 793.

Constitutionality of "no history of criminal activity" circumstance. — The mitigating circumstance relating to a defendant's having "no significant history of prior criminal activity," is not unconstitutionally vague and indefinite. State v. Gilbert, 100 N.M. 392, 671 P.2d 640 (1983), cert. denied, 465 U.S. 1073, 104 S. Ct. 1429, 79 L. Ed. 2d 753 (1984).

It is constitutionally allowable to consider mitigating circumstance that defendant cooperated with authorities. This does not unconstitutionally allow for imposition of the death penalty based upon the exercise of the right to remain silent. State v. Compton, 104 N.M. 683, 726 P.2d 837, cert. denied, 479 U.S. 890, 107 S. Ct. 291, 93 L. Ed. 2d 265 (1986).

Acceptable to instruct jury to consider any mitigating factor. — An instruction which gave the jury broad discretion to consider any factor in mitigation of the death penalty, in addition to any statutory mitigating circumstances, was an ample and acceptable substitution for a specific written list of non-statutory mitigating circumstances. State v. Compton, 104 N.M. 683, 726 P.2d 837, cert. denied, 479 U.S. 890, 107 S. Ct. 291, 93 L. Ed. 2d 265 (1986).

Limitation on mitigation evidence. — The trial court did not err by excluding evidence that was not relevant to the defendant's character, record, or circumstances of his offense. State v. Clark, 1999-NMSC-035, 128 N.M. 119, 990 P.2d 793.

Proportionality evidence is not proper for the jury to consider as mitigation. State v. Clark, 1999-NMSC-035, 128 N.M. 119, 990 P.2d 793.

Defendant's failure to show any mitigating circumstances, in and of itself, is not an aggravating circumstance. State v. Allen, 2000-NMSC-002, 128 N.M. 482, 994 P.2d 728, cert. denied, 530 U.S. 1218, 120 S. Ct. 2225, 147 L. Ed. 2d 256 (2000).

Law reviews. — For article, "Constitutionality of the New Mexico Capital Punishment Statute," see 11 N.M.L. Rev. 269 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Pyromania and the criminal law, 51 A.L.R.4th 1243.

ARTICLE 21
Sentence, Pardons and Paroles

31-21-1. [Construction of statutory provisions prescribing term of imprisonment; maximum or minimum.]

In all penal statutes of the state where by the terms of such statutes a definite punishment of imprisonment in the penitentiary is prescribed the time of such imprisonment in such statute shall be construed to be the maximum of imprisonment, unless such statutes expressly provide that such time is the minimum.

History: Laws 1909, ch. 32, § 10; Code 1915, § 5425; C.S. 1929, § 139-103; 1941 Comp., § 42-1702; 1953 Comp., § 41-17-2.

ANNOTATIONS

Cross references. — For juvenile probation services, see 32A-2-5 and 32A-2-24 NMSA 1978.

For separate sentences construed as cumulative, see 33-2-39 NMSA 1978.

For inapplicability of the Rules of Evidence to sentencing procedures, see Rule 11-1101 NMRA.

Credit for time already served. — Prisoner was entitled to credit for time served under prior void sentence when he was resentenced following habeas corpus proceeding to correct improper sentence. Sneed v. Cox, 74 N.M. 659, 397 P.2d 308 (1964).

No credit for time served under void, original proceeding. — The Sneed v. Cox, 74 N.M. 659, 397 P.2d 308 (1964), rule is applicable when an erroneous sentence is being corrected, but does not apply where the original proceeding was void for lack of jurisdiction even though time was served under a conviction found to be void because of absence of jurisdiction, credit may not be give for such time served when the prisoner is, on a subsequent trial, validly convicted of the same offense and given a new sentence. Morgan v. Cox, 75 N.M. 472, 406 P.2d 347 (1965).

Section inapplicable when sentence prescribes indefinite punishment. — Section 42-1-61, 1953 Comp. (repealed), which provided for a sentence of "not less than two years," does not by its terms prescribe a definite punishment, but only a minimum, and this section is therefore inapplicable by its own terms. Jones v. Cox, 73 N.M. 450, 389 P.2d 214 (1964).

Section inapplicable in determining maximum sentence for sodomy. — This section was inapplicable in determining maximum sentence imposed under 40-7-7, 1953 Comp. (repealed), providing imprisonment for not less than one year for sodomy. Starkey v. Cox, 73 N.M. 434, 389 P.2d 203 (1964).

Court must consider whether petitioner deprived of section's benefits. — The right to see the parole board which arises under the parole laws is not a matter of grace, and in order to fully comply with the purpose intended to be served by the indeterminate sentencing statute and the parole statutes, the supreme court must consider whether petitioner is deprived of the benefits arising under the statutory minimum when his parole board interview is denied by virtue of a sentence which did not conform to the statute. Sneed v. Cox, 74 N.M. 659, 397 P.2d 308 (1964).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 613, 829, 830, 942, 972, 973.

Validity, under indeterminate sentence law, of sentence fixing identical minimum and maximum terms of imprisonment, 29 A.L.R. 1344.

24 C.J.S. Criminal Law §§ 1468, 1505.

31-21-2. Clothing, money and transportation furnished to prisoners on release from correctional facility.

Upon the release of any prisoner from a correctional facility of the corrections department:

A. the superintendent shall provide him with suitable clothing as required and:

(1) in the case of release on parole, transportation to his place of employment if within this state, or if not within this state, then to any place within this state; or

(2) in the case of all other types of release, transportation to his home, if within the state, or if not within this state, then to the place of his conviction or to any other place within the state; and

B. the superintendent may provide him with not more than one hundred dollars ($100) and, in case of an exceptional situation, with the prior approval of the secretary of corrections, an additional amount not to exceed three hundred fifty dollars ($350) for purchase of transportation to a location in another state within the continental limits of the United States.

History: Laws 1909, ch. 32, § 7; Code 1915, § 5081; C.S. 1929, § 130-169; Laws 1939, ch. 55, § 18; 1941 Comp., § 42-1708; Laws 1951, ch. 99, § 1; 1953 Comp., § 41-17-8; Laws 1967, ch. 30, § 1; 1969, ch. 10, § 1; 1977, ch. 145, § 1; 1982, ch. 59, § 1.

ANNOTATIONS

Statute's provisions mandatory. — The statute is mandatory. No exceptions are incorporated in it. The plain language of this statute makes it incumbent upon superintendent to provide clothing, money and transportation in these two instances. 1955-56 Op. Att'y Gen. No. 55-6122.

Effective upon prisoner's release. — Where prisoner had served the maximum sentence for the crime committed, the person is entitled to the items which the statute affords a prisoner upon expiration of his maximum sentence. 1955-56 Op. Att'y Gen. No. 55-6170 (opinion rendered prior to 1967 and 1969 amendments).

31-21-3. Short title.

Sections 31-21-3 through 31-21-19 NMSA 1978 may be cited as the "Probation and Parole Act".

History: 1953 Comp., § 41-17-12, enacted by Laws 1955, ch. 232, § 1; 1963, ch. 301, § 1.

ANNOTATIONS

Cross references. — For inmate-release program, see 33-2-43 to 33-2-47 NMSA 1978.

For inapplicability of the Rules of Evidence to sentencing procedures, see Rule 11-1101 NMRA.

No contract between state and prisoner. — No act of the parole board can constitute a contract between a prisoner and the state. Aragon v. Cox, 75 N.M. 537, 407 P.2d 673 (1965).

Void order of parole is without force or effect to justify the release of a prisoner. Aragon v. Cox, 75 N.M. 537, 407 P.2d 673 (1965).

Law reviews. — For note, "Due Process, Equal Protection and the New Mexico Parole System," see 2 N.M.L. Rev. 234 (1972).

For note, "Negligent Hiring and Retention - Availability of Action Limited By Foreseeability Requirement," see 10 N.M.L. Rev. 491 (1980).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Propriety of conditioning probation on defendant's remaining childless or having no additional children during probationary period, 94 A.L.R.3d 1218.

Jury's discussion of parole law as ground for reversal for new trial, 21 A.L.R.4th 420.

Right of convicted defendant to refuse probation, 28 A.L.R.4th 736.

31-21-4. Construction and purpose of act.

The Probation and Parole Act [31-21-3 to 31-21-19 NMSA 1978] shall be liberally construed to the end that the treatment of persons convicted of crime shall take into consideration their individual characteristics, circumstances, needs and potentialities as revealed by case study, and that such persons shall be dealt with in the community by a uniformly organized system of constructive rehabilitation under probation supervision instead of in an institution, or under parole supervision when a period of institutional treatment is deemed essential in the light of the needs of public safety and their own welfare.

History: 1953 Comp., § 41-17-13, enacted by Laws 1955, ch. 232, § 2; 1963, ch. 301, § 2.

ANNOTATIONS

Law reviews. — For note, "Due Process, Equal Protection and the New Mexico Parole System," see 2 N.M.L. Rev. 234 (1972).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 59 Am. Jur. 2d Pardon and Parole §§ 39 to 44.

67A Pardon and Parole §§ 39, 40, 43.

31-21-5. Definitions.

As used in the Probation and Parole Act [31-21-3 to 31-21-19 NMSA 1978]:

A. "probation" means the procedure under which an adult defendant, found guilty of a crime upon verdict or plea, is released by the court without imprisonment under a suspended or deferred sentence and subject to conditions;

B. "parole" means the release to the community of an inmate of an institution by decision of the board or by operation of law subject to conditions imposed by the board and to its supervision;

C. "institution" means the state penitentiary and any other similar state institution hereinafter created;

D. "board" means the parole board;

E. "director" means the director of the field services division of the corrections department or any employee designated by him; and

F. "adult" means any person convicted of a crime by a district court.

History: 1953 Comp., § 41-17-14, enacted by Laws 1978, ch. 41, § 1; 1991, ch. 52, § 1.

ANNOTATIONS

Cross references. — For state board of probation and parole as referring to corrections division, see 33-1-7 NMSA 1978.

Repeals and reenactments. — Laws 1978, ch. 41, § 1, repeals 41-17-14, 1953 Comp. (former 31-21-5 NMSA 1978), relating to definitions in the Probation and Parole Act, and enacts the above section.

The 1991 amendment, effective July 1, 1991, in Subsection D, substituted "parole board" for "state board of probation and parole" and in Subsection E substituted "director of the field services division of the corrections department" for "chief of the fields services bureau of the corrections division of the criminal justice department".

Where judgment contains no reference to probation. — Defendant was on "probation" within meaning of statute, where sentence was suspended subject to conditions stated in judgment and defendant had signed an agreement concerning rules, regulations and conditions of probation, even though judgment entered at time of the original sentence contained no specific reference to probation. State v. Sublett, 78 N.M. 655, 436 P.2d 515 (Ct. App. 1968).

Presumption that court considers probation before sentencing. — Where defendant's counsel asked the court to place defendant on probation before sentence was imposed, and no reasons were given by the court for denying probation, it is presumed the court considered the question of probation before sentencing defendant to the penitentiary. State v. Follis, 472 P.2d 655 (Ct. App. 1970).

Court not required to enforce abstention from searches by probation officers. — Statutory provisions that require the director to supervise probationers, direct the work of probation officers and formulate methods of supervision do not require a court to enforce the provisions of the manual concerning abstention from searches by probation officers. State v. Gardner, 95 N.M. 171, 619 P.2d 847 (Ct. App. 1980).

Law reviews. — For note, "Due Process, Equal Protection and the New Mexico Parole System," see 2 N.M.L. Rev. 234 (1972).

For note, "Parole Revocation and the Right to Counsel," see 5 N.M.L. Rev. 311 (1975).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 59 Am. Jur. 2d Pardon and Parole §§ 1 to 9, 74.

67A C.J.S. Pardon and Parole §§ 2 to 4, 39.

31-21-6. Protection of records.

All social records, including presentence reports, pre-parole reports and supervision histories, obtained by the board are privileged and shall not be disclosed directly or indirectly to anyone other than the board, director, sentencing guidelines commission or sentencing judge, but authorities of the institution in which the prisoner is confined shall have access to all records and reports concerning the prisoner, and the sentencing judge, board and director shall have access to all records concerning the prisoner. The board, in the case of parole records, and the sentencing judge, in the case of probation records, in their discretion, whenever the best interest or welfare of a particular probationer or prisoner makes such action desirable or helpful, may permit inspection of the reports, or parts thereof, by the probationer, prisoner or his attorney. The sentencing guidelines commission shall have access to the social records for statistical and policymaking purposes only and shall not release any information identifying any individual.

History: 1953 Comp., § 41-17-18, enacted by Laws 1955, ch. 232, § 7; 1963, ch. 301, § 7; 1989, ch. 362, § 1.

ANNOTATIONS

Cross references. — For state board of probation and parole referring to the corrections division, see 33-1-7 NMSA 1978.

The 1989 amendment, effective April 7, 1989, inserted "sentencing guidelines commission" near the middle of the first sentence and added the last sentence.

Reference to records during board's deliberations. — If in the board's deliberations any reference is made to any of these records, such references and the information contained therein must be made under circumstances such that the prohibited

disclosure may not occur. It is the board's duty, imposed by the legislature, to keep and guard this information from those not authorized to receive it. And the statute makes no exception of members of the press, even if these would not divulge the information further. 1955-56 Op. Att'y Gen. No. 56-6509 (opinion rendered prior to 1963 amendment).

When board's minutes may be distributed to press. — There is no objection to a distribution to the press of the minutes of the board's meetings so long as these do not contain references or information secured from privileged records covered by this section. 1955-56 Op. Att'y Gen. No. 56-6509 (opinion rendered prior to 1963 amendment).

Mailing of probation records. — The decision to allow probation records to be mailed to an attorney is within the discretion of the sentencing judge. 1971 Op. Att'y Gen. No. 71-25.

No privilege regarding communications made by inmate to probation officer. — Nothing in this section makes privileged a communication made by a criminal to a probation and parole officer in the course of a presentence investigation. State v. Silva, 78 N.M. 286, 430 P.2d 783 (Ct. App. 1967).

Privilege inapplicable to drug tests. — Defendants were subjected to random urinalysis testing as a condition of probation or parole and tested positive for the presence of cocaine. Subsequently, they argued that their drug test results should not have been used to prosecute them for possession of cocaine because disclosure of the drug test results violates the privilege against disclosure found in this section. However the drug test results are more akin to investigative reports than social records; thus, the privilege set forth is inapplicable. State v. Rickard, 118 N.M. 312, 881 P.2d 57 (Ct. App. 1994), rev'd in part on other grounds, 118 N.M. 586, 884 P.2d 477 (1994).

A defendant could not assert a privilege against the disclosure of drug test results since the drug test results are not social records. State v. Ware, 118 N.M. 703, 884 P.2d 1182 (Ct. App. 1994).

Privilege inapplicable to status as parolee or probationer. — This section did not apply to a list containing the defendant's name and parole status obtained from the Probation and Parole Board by agents of the Immigration and Naturalization Service. United States v. Guerrero-Hernandez, 95 F.3d 983 (10th Cir. 1996).

Time to raise claim of privilege, when available. — Defendant cannot on appeal be heard to complain that a communication made by defendant to a probation and parole officer in the course of a presentence investigation was privileged, when no claim of privilege was ever raised in the trial court. State v. Silva, 78 N.M. 286, 430 P.2d 783 (Ct. App. 1967).

Law reviews. — For note, "Due Process, Equal Protection and the New Mexico Parole System," see 2 N.M. L. Rev. 234 (1972).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 62A Am. Jur. 2d Privacy §§ 60, 206.

Defendant's right to disclosure of presentence report, 40 A.L.R.3d 681.

31-21-7. Duties of director.

The director shall:

A. provide probation and parole services and supervise probationers and parolees;

B. assign officers to serve in each judicial district. Selection and assignment of officers to each judicial district shall be made by the director;

C. obtain office quarters for the staff in each district as necessary;

D. assign the secretarial, bookkeeping and accounting work to clerical employees;

E. direct the work of the officers and other employees;

F. formulate methods of investigation, supervision, recordkeeping and reports;

G. conduct training courses for the staff;

H. seek to cooperate with all agencies, public and private, that are concerned with the treatment or welfare of persons on probation or parole;

I. report to the parole board concerning the status of parolees under his supervision; and

J. perform such other duties as directed by the secretary of corrections.

History: 1953 Comp., § 41-17-21, enacted by Laws 1955, ch. 232, § 10; 1963, ch. 301, § 9; 1975, ch. 194, § 7; 1977, ch. 257, § 56; 1990, ch. 7, § 1.

ANNOTATIONS

Cross references. — For state board of probation and parole as referring to corrections division, see 33-1-7 NMSA 1978.

The 1990 amendment, effective May 16, 1990, deleted "with the advice and consent of the judge of the district" at the end of Subsection B, made a minor stylistic change in Subsection H, and substituted "secretary of corrections" for "secretary of the criminal justice department" at the end of Subsection J.

Court not required to enforce abstention from searches by probation officers. — Statutory provisions that require the director to supervise probationers, direct the work of probation officers and formulate methods of supervision do not require a court to enforce the provisions of the manual concerning abstention from searches by probation officers. State v. Gardner, 95 N.M. 171, 619 P.2d 847 (Ct. App. 1980).

Law reviews. — For note, "Due Process, Equal Protection and the New Mexico Parole System," see 2 N.M.L. Rev. 234 (1972).

31-21-8. Director to administer interstate compacts relating to convicts on probation and parole.

The director is the administrator of interstate compacts relating to convicts on probation and parole.

History: 1953 Comp., § 41-17-21.1, enacted by Laws 1959, ch. 33, § 1; 1977, ch. 257, § 57.

ANNOTATIONS

Law reviews. — For note, "Due Process, Equal Protection and the New Mexico Parole System," see 2 N.M.L. Rev. 234 (1972).

31-21-9. Presentence and prerelease investigations.

A. Upon the order of any district or magistrate court, the director shall prepare a presentence report which shall include such information as the court may request.

B. Upon the order of any district court the director shall prepare a prerelease report which the court shall use to determine the accused's qualifications for bail. The report shall include available information about the accused's family ties, employment, financial resources, character, physical and mental condition, the length of his residence in the community, his record of convictions, his record of appearance at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings and any history of drug or alcohol abuse.

C. All local and state law enforcement agencies shall furnish to the director any requested criminal records.

History: 1953 Comp., § 41-17-23, enacted by Laws 1972, ch. 71, § 17.

ANNOTATIONS

Repeals and reenactments. — Laws 1972, ch. 71, § 17, repeals 41-17-23, 1953 Comp., relating to presentence investigation, and enacts the above section.

Compiler's notes. — Laws 1972, ch. 71, § 19, provides that this act shall not be construed to repeal the provisions of 66-8-131 to 66-8-133 NMSA 1978, relating to the issuance of uniform traffic citations.

Obtaining of presentence report is not matter of right; the report is discretionary with the court. State v. Follis, 81 N.M. 690, 472 P.2d 655 (Ct. App. 1970) (decided under former law).

Judge's request for presentence report discretionary. — The trial judge has discretion to impose sentence immediately after conviction or request a presentence report, and where the jury had returned its verdict, it could not be said that immediate sentencing deprived defendant of a fair trial. State v. Mireles, 84 N.M. 146, 500 P.2d 431 (Ct. App. 1972) (decided under former law).

Absence of presentence report provides no basis for relief. State v. Follis, 81 N.M. 690, 472 P.2d 655 (Ct. App. 1970) (decided under former law).

"Statement" before court for purpose of altering sentence under 31-18-15.1 NMSA 1978 is presentence report. State v. Wilson, 97 N.M. 534, 641 P.2d 1081 (Ct. App. 1982).

No statutory limitations upon contents. — There are no statutory limitations upon the contents of the presentence report. State v. Montoya, 91 N.M. 425, 575 P.2d 609 (Ct. App.), cert. denied, 91 N.M. 491, 576 P.2d 297 (1978).

Inclusion of arrest record in presentence report does not violate due process. State v. Montoya, 91 N.M. 425, 575 P.2d 609 (Ct. App.), cert. denied, 91 N.M. 491, 576 P.2d 297 (1978).

Time spent in boys' school may also be considered. — The parole board entirely within its own discretion may consider the time spent at the New Mexico boys' school towards eligibility for consideration for parole. 1957-58 Op. Att'y Gen. No. 58-109 (opinion rendered under former law).

Law reviews. — For comment, "Definitive Sentencing in New Mexico: The 1977 Criminal Sentencing Act," see 9 N.M.L. Rev. 131 (1978-79).

For comment, "A Comment on State v. Montoya and the use of Arrest Records in Sentencing," see 9 N.M.L. Rev. 443 (1979).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law § 807.

Right of defendant to inspect report of presentence investigation of witness previously convicted of crime, under Rule 32(c) of Federal Rules of Criminal Procedure, 38 A.L.R. Fed. 786.

24 C.J.S. Criminal Law §§ 1480, 1492, 1493, 1496.

31-21-10. Parole authority and procedure.

A. An inmate of an institution who was sentenced to life imprisonment as the result of the commission of a capital felony, who was sentenced to life imprisonment as the result of a conviction for a first degree felony resulting in the death of a child, who was convicted of three violent felonies and sentenced pursuant to Sections 31-18-23 and 31-18-24 NMSA 1978 or who was convicted of two violent sexual offenses and sentenced pursuant to Subsection A of Section 31-18-25 NMSA 1978 and Section 31-18-26 NMSA 1978 becomes eligible for a parole hearing after he has served thirty years of his sentence. Before ordering the parole of an inmate sentenced to life imprisonment, the board shall:

(1) interview the inmate at the institution where he is committed;

(2) consider all pertinent information concerning the inmate, including:

(a) the circumstances of the offense;

(b) mitigating and aggravating circumstances;

(c) whether a deadly weapon was used in the commission of the offense;

(d) whether the inmate is a habitual offender;

(e) the reports filed under Section 31-21-9 NMSA 1978; and

(f) the reports of such physical and mental examinations as have been made while in an institution;

(3) make a finding that a parole is in the best interest of society and the inmate; and

(4) make a finding that the inmate is able and willing to fulfill the obligations of a law-abiding citizen.

If parole is denied, the inmate sentenced to life imprisonment shall again become entitled to a parole hearing at two-year intervals. The board may, on its own motion, reopen any case in which a hearing has already been granted and parole denied.

B. Unless the board finds that it is in the best interest of society and the parolee to reduce the period of parole, a person who was convicted of a capital felony shall be required to undergo a minimum period of parole of five years. During the period of parole, the person shall be under the guidance and supervision of the board.

C. Except for sex offenders as provided in Section 31-21-10.1 NMSA 1978, an inmate who was convicted of a first, second or third degree felony and who has served the sentence of imprisonment imposed by the court in an institution designated by the corrections department shall be required to undergo a two-year period of parole. An inmate who was convicted of a fourth degree felony and who has served the sentence of imprisonment imposed by the court in an institution designated by the corrections department shall be required to undergo a one-year period of parole. During the period of parole, the person shall be under the guidance and supervision of the board.

D. Every person while on parole shall remain in the legal custody of the institution from which he was released, but shall be subject to the orders of the board. The board shall furnish to each inmate as a prerequisite to his release under its supervision a written statement of the conditions of parole that shall be accepted and agreed to by the inmate as evidenced by his signature affixed to a duplicate copy to be retained in the files of the board. The board shall also require as a prerequisite to release the submission and approval of a parole plan. If an inmate refuses to affix his signature to the written statement of the conditions of his parole or does not have an approved parole plan, he shall not be released and shall remain in the custody of the institution in which he has served his sentence, excepting parole, until such time as the period of parole he was required to serve, less meritorious deductions, if any, expires, at which time he shall be released from that institution without parole, or until such time that he evidences his acceptance and agreement to the conditions of parole as required or receives approval for his parole plan or both. Time served from the date that an inmate refuses to accept and agree to the conditions of parole or fails to receive approval for his parole plan shall reduce the period, if any, to be served under parole at a later date. If the district court has ordered that the inmate make restitution to a victim as provided in Section 31-17-1 NMSA 1978, the board shall include restitution as a condition of parole. The board shall also personally apprise the inmate of the conditions of parole and his duties relating thereto.

E. When a person on parole has performed the obligations of his release for the period of parole provided in this section, the board shall make a final order of discharge and issue him a certificate of discharge.

F. Pursuant to the provisions of Section 31-18-15 NMSA 1978, the board shall require the inmate as a condition of parole:

(1) to pay the actual costs of his parole services to the adult probation and parole division of the corrections department for deposit to the corrections department intensive supervision fund not exceeding one thousand eight hundred dollars ($1,800) annually to be paid in monthly installments of not less than twenty-five dollars ($25.00)

and not more than one hundred fifty dollars ($150), as set by the appropriate district supervisor of the adult probation and parole division, based upon the financial circumstances of the defendant. The defendant's payment of the supervised parole costs shall not be waived unless the board holds an evidentiary hearing and finds that the defendant is unable to pay the costs. If the board waives the defendant's payment of the supervised parole costs and the defendant's financial circumstances subsequently change so that the defendant is able to pay the costs, the appropriate district supervisor of the adult probation and parole division shall advise the board and the board shall hold an evidentiary hearing to determine whether the waiver should be rescinded; and

(2) to reimburse a law enforcement agency or local crime stopper program for the amount of any reward paid by the agency or program for information leading to his arrest, prosecution or conviction.

G. The provisions of this section shall apply to all inmates except geriatric, permanently incapacitated and terminally ill inmates eligible for the medical and geriatric parole program as provided by the Parole Board Act [31-21-22 NMSA 1978].

History: 1978 Comp., § 31-21-10, enacted by Laws 1980, ch. 28, § 1; 1981, ch. 285, § 3; 1982, ch. 107, § 1; 1983, ch. 136, § 1; 1987, ch. 139, § 4; 1988, ch. 62, § 2; 1994, ch. 21, § 1; 1994, ch. 24, § 4; 1996, ch. 79, § 4; 1997, ch. 140, § 2; 2003 (1st S.S.), ch. 1, § 8; 2004, ch. 38, § 2; 2005, ch. 59, § 3.

ANNOTATIONS

The 2003 (1st S.S.) amendment, effective February 3, 2004, substituted “an institution” for “prison” in Subparagraph (2)(f) of Subsection A, added “except for sex offenders as provided in Section 31-21-10.1 NMSA 1978” at the beginning of the first sentence of Subsection C and substituted “an institution” for “a corrections facility” in the first and second sentences of that subsection, and substituted “institution” for both “correction facility” and “facility” in the fourth sentence of Subsection D.

The 2004 amendments, effective July 1, 2004, amended Paragraph (1) of Subsection F to change one thousand twenty dollars ($1,020) to one thousand eight hundred dollars ($1,800), fifteen dollars ($15.00) to twenty-five dollars ($25.00), eighty-five dollars ($85.00) to one hundred fifty dollars ($150) and to add after "($150) "as set by the appropriate district supervisor of the adult probation and parole division, based upon the financial circumstances of the defendant. The defendant's payment of the supervised parole costs shall not be waived unless the board holds an evidentiary hearing and finds that the defendant is unable to pay the costs. If the board waives the defendant's payment of the supervised parole costs and the defendant's financial circumstances subsequently change so that the defendant is able to pay the costs, the appropriate district supervisor of the adult probation and parole division shall advise the board and the board shall hold an evidentiary hearing to determine whether the waiver should be rescinded".

The 2005 amendment, effective June 17, 2005, provides that an inmate sentenced to life imprisonment for a first degree felony resulting in the death of a child becomes eligible for a parole hearing after serving thirty years of the sentence.

Applicability. — Laws 2004, ch. 38, § 4 makes the 2004 amendments applicable for persons convicted of a criminal offense on or after July 1, 2004.

Subsection A of this section does not create a minimum sentence for those sentenced to life imprisonment. Compton v. Lytle, 2003-NMSC-031, 134 N.M. 586, 81 P.3d 39.

Good time credit not available.

The legislature intended to differentiate between capital and noncapital felons by allowing for good-time credits for the latter and denying them to the former; a life sentence does not have a determinate maximum sentence to be reduced by good-time credits. Compton v. Lytle, 2003-NMSC-031, 134 N.M. 586, 81 P.3d 39.

31-21-10.1. Sex offenders; period of parole; terms and conditions of parole.

A. If the district court sentences a sex offender to a term of incarceration in a facility designated by the corrections department, the district court shall include a provision in the judgment and sentence that specifically requires the sex offender to serve an indeterminate period of supervised parole for a period of not less than five years and not in excess of twenty years. A sex offender's period of supervised parole may be for a period of less than twenty years if, at a review hearing provided for in Subsection B of this section, the state is unable to prove that the sex offender should remain on parole. Prior to placing a sex offender on parole, the board shall conduct a hearing to determine the terms and conditions of supervised parole for the sex offender. The board may consider any relevant factors, including:

(1) the nature and circumstances of the offense for which the sex offender was incarcerated;

(2) the nature and circumstances of a prior sex offense committed by the sex offender;

(3) rehabilitation efforts engaged in by the sex offender, including participation in treatment programs while incarcerated or elsewhere;

(4) the danger to the community posed by the sex offender; and

(5) a risk and needs assessment regarding the sex offender, developed by the sex offender management board of the New Mexico sentencing commission or another appropriate entity, to be used by appropriate parole board personnel.

B. The board shall review the terms and conditions of a sex offender's supervised parole at two and one-half year intervals. When a sex offender has served the initial five years of supervised parole, the board shall also review the duration of the sex offender's supervised parole at two and one-half year intervals. When a sex offender has served the initial five years of supervised parole, at each review hearing the state shall bear the burden of proving to a reasonable certainty that the sex offender should remain on parole.

C. The board may order a sex offender released on parole to abide by reasonable terms and conditions of parole, including:

(1) being subject to intensive supervision by a parole officer of the corrections department;

(2) participating in an outpatient or inpatient sex offender treatment program;

(3) a parole agreement by the sex offender not to use alcohol or drugs;

(4) a parole agreement by the sex offender not to have contact with certain persons or classes of persons; and

(5) being subject to alcohol testing, drug testing or polygraph examinations used to determine if the sex offender is in compliance with the terms and conditions of his parole.

D. The board shall notify the chief public defender of an upcoming parole hearing for a sex offender, and the chief public defender shall make representation available to the sex offender at the parole hearing.

E. If the board finds that a sex offender has violated the terms and conditions of his parole, the board may revoke his parole or may order additional terms and conditions of parole.

F. The provisions of this section shall apply to all sex offenders, except geriatric, permanently incapacitated and terminally ill inmates eligible for the medical and geriatric parole program as provided by the Parole Board Act [31-21-22 to 31-21-26 NMSA 1978].

G. As used in this section, "sex offender" means a person who is convicted of, pleads guilty to or pleads nolo contendere to any one of the following offenses:

(1) kidnapping, as provided in Section 30-4-1 NMSA 1978, when committed with intent to inflict a sexual offense upon the victim;

(2) criminal sexual penetration in the first, second or third degree, as provided in Section 30-9-11 NMSA 1978;

(3) criminal sexual contact of a minor in the second or third degree, as provided in Section 30-9-13 NMSA 1978;

(4) sexual exploitation of children in the second degree, as provided in Section 30-6A-3 NMSA 1978; or

(5) sexual exploitation of children by prostitution in the first or second degree, as provided in Section 30-6A-4 NMSA 1978.

History: Laws 2003 (1st S.S.), ch. 1, § 9.

ANNOTATIONS

Effective dates. — Laws 2003 (1st S.S.), ch. 1 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on February 3, 2004, 90 days after adjournment of the legislature.

31-21-11. Parole to detainers to serve another sentence or for hospitalization and treatment.

Prisoners who are otherwise eligible for parole may be paroled to detainers to serve another sentence within the penitentiary or to the forensic treatment or alcohol treatment unit of the New Mexico behavioral health institute at Las Vegas or to any other specific hospital or residential treatment program determined necessary by the board.

History: 1953 Comp., § 41-17-24.1, enacted by Laws 1959, ch. 30, § 1; 1977, ch. 216, § 13; 1982, ch. 107, § 2; 2005, ch. 313, § 10.

ANNOTATIONS

Cross references. — For state board of probation and parole as referring to corrections division, see 33-1-7 NMSA 1978.

The 2005 amendment, effective June 17, 2005, changes the name of the New Mexico state hospital to the New Mexico behavioral institute at Las Vegas.

Cancellation of detainers. — The issuing and cancellation of detainers is properly a matter for the parole agency of this state. The board has authority to cancel, if it deems such advisable, an outstanding detainer or warrant based upon a violation of parole. 1955-56 Op. Att'y Gen. No. 56-6371.

No loss of state's jurisdiction. — Petitioner is not denied due process in violation of state and federal constitutions by his imprisonment and detention in New Mexico for violation of terms of parole agreement whereby New Mexico had paroled him to

detainer in Arizona without surrendering its jurisdiction over him. Snow v. Cox, 76 N.M. 238, 414 P.2d 217 (1966).

Effect of two life sentences on "outside" parole. — As a practical matter a person committed under two life sentences cannot be granted an "outside" parole until he has served 20 years but he can be granted an "in custody" parole after serving 10 years. 1961-62 Op. Att'y Gen. No. 61-59.

Cumulative sentences. — If it were mandatory upon a penitentiary to construe cumulative sentences as one continuous sentence, the provisions of this section would not be effective. 1963-64 Op. Att'y Gen. No. 63-165.

31-21-12. Conditional release.

A. Any prisoner who is released by authority of the governor under any conditional release or other disposition made under the pardoning power, other than full pardon, shall, upon release, be deemed as released on parole until the expiration of the basic term or terms of imprisonment for which he was sentenced and until the expiration of any period of parole included as a part of sentence.

B. Except for a full pardon, the governor may not conditionally release or otherwise pardon a prisoner during the period for which such person is serving any enhanced term of his sentence pursuant to Section 31-18-16 NMSA 1978.

History: 1953 Comp., § 41-17-25, enacted by Laws 1955, ch. 232, § 14; 1977, ch. 216, § 14.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 59 Am. Jur. 2d Pardon and Parole §§ 63 to 72; 60 Am. Jur. 2d Penal and Correctional Institutions §§ 226, 229, 230, 232 to 235.

Conditional pardon, 60 A.L.R. 1410.

Offenses and convictions covered by pardon, 35 A.L.R.2d 1261.

Denial of state prisoner's application for, or revocation of, participation in work or study release program or furlough program as actionable under Civil Rights Act of 1871 (42 USCS § 1983), 55 A.L.R. Fed. 208.

67A C.J.S. Pardon and Parole §§ 23 to 28.

31-21-13. Information from prison officials.

It shall be the duty of all prison officials to grant to the members of the board, or its properly accredited representatives, access at all reasonable times to any prisoner over whom the board has jurisdiction under this act [31-21-3 to 31-21-19 NMSA 1978], to provide for the board or such representatives facilities for communicating with and interviewing such prisoner and to furnish to the board such reports and records as the board shall require concerning the conduct and character of any prisoner in their custody and any other facts deemed by the board pertinent in determining whether such prisoner shall be paroled.

History: 1953 Comp., § 41-17-26, enacted by Laws 1955, ch. 232, § 15.

ANNOTATIONS

Cross references. — For state board of probation and parole as referring to corrections division, see 33-1-7 NMSA 1978.

31-21-13.1. Intensive supervision programs.

A. As used in this section, "intensive supervision programs" means programs that provide highly structured and intense supervision, with stringent reporting requirements, of certain individuals who represent an excessively high assessment of risk of violation of probation or parole, emphasize meaningful rehabilitative activities and reasonable alternatives without seriously increasing the risk of recidivist crime and facilitate the payment of restitution by the offender to the victim. Intensive supervision programs include house arrest programs or electronic surveillance programs or both.

B. The corrections department shall implement and operate intensive supervision programs in various local communities. The programs shall provide services for appropriate individuals by probation and parole officers of the corrections department. The corrections department shall promulgate rules and regulations to provide that the officers providing these services have a maximum case load of twenty offenders and to provide for offender selection and other criteria. The corrections department may cooperate with all recognized law enforcement authorities and share all necessary and pertinent information, records or documents regarding probationers or parolees in order to implement and operate these intensive supervision programs.

C. For purposes of this section, a judge contemplating imposition of an intensive supervision program for an individual shall consult with the adult probation and parole division of the corrections department and consider the recommendations before imposing such probation. The adult probation and parole division of the corrections department shall recommend only those individuals who would have otherwise been recommended for incarceration for intensive supervision programs. A judge has discretion to impose an intensive supervision program for an individual, regardless of recommendations made by the adult probation and parole division. Inmates eligible for parole, or within twelve months of eligibility for parole, or inmates who would otherwise remain in a correctional institution for lack of a parole plan or those parolees whose

parole the board would otherwise revoke are eligible for intensive supervision programs. The provisions of this section do not limit or reduce the statutory authority vested in probation and parole supervision as defined by any other section of the Probation and Parole Act [31-21-3 to 31-21-19 NMSA 1978].

D. There is created in the state treasury the "corrections department intensive supervision fund" to be administered by the corrections department upon vouchers signed by the secretary of corrections. Balances in the corrections department intensive supervision fund shall not revert to the general fund. Beginning July 1, 1988, the intensive supervision programs established pursuant to this section shall be funded by those supervision costs collected pursuant to the provisions of Sections 31-20-6 and 31-21-10 NMSA 1978. The corrections department is specifically authorized to hire additional permanent or term full-time equivalent positions for the purpose of implementing the provisions of this section.

History: 1978 Comp., § 31-21-13.1, enacted by Laws 1988, ch. 62, § 3; 1991, ch. 52, § 2.

ANNOTATIONS

The 1991 amendment, effective July 1, 1991, in the first sentence of Subsection A, substituted "individuals who represent an excessively high assessment to risk of violation of probation or parole, emphasize" for "probationers and parolees who represent an excessively high assessment of risk to the community, emphasizes"; in the second sentence of Subsection B, substituted "individuals" for "probationers and parolees"; Subsection C, substituted "adult probation and parole division" for "field services division" in the first two sentences, added the present third sentence, and in the present fourth sentence substituted "Inmates eligible for parole, or within twelve months of eligibility for parole, or inmates" for "Only those parolees"; and made minor stylistic changes throughout the section.

Warrantless searches and seizures. — Defendant's expectations of privacy, particularly as to his vehicle parked outside the probation office, were necessarily reduced by his status and by the provisions in the probation order and intensive supervision program agreement regarding warrantless searches and seizures where he was under arrest, and had undergone a patdown search that aroused suspicions and a key-lock match that caught him in a lie. Defendant's probation status, together with his prior convictions and current probation violation for which he was arrested, the patdown discovery of a large sum of cash in small bills, and defendant's lie about how he arrived at the probation office were sufficient to give the officers a reasonable basis to search the vehicle for evidence of another violation of his probation conditions. State v. Ponce, 2004-NMCA-137, 136 N.M. 614, 103 P.3d 54, cert. granted, 2004-NMCERT-012, 136 N.M. 614, 103 P.3d 54.

31-21-14. Return of parole violator.

A. At any time during release on parole the board or the director may issue a warrant for the arrest of the released prisoner for violation of any of the conditions of release, or issue a notice to appear to answer a charge of violation. The notice shall be served personally upon the prisoner. The warrant shall authorize the superintendent of the institution from which the prisoner was released to return the prisoner to the actual custody of the institution or to any other suitable detention facility designated by the board or the director. If the prisoner is out of the state, the warrant shall authorize the superintendent to return him to the state.

B. The director may arrest the prisoner without a warrant or may deputize any officer with power of arrest to do so by giving him a written statement setting forth that the prisoner has, in the judgment of the director, violated the conditions of his release. Where an arrest is made without a warrant, the prisoner shall not be returned to the institution unless authorized by the director or the board. Pending hearing as provided by law upon any charge of violation, the prisoner shall remain incarcerated in the institution.

C. Upon arrest and detention, the board shall cause the prisoner to be promptly brought before it for a parole revocation hearing on the parole violation charged, under rules and regulations the board may adopt. If violation is established, the board may continue or revoke the parole or enter any other order as it sees fit.

D. A prisoner for whose return a warrant has been issued shall, if it is found that the warrant cannot be served, be a fugitive from justice. If it appears that he has violated the provisions of his release, the board shall determine whether the time from the date of the violation to the date of his arrest, or any part of it, shall be counted as time served under the sentence.

History: 1953 Comp., § 41-17-28, enacted by Laws 1955, ch. 232, § 17; 1959, ch. 31, § 1; 1963, ch. 301, § 12.

ANNOTATIONS

Cross references. — For state board of probation and parole as referring to corrections division, see 33-1-7 NMSA 1978.

No violation of due process rights. — Defendant's due process rights are not violated by a deferral of a parole revocation hearing, following service of an intervening sentence. The granting of a writ of habeas corpus to defendant by the district court was error. Moody v. Quintana, 89 N.M. 574, 555 P.2d 695 (1976).

Meaning of section. — It is not within the meaning of this section to require a hearing subsequent to the granting of a parole, which is contingent upon approval of a parole "plan" and the various other steps necessary for release but prior to actual release. To give the statute any other construction would be to destroy the object sought to be

accomplished by the legislature. Williams v. New Mexico Dep't of Cors., 84 N.M. 421, 504 P.2d 631 (1972).

Parole violator is to be treated as escaped prisoner and liable, when arrested, to serve out the unexpired term of his maximum possible imprisonment, excluding the time of his absence. 1912-13 Op. Att'y Gen. 12-878 (opinion rendered under former law).

Board under no obligation to issue warrant. — This section is intended to permit the board to determine whether to issue a warrant for the parole violator's return and to consider the matter of his parole revocation. The board is not obligated to issue such a warrant, and if it does not do so the parolee continues on parole. Conston v. New Mexico State Bd. of Probation & Parole, 79 N.M. 385, 444 P.2d 296 (1968).

Board determines what time counts as time served. — Whether the time from the issuance of a warrant for violation of the parole to the date of arrest of the parole violator is to be counted as time served is to be determined by the parole board. 1955-56 Op. Att'y Gen. No. 55-6304.

Credit for time spent out of custody. — Denial of credit for time spent out of custody after breach of parole conditions is not contemplated or permitted. Conston v. New Mexico State Bd. of Probation & Parole, 79 N.M. 385, 444 P.2d 296 (1968).

Parole supervisor may personally arrest violator. — There is no authority for the director of parole or a parole supervisor to issue a warrant in the name of the parole board. A parole supervisor can personally arrest a parole violator and, if he does, he must furnish a written statement setting forth the facts of violation and this is sufficient for the detention authorities to hold the parolee. The parole supervisor, by issuing a written statement that there has been a violation of parole in his judgment, may deputize an officer to arrest a parole violator and this statement is sufficient authority to hold the parolee. 1955-56 Op. Att'y Gen. No. 55-6335.

Right to make bail. — Parole violation, and commission of crime while on parole, gives rise to two separate and distinct proceedings. Accordingly, a parolee if accused of a crime is entitled to bail, as an accused in a criminal case, the same as any other person. But as a parolee, he is not entitled to make bail. This might be academic if the parole board revokes the parole and returns the man to prison for parole violation. On the other hand, the parole board may not find a violation and would permit continuation of the parole, in which case the man has every right to bail in accordance with law, as if he had never been convicted. If charges have been filed, and the parolee makes bail, it follows that nonetheless the parole authorities can arrest and detain pending investigation of parole violation, or violations at a subsequent time. 1957-58 Op. Att'y Gen. No. 58-171.

Criminal justice department bears cost for arrested parolee. — A parolee arrested pursuant to this section is in the control and custody of the state penitentiary, and the

department of corrections (corrections department) must bear the cost of such control and custody. 1970 Op. Att'y Gen. No. 70-62.

State penitentiary responsible for parolee's medical costs. — Where a parolee from the state penitentiary is arrested for a parole violation, placed in a county jail, attempts suicide, and is rushed to a hospital, he is in the legal custody and control of the state penitentiary when he injured himself, and the state penitentiary, not the county, is responsible for the medical costs. 1968 Op. Att'y Gen. No. 68-26.

Imprisonment not part of sentence. — Imprisonment for noncompliance with parole matters is not a term of imprisonment which can be imposed by sentence, as such imprisonment results only after sentence has been imposed. State v. Gonzales, 96 N.M. 556, 632 P.2d 1194 (Ct. App. 1981).

Subsection C relates to procedure when violation occurs. — Subsection C regarding a parole revocation hearing relates to the statutory procedures to be followed when an inmate released on parole is charged with violating any of the conditions of release. Williams v. New Mexico Dep't of Cors., 84 N.M. 421, 504 P.2d 631 (1972).

Prisoner is not on parole from time original resolution is passed, and an order of rescission does not take from him a vested right without due process of law. Williams v. New Mexico Dep't of Cors., 84 N.M. 421, 504 P.2d 631 (1972).

Parole begins upon actual release. — Until the prisoner is actually released, the board has the power to "reopen and advance, postpone or deny a parole which has been granted." Williams v. New Mexico Dep't of Cors., 84 N.M. 421, 504 P.2d 631 (1972).

Parloee must sign parole agreement. — There must be an acceptance of the terms and conditions of the parole agreement, which must be signed by the convict, before the said parole becomes legally effective to secure his release from the institution. Williams v. New Mexico Dep't of Cors., 84 N.M. 421, 504 P.2d 631 (1972).

Board may revoke "pending" parole without revocation hearing. — Where the necessary steps to complete petitioner's release on parole had not been accomplished, the parole board's action in revoking a "pending" parole was within the discretion of the board, and petitioner was not entitled to a parole revocation hearing. Williams v. New Mexico Dep't of Cors., 84 N.M. 421, 504 P.2d 631 (1972).

Only under limited circumstances may director order rehearing. — Field services division director acted within his statutory and inherent authority in ordering a new preliminary revocation hearing when the initial hearing officer's finding of no probable cause for revocation was based on an erroneous legal conclusion. This decision should not be interpreted as allowing the director to order a rehearing when he is merely dissatisfied with the result of the initial hearing. Only upon a clear misapplication of the

law or for other strong and compelling reasons should this authority be exercised. Barnett v. Malley, 90 N.M. 633, 567 P.2d 482 (1977).

Deferral of parole revocation hearing following service of an intervening sentence is without prejudice and does not violate a defendant's due process rights where the parole violation was established by an intervening conviction. Moody v. Quintana, 89 N.M. 574, 555 P.2d 695 (1976).

Right to counsel at hearing discretionary. — The state authority charged with the responsibility for administering the probation and parole system has discretion to determine the need for counsel at revocation hearings on a case-by-case basis, but if the determination is made to supply counsel to indigent parolees, then counsel must be made available and given the opportunity to participate in any subsequent rehearings. Barnett v. Malley, 90 N.M. 633, 567 P.2d 482 (1977).

Term "as it sees fit" gives board restricted powers. — While the authority granted the board under this section to enter any order "as it sees fit" might seem to be sufficiently broad to permit a denial of credit of eight and one-half months as time served on a sentence during which time parolee was not in custody, the use of such language was not intended to grant unrestricted power. Conston v. New Mexico State Bd. of Probation & Parole, 79 N.M. 385, 444 P.2d 296 (1968).

No court review of revocation decision. — Laws 1909, ch. 32, § 5, having conferred upon superintendent of penitentiary the power to retake and reimprison paroled convicts, his revocation of a parole was in the exercise of a sole discretion, not reviewable by the courts. Ex parte Vigil, 24 N.M. 640, 175 P. 713 (1918) (decided under former law).

Law reviews. — For note, "Due Process, Equal Protection and the New Mexico Parole System," see 2 N.M.L. Rev. 234 (1972).

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. — 59 Am. Jur. 2d Pardon and Parole §§ 84, 96 to 98, 100 to 102, 106, 110, 112, 113.

Right to assistance of counsel at proceedings to revoke probation, 44 A.L.R.3d 306.

67A C.J.S. Pardon and Parole §§ 61, 64, 67, 79, 80, 83.

31-21-15. Return of probation violator.

A. At any time during probation:

(1) the court may issue a warrant for the arrest of a probationer for violation of any of the conditions of release. The warrant shall authorize the return of the probationer to the custody of the court or to any suitable detention facility designated by the court;

(2) the court may issue a notice to appear to answer a charge of violation. The notice shall be personally served upon the probationer; or

(3) the director may arrest a probationer without warrant or may deputize any officer with power of arrest to do so by giving him a written statement setting forth that the probationer has, in the judgment of the director, violated the conditions of his release. The written statement, delivered with the probationer by the arresting officer to the official in charge of a county jail or other place of detention, is sufficient warrant for the detention of the probationer. Upon arrest and detention, the director shall immediately notify the court and submit in writing a report showing in what manner the probationer has violated the conditions of release.

B. The court shall then hold a hearing, which may be informal, on the violation charged. If the violation is established, the court may continue the original probation, revoke the probation and either order a new probation with any condition provided for in Section 31-20-5 or 31-20-6 NMSA 1978, or require the probationer to serve the balance of the sentence imposed or any lesser sentence. If imposition of sentence was deferred, the court may impose any sentence which might originally have been imposed, but credit shall be given for time served on probation.

C. If it is found that a warrant for the return of a probationer cannot be served, the probationer is a fugitive from justice. After hearing upon return, if it appears that he has violated the provisions of his release, the court shall determine whether the time from the date of violation to the date of his arrest, or any part of it, shall be counted as time served on probation.

D. The board shall budget funds to cover expenses of returning probationers to the court. The sheriff of the county in which the probationer was convicted is the court's agent in the transportation of the probationer, but the director, with the consent of the court, may utilize other state agencies for this purpose when it is in the best interest of the state.

History: 1953 Comp., § 41-17-28.1, enacted by Laws 1963, ch. 301, § 13; 1989, ch. 139, § 1.

ANNOTATIONS

Cross references. — For state board of probation and parole referring to corrections division, see 33-1-7 NMSA 1978.

The 1989 amendment, effective June 16, 1989, in Subsection B substituted "continue the original probation, revoke the probation and either order a new probation with any condition provided for in Section 31-20-5 or 31-20-6 NMSA 1978, or" for "continue or revoke the probation and may" in the second sentence.

I. GENERAL CONSIDERATION.

Legislature has expressly determined procedures to bring a person on probation before the court for violation of a condition of probation. State v. Ponce, 2004-NMCA-137, 136 N.M. 614, 103 P.3d 54, cert. granted, 2004-NMCERT-012, 136 N.M. 614, 103 P.3d 54.

Constitutionality of section. — This section does not provide for mandatory notice to the probationer before revocation of his probation, thus creating a question of constitutionality. 1964 Op. Att'y Gen. No. 64-106.

Legislative intent. — The legislature intended the Probation and Parole Act to be read along with the criminal code provisions concerning revocation of probation. 1964 Op. Att'y Gen. No. 64-106.

Generally as to probation. — Probation is conferred as a privilege and cannot be demanded as a right. It is a matter of favor, not of contract. There is no requirement that it must be granted on a specified showing. The defendant stands convicted; he faces punishment and cannot insist on terms or strike a bargain. He is still a person convicted of an offense, and the suspension of his sentence remains within the control of the court. State v. Brusenhan, 78 N.M. 764, 438 P.2d 174 (Ct. App. 1968).

Legislature authorized to define court's jurisdiction over sentencing. — It is within the power of the legislature alone to define the court's jurisdiction over the sentencing of offenders. State v. Travarez, 99 N.M. 309, 657 P.2d 636 (Ct. App. 1983).

Sentencing scheme for suspension and deferment is not unconstitutionally vague. State v. Kenneman, 98 N.M. 794, 653 P.2d 170 (Ct. App. 1982).

Probation is conditional liberty intended to alleviate aspects of punishment by incarceration. It offers rehabilitation and restoration to society. State v. Chavez, 607 P.2d 640 (Ct. App.), cert. denied, 94 N.M. 629, 614 P.2d 546 (1979).

For probation to be legally effective, defendant did not have to report to the probation office, open his file, and sign a probation order. Defendant was constructively on probation from the date of his sentencing. State v. Jimenez, 2004-NMSC-012, 135 N.M.442, 90 P.3d 461.

Probation violation options of court. — Three courses are open to the trial court upon the establishment of a violation of the terms or conditions of probation, and these courses are: (1) the court may continue the probation; (2) the court may revoke the

probation and require the defendant to serve the balance of the sentence previously imposed; or (3) the court may revoke the probation and require the defendant to serve a sentence which is less than the balance of the sentence previously imposed. State v. Reinhart, 79 N.M. 36, 439 P.2d 554 (1968) (decided prior to 1989 amendment of Subsection B).

Section provides alternatives.— Subsection B of this section presents a district court with several alternatives for dealing with a defendant who has violated the conditions of his or her release. State v. Baca, 2005-NMCA-001, 136 N.M. 667, 104 P.3d 533, cert. denied, 2004-NMCERT-012, 136 N.M. 665, 103 P.3d 1097.

Scope of arrest options. — In revoking an order suspending sentence, an arrest may be accomplished in one of the four following ways: the district court which placed the defendant on probation may issue a warrant upon the filing of a petition by the district attorney; the district court which placed the defendant on probation may issue a notice to appear to answer a charge of violation brought by the probation office; the director of the probation and parole board may arrest the probationer without warrant; and a written statement issued by the director may be used as a warrant for arrest by an officer deputized by the director. 1964 Op. Att'y Gen. No. 64-106.

Revocation of probation where defendant unable to pay fine or restitution. — There are substantive limits on the automatic revocation of probation where an indigent defendant is unable to pay a fine or restitution. Those substantive limits require that: (1) There must be an inquiry into the reasons for the failure to pay; (2) if the reasons for defendant's failure to pay are either not willful or indicate an inability to pay, the court must consider alternatives to incarceration; and (3) only if alternative measures do not meet the state's interests, then the court may order confinement. State v. Parsons, 104 N.M. 123, 717 P.2d 99 (Ct. App. 1986).

Court cannot defer credit for probation time. — All time served on probation shall be credited (unless a defendant is a fugitive) and the trial court thus errs in purporting to defer credit for time served on probation. State v. Encinias, 104 N.M. 740, 726 P.2d 1174 (Ct. App. 1986).

Probation condition may be changed upon violation, but not to increase penalty. — When a violation of probation is established, the trial court may relieve a defendant of the conditions of probation or continue the existing conditions, but the trial court may not change any probation condition so that the penalty is increased, even if the defendant is agreeable to such change. State v. Crespin, 96 N.M. 640, 633 P.2d 1238 (Ct. App. 1981).

Imposition of additional sanctions authorized. — This section does not foreclose the imposition of additional otherwise permissible sanctions for the acts that form the basis for revocation or modification of probation and, in appropriate circumstances, the state had authority to seek enhancement of a defendant's sentence under the habitual-offender statute. State v. Freed, 1996-NMCA-044, 121 N.M. 562, 915 P.2d 325.

Revocation of only one of several concurrent suspended sentences. — When a defendant is sentenced to multiple concurrent sentences, the trial court suspends the sentences and places the defendant on probation and the defendant violates the terms of his probation, the trial court cannot invoke the original sentence on count I 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. That effect, of course, creates an increase in penalty and violates the constitutional prohibition against double jeopardy. State v. Martinez, 99 N.M. 248, 656 P.2d 911 (Ct. App. 1982).

Nolo plea not basis for revocation of probation. — A court may not use a conviction based on a nolo contendere plea as the sole basis to revoke probation. State v. Baca, 101 N.M. 415, 683 P.2d 970 (Ct. App. 1984).

Constitutional to impose three-year sentence when sentencing originally deferred for two years. — The imposition of a three-year sentence when sentencing was originally deferred for two years does not violate the prohibition on double jeopardy, when the first sentence imposed is where the defendant's probation is revoked. State v. Kenneman, 98 N.M. 794, 653 P.2d 170 (Ct. App. 1982).

Court lacks jurisdiction in probation revocation matter when period of deferred sentence expires. — Section 31-20-9 NMSA 1978 relieves the defendant of any obligations imposed on him by order of the court when the period of a deferred sentence expires, and he is deemed then to have satisfied his liability for the crime. The trial court thereafter lacks jurisdiction to proceed in a probation revocation matter. State v. Travarez, 99 N.M. 309, 657 P.2d 636 (Ct. App. 1983).

Court may not order defendant to live in halfway house as condition of probation. — Ordering defendant to live in a halfway house as an additional condition of probation amounts to an increased penalty under *State v. Crespin,* 96 N.M. 640, 633 P.2d 1238 (Ct. App. 1981), and thus the court has no jurisdiction to make such an order. State v. Chavez, 100 N.M. 750, 676 P.2d 827 (Ct. App. 1984).

All time served on probation shall be credited unless defendant is a fugitive. State v. Kenneman, 98 N.M. 794, 653 P.2d 170 (Ct. App. 1982).

Language in this section unambiguously mandates credit for time served on probation in the case of a defendant whose initial sentence was deferred. State v. Leslie, 2004-NMCA-106, 136 N.M. 244, 96 P.3d 805.

Subsection B of this section mandates credit for time served, the only exception being where a defendant is a “fugitive from justice” as defined in Subsection C of this section. State v. Leslie, 2004-NMCA-106, 136 N.M. 244, 96 P.3d 805.

Person eligible to receive conditional discharge. — Although Subsection B of this section refers only to a deferred sentence and not to a conditional discharge, a person who is eligible to receive a conditional discharge is by definition one who is entitled to a deferred sentence. State v. Leslie, 2004-NMCA-106, 136 N.M. 244, 96 P.3d 805.

Arrest without warrant by director restricted. — The procedure whereby the director makes an arrest without a warrant probably should not be utilized when arresting suspected probation violators who are not presently within the jurisdiction of the court which granted probation. 1964 Op. Att'y Gen. No. 64-106.

Degree of proof necessary to establish probation violation. — At a probation violation hearing, the violation must be established with reasonable certainty. The violation does not have to be established beyond a reasonable doubt. State v. Murray, 81 N.M. 445, 468 P.2d 416 (Ct. App. 1970).

Conscience of court to be satisfied. — A violation of the conditions of probation must be established with such reasonable certainty as to satisfy the conscience of the court of the truth of the violation. If the evidence inclines a reasonable and impartial mind to the belief that the defendant had violated the terms of his probation, it is sufficient. State v. Brusenhan, 78 N.M. 764, 438 P.2d 174 (Ct. App. 1968).

Reasonable and impartial mind to be inclined. — The degree of proof necessary to establish a violation of probation in revocation hearings is that which inclines a reasonable and impartial mind to the belief that defendant had violated the terms of probation, and a reasonable and impartial mind is one which hears before it condemns, which proceeds on inquiry, and only renders a decision after hearing all the evidence. State v. Pacheco, 85 N.M. 778, 517 P.2d 1304 (Ct. App. 1973).

Revocation hearing part of original order. — The hearing on revocation authorized by this section is a continuation of the original probation order. 1965 Op. Att'y Gen. No. 65-213.

Probationer must have opportunity to be heard and to show, if he can, that he did not violate the conditions of his suspended sentence, or, if he did, that circumstances in mitigation suggest that the violation does not warrant revocation. State v. Montoya, 93 N.M. 84, 596 P.2d 527 (Ct. App. 1979).

Notice and hearing constitutionally mandated. — The right of personal liberty is one of the highest rights of citizenship and cannot be taken from a defendant in a probation revocation proceeding without notice and an opportunity to be heard without invading his constitutional rights. State v. Brusenhan, 78 N.M. 764, 438 P.2d 174 (Ct. App. 1968).

Commitment under suspended sentence. — A defendant may not be committed under a suspended sentence until he is given notice of the alleged violation of his

probation and has had an opportunity to be heard; to deny either of these is to violate due process of law. 1964 Op. Att'y Gen. No. 64-106.

Revocation of probation and suspended sentence compared. — A violation of the conditions of the probation during the probationary period was also a violation of the conditions of the suspension, because probation was merely the status of one released under a suspended sentence. Therefore, there was no difference between proceedings to revoke a suspended sentence under 40A-29-20, 1953 Comp. (since repealed) and proceedings to revoke an order of probation under this section. State v. Holland, 78 N.M. 324, 431 P.2d 57 (1967).

Scope of language of suspension. — In order to avoid the contention that the conditions of the order of suspension do not embrace the conditions and terms of probation, the trial courts, by appropriate language, should expressly provide that the conditions and terms of probation are made conditions and terms of the suspension. State v. Holland, 78 N.M. 324, 431 P.2d 57 (1967).

Effect of probation grant. — Although the granting of probation is a matter of grace, once it has been granted the probationer has a vested right to his conditional liberty and he may not be deprived of this right without due process of law. 1964 Op. Att'y Gen. No. 64-106.

Hearing on revocation of probation or parole is not trial on a criminal charge, but is a hearing to determine whether, during the probationary or parole period, the defendant has conformed to or breached the course of conduct outlined in the probation or parole order. State v. Sanchez, 94 N.M. 521, 612 P.2d 1332 (Ct. App. 1980).

Formal trial not required. — Where defendant claimed that neither the judge nor his counsel advised him of his right to a "trial" on whether he had violated the conditions of his probation, it was held that he was not entitled to a trial in any strict or formal sense. He was entitled to a hearing on the alleged violations, but that hearing could be informal. State v. Murray, 81 N.M. 445, 468 P.2d 416 (Ct. App. 1970).

Hearing to revoke probation may be informal. — This does not mean that he may insist upon a trial in any strict or formal sense. State v. Brusenhan, 78 N.M. 764, 438 P.2d 174 (Ct. App. 1968).

Testimony not coerced. — Where defendant at probation revocation hearing was not called or sworn as a witness, but was advised by the court as to the nature of each charge made against him and was asked whether or not the charge was true, and thereby was given an opportunity to admit or deny the charge, and where he was also given an opportunity to explain his plea to each charge, and in some instances he offered an explanation, this did not constitute compelled, coerced or required testimony by defendant against himself. These proceedings were in the nature of an arraignment. State v. Brusenhan, 78 N.M. 764, 438 P.2d 174 (Ct. App. 1968).

Competence of counsel. — 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, N.M.R. Civ. P. (now see Rule 1-093) (only applied to post-conviction motions made before September 1, 1975). The failure of an attorney to confer with his client, without more, could not establish the incompetence of that attorney. State v. Brusenhan, 78 N.M. 764, 438 P.2d 174 (Ct. App. 1968).

When effective use of counsel denied. — Probation revocation hearing must have constituted a sham, a farce or a mockery of justice before a defendant can be said to have been denied, the effective assistance of counsel. State v. Brusenhan, 78 N.M. 764, 438 P.2d 174 (Ct. App. 1968).

Right to jury trial on identity. — Defendant has a right to a jury trial on the question of his identity. State v. Murray, 81 N.M. 445, 468 P.2d 416 (Ct. App. 1970).

When jury trial waived. — Having failed to raise the question of want of identity defendant waives his right to a trial by jury on that issue at his probation revocation proceeding. State v. Paul, 82 N.M. 791, 487 P.2d 493 (Ct. App. 1971).

Revocation hearing by court granting probation constitutional if held immediately after probationer notified. — A hearing for revocation of probation by a court which granted probation will satisfy due process if the hearing is held immediately after a notice to appear to answer a charge of violation is personally served upon a probationer. State v. Chavez, 94 N.M. 102, 607 P.2d 640 (Ct. App.), cert. denied, 94 N.M. 629, 614 P.2d 546 (1979).

Incarceration for probation violation not required. — Neither 31-20-5 NMSA 1978 nor this section require the trial court to impose incarceration if the defendant violates the conditions of his probation. State v. Mares, 119 N.M. 48, 888 P.2d 930 (1994).

Evidentiary hearing required where arrest delayed. — 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 of their attempts to execute the warrants for defendant's arrest. State v. Murray, 81 N.M. 445, 468 P.2d 416 (Ct. App. 1970).

Delay waives probation revocation. — 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, 81 N.M. 445, 468 P.2d 416 (Ct. App. 1970).

Unreasonable delay in arrest results in state's waiver of defendant's violations. — Unreasonable delay between knowledge of violation and notice or arrest, or between arrest and hearing, resulting in prejudice or oppressive detriment would result, as a matter of law, in the state's waiver of defendant's violations. State v. Sanchez, 94 N.M. 521, 612 P.2d 1332 (Ct. App. 1980).

Seven-month delay between arrest for probation violation and revocation hearing is denial of procedural due process. State v. Chavez, 94 N.M. 102, 607 P.2d 640 (Ct. App.), cert. denied, 94 N.M. 629, 614 P.2d 546 (1979).

Effect on revocation of conviction or acquittal of subsequent offense. — Conviction of a subsequent offense is not a prerequisite for revocation of probation but if revocation was solely on the basis of the charge of an offense and defendant was thereafter acquitted of the charge, revocation was improper. Maes v. State, 84 N.M. 251, 501 P.2d 695 (Ct. App. 1972).

Procedure where subsequent criminal charge in another jurisdiction. — Where a defendant is being held on a subsequent criminal charge in a jurisdiction other than the one which placed him on probation, the board should delay proceeding against him for violation of probation until the subsequent charge is disposed of. 1964 Op. Att'y Gen. No. 64-106.

Bail allowed if violation not criminal offense. — If a violation of probation is not a criminal offense the defendant should be allowed bail. 1964 Op. Att'y Gen. No. 64-106.

Effect of post-conviction relief on improper probation revocation. — 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, 84 N.M. 251, 501 P.2d 695 (Ct. App. 1972).

Bail where arrested in other county. — A probationer, arrested in a county other than the county which granted him probation, has a right to be admitted to bail in the county in which he is arrested. 1964 Op. Att'y Gen. No. 64-106.

Board to pay expenses of returning probationers. — The state board of probation and parole is responsible for the payment of expenses incurred in the returning of probation violators to the court. 1969 Op. Att'y Gen. No. 69-30.

Limitation on expenses. — The phrase "expenses of returning probationers" is not meant to include the cost of detention prior to the return. 1970 Op. Att'y Gen. No. 70-62.

Fixing of penalties is legislative function and what constitutes an adequate punishment is a matter for legislative judgment. State v. Sublett, 78 N.M. 655, 436 P.2d 515 (Ct. App. 1968).

Credit if probation and suspended sentence. — Where defendant was released without imprisonment under a suspended sentence and subject to conditions, and at the time of release, defendant was on "probation" as that word is used in the Probation and Parole Act, defendant was entitled to credit for probation time served while his sentence was suspended. State v. Sublett, 78 N.M. 655, 436 P.2d 515 (Ct. App. 1968).

Discretion of court as to credit. — Under Subsection B of this section, upon revocation of a suspended sentence, the trial court may require the defendant to serve (1) the balance of the sentence imposed - that is, the term remaining after giving credit for allowable probation time or (2) a lesser term. The trial court does not have authority under this statute to withhold credit for allowable probation time. State v. Sublett, 78 N.M. 655, 436 P.2d 515 (Ct. App. 1968).

Meaning of "balance". — The word "balance" in the statute means "remainder," or that portion of the term of the sentence which remains after deducting therefrom the time during which defendant has been on probation. State v. Reinhart, 79 N.M. 36, 439 P.2d 554 (1968).

Minimum requirement of court. — Under Subsection B of this section trial court must, as a minimum, credit allowable probation time on the original sentence that has been invoked. State v. Sublett, 78 N.M. 655, 436 P.2d 515 (Ct. App. 1968).

District court abused its discretion by modifying defendant's probation condition which had been agreed upon pursuant to a plea bargain. State v. Trujillo, 117 N.M. 769, 877 P.2d 575 (1994).

Law reviews. — For note, "Due Process, Equal Protection and the New Mexico Parole System," see 2 N.M.L. Rev. 234 (1972).

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 criminal law, see 16 N.M.L. Rev. 9 (1986).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law § 913 et seq.

Right of defendant sentenced after revocation of probation to credit for jail time served as condition of probation, 99 A.L.R.3d 781.

Immunity of public officer from liability for injuries caused by negligently released individual, 5 A.L.R.4th 773.

Admissibility of hearsay evidence in probation revocation hearings, 11 A.L.R.4th 999.

Power of court, after expiration of probation term, to revoke or modify probation for violations committed during the probation term, 13 A.L.R.4th 1240.

Power of court to revoke probation for acts committed after imposition of sentence but prior to commencement of probation term, 22 A.L.R.4th 755.

Propriety of increased sentence following revocation of probation, 23 A.L.R.4th 883.

Defendant's right to credit for time spent in halfway house, rehabilitation center, or other restrictive environment as condition of probation, 24 A.L.R.4th 789.

Revocation of probation based on defendant's misrepresentation or concealment of information from trial court, 36 A.L.R.4th 1182.

Probation officer's liability for negligent supervision of probationer, 44 A.L.R.4th 638.

Probation revocation: insanity as defense, 56 A.L.R.4th 1178.

Determination that state failed to prove charges relied upon for revocation of probation as barring subsequent criminal action based on same underlying charges, 2 A.L.R.5th 262.

Who may institute proceedings to revoke probation, 21 A.L.R.5th 275.

Validity, construction, and application of concurrent-sentence doctrine - state cases, 56 A.L.R.5th 385.

24 C.J.S. Criminal Law §§ 1562 to 1564.

II. FUGITIVE STATUS.

Legislative intent. — In enacting Subsection C of this statute, the legislature intended to ensure that probationers could not defeat the trial court's authority to revoke probation by absconding from the jurisdiction. State v. Apache, 104 N.M. 290, 720 P.2d 709 (Ct. App. 1986).

Extradition not required. — The state was not required to extradite defendant from Arizona so as to prevent his classification as a fugitive under this section and the resulting revocation of probation. State v. McDonald, 113 N.M. 305, 825 P.2d 238 (Ct. App. 1991).

When fugitive status determined. — It is implicit in this statute that the judicial determination of fugitive status shall be made only after the probationer has been found and brought before the court, regardless of whether this occurs before or after the date

on which probation was originally to have expired. State v. Apache, 104 N.M. 290, 720 P.2d 709 (Ct. App. 1986).

Inadequate notice of status. — Where at the probation revocation hearing, the state requested that the court find that defendant violated his probation, find him to be an absconder, and impose the sentence authorized by law, the state's use of the word "absconder" referring to defendant's failure to report for probation in the two probation violation reports filed, failed to provide adequate notice to defendant that he may be found a fugitive and denied credit pursuant to Subsection C of this section. State v. Jimenez, 2004-NMSC-012, 135 N.M.442, 90 P.3d 461.

Attempt to serve warrant. — To establish that probationer is "fugitive" under this provision, the state is required, at a minimum, to show that it attempted to serve a warrant on probationer but was unable to or that it would have failed to serve the warrant if it had attempted to do so. State v. Thomas, 113 N.M. 298, 825 P.2d 231 (Ct. App. 1991).

Lack of evidence that authorities actually attempted to serve a warrant does not amount to a failure of proof under Subsection C of this statute which requires a finding that the arrest warrant "cannot be served." State v. Apache, 104 N.M. 290, 720 P.2d 709 (Ct. App. 1986).

Effect of fugitive status on credit. — The trial court's discretion to credit or disallow probation time from violation of probation to arrest depends upon defendant being a fugitive from justice. Whether defendant was a fugitive requires a determination that the warrant for the return of defendant cannot be served. Where the trial court may have made a judicial determination of the above matters in fixing the credit to be given on the reinstated sentence, but the record does not reflect such a determination, since the question of allowable credit is cognizable in a post-conviction motion, defendant is entitled to an evidentiary hearing on the question of the propriety of the credit given. State v. Murray, 81 N.M. 445, 468 P.2d 416 (Ct. App. 1970).

Evidence. — There was sufficient evidence to support the trial court's ruling that defendant was not entitled to credit for all of the time he was found to have been a fugitive. State v. Apache, 104 N.M. 290, 720 P.2d 709 (Ct. App. 1986).

Where the state made no showing that the warrant was entered into the National Crime Information Center database, that it attempted to serve defendant with a warrant, or that any attempt to serve defendant would have been futile, evidence in the record does not sufficiently demonstrate that defendant was a fugitive under Subsection C of this section. State v. Jimenez, 2004-NMSC-012, 135 N.M.442, 90 P.3d 461.

Failure to object to status did not preclude appeal. — Where the petition to revoke defendant's parole did not mention Subsection C of this section or allege that defendant was a fugitive, defendant could not have known that his status as a fugitive was at issue until the district court filed its order revoking probation and denying defendant credit for

time served on probation. Under these circumstances, defendant had no opportunity to object to the court's ruling at the time it was made, and thus, the failure to object does not prejudice his ability to raise this claim on appeal. State v. Jimenez, 2004-NMSC-012, 135 N.M.442, 90 P.3d 461.

Fugitive defendant incarcerated in another jurisdiction. — A defendant is a fugitive within the meaning of this section if he cannot be taken into actual custody and brought before the court pursuant to an arrest warrant. Thus defendant who could not be taken into custody under authority of the warrant because he was incarcerated in Arizona was properly denied credit against his sentence. State v. McDonald, 113 N.M. 305, 825 P.2d 238 (Ct. App. 1991).

31-21-16. Repealed.

ANNOTATIONS

Repeals. — Laws 1977, ch. 216, § 17, repeals 41-17-30 1953 Comp. (31-21-16 NMSA 1978), relating to discharge of prisoner or parolee.

31-21-17. Executive clemency; investigation and reports.

On request of the governor the board shall investigate and report to him with respect to any case of pardon, commutation of sentence or reprieve.

History: 1953 Comp., § 41-17-31, enacted by Laws 1955, ch. 232, § 20.

ANNOTATIONS

Law reviews. — For note, "Due Process, Equal Protection and the New Mexico Parole System," see 2 N.M.L. Rev. 234 (1972).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Executive clemency to remove disqualification for office or other disqualification, resulting from conviction of crime, as applicable in case of conviction in federal court or court of another state, 135 A.L.R. 1493.

Revocation of order commuting state criminal sentence, 88 A.L.R.5th 463.

31-21-17.1. Administration by department.

The corrections department shall identify geriatric, permanently incapacitated and terminally ill inmates eligible for geriatric or medical parole based on rules established by the board. The department shall forward an application and documentation in support of parole eligibility to the board within thirty days of receipt of an application from an inmate. The documentation shall include information concerning the inmate's

age, medical history and prognosis, institutional behavior and adjustment and criminal history. The inmate or inmate's representative may submit an application to the board.

History: Laws 1994, ch. 21, § 2.

ANNOTATIONS

Cross references. — For powers and duties of board in regard to medical and geriatric parole program, see 31-21-25.1 NMSA 1978.

31-21-18. Application to persons now on probation or parole.

The provisions of the Probation and Parole Act [31-21-3 to 31-21-19 NMSA 1978] apply to all persons who, at the effective date, are on probation or parole, or eligible to be placed on probation or parole under existing laws, with the same effect as if the act had been in operation at the time they were placed on probation or parole or become eligible to be placed thereon.

History: 1953 Comp., § 41-17-32, enacted by Laws 1955, ch. 232, § 21; 1963, ch. 301, § 14.

ANNOTATIONS

"Effective date" interpreted. — The phrase "at the effective date" in this section cannot reasonably be read to mean that all subsequent amendments to the Parole Act are retroactive to 1963, the effective date of this section. Therefore, because the petitioner's offenses were committed before February 22, 1980, the effective date of 31-21-10 NMSA 1978, 31-21-10 NMSA 1978 did not apply to him, he was not entitled to determinate parole, and he could not establish a liberty interest to support his due process claim. Helker v. Shanks, 47 F.3d 1065 (10th Cir. 1995).

Law reviews. — For note, "Due Process, Equal Protection and the New Mexico Parole System," see 2 N.M.L. Rev. 234 (1972).

31-21-19. Participation of the United States and other states.

The board, in its discretion and with the written consent of the governor, may accept from the United States or any of its agencies, and from any state of the United States, advisory services, funds, equipment and supplies available to this state for any of the purposes contemplated by the Probation and Parole Act [31-21-3 to 31-21-19 NMSA 1978], and may enter into contracts and agreements with the United States or any of its agencies, and any state of the United States as necessary, proper and convenient.

History: 1953 Comp., § 41-17-33, enacted by Laws 1955, ch. 232, § 22; 1959, ch. 48, § 1; 1963, ch. 301, § 15.

ANNOTATIONS

Cross references. — For state board of probation and parole as referring to the corrections division, see 33-1-7 NMSA 1978.

Law reviews. — For note, "Due Process, Equal Protection and the New Mexico Parole System," see 2 N.M.L. Rev. 234 (1972).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 91 C.J.S. United States § 222 et seq.

31-21-20. Information from courts.

The director shall obtain from each district court statistical data regarding dispositions of all defendants, whether found guilty or discharged.

History: 1953 Comp., § 41-17-35, enacted by Laws 1963, ch. 301, § 16.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — The propriety of conditioning parole on defendant's not entering specified geographical area, 54 A.L.R.5th 743.

31-21-21. Conditions of probation.

The board shall adopt general regulations concerning the conditions of probation which apply in the absence of specific conditions imposed by the court. All probationers are subject to supervision of the board unless otherwise specifically ordered by the court in the particular case. Nothing in the Probation and Parole Act [31-21-3 to 31-21-19 NMSA 1978] limits the authority of the court to impose or modify any general or specific condition of probation. The board may recommend and by order the court may impose and modify any conditions of probation. The court shall transmit to the board and to the probationer a copy of any order.

History: 1953 Comp., § 41-17-36, enacted by Laws 1963, ch. 301, § 17.

ANNOTATIONS

Cross references. — For state board of probation and parole as referring to the corrections division, see 33-1-7 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Validity of requirement that, as condition of probation, defendant submit to warrantless searches, 99 A.L.R.5th 557.

Specific condition requiring search of defendant's car overrides contrary manual provisions. — A specific condition requiring that a defendant submit to a search of his car upon request of his probation officer overrides manual provisions directing that

probation officers abstain from searches of probationers. State v. Gardner, 95 N.M. 171, 619 P.2d 847 (Ct. App. 1980).

District court abused its discretion by modifying defendant's probation condition which had been agreed upon pursuant to a plea bargain. State v. Trujillo, 117 N.M. 769, 877 P.2d 575 (1994).

Law reviews. — For annual survey of New Mexico law relating to administrative law, see 12 N.M.L. Rev. 1 (1982).

21 Am. Jur. 2d Criminal Law § 908 et seq.

Propriety of conditioning probation on defendant's remaining childless or having no additional children during probationary period, 94 A.L.R.3d 1218.

Right of defendant sentenced after revocation of probation to credit for jail time served as condition of probation, 99 A.L.R.3d 781.

Propriety of conditioning probation on defendant's not associating with particular person, 99 A.L.R.3d 967.

Propriety of conditioning probation on defendant's serving part of probationary period in jail or prison, 6 A.L.R.4th 446.

Power of court, after expiration of probation term, to revoke or modify probation for violations committed during the probation term, 13 A.L.R.4th 1240.

Propriety of requirement, as condition of probation, that defendant refrain from use of intoxicants, 19 A.L.R.4th 1251.

Power of court to revoke probation for acts committed after imposition of sentence but prior to commencement of probation term, 22 A.L.R.4th 755.

Defendant's right to credit for time spent in halfway house, rehabilitation center, or other restrictive environment as condition of probation, 24 A.L.R.4th 789.

Propriety of conditioning probation on defendant's not entering specified geographical area, 28 A.L.R.4th 725.

Propriety of conditioning probation on defendant's submission to polygraph or other lie detector testing, 86 A.L.R.4th 709.

Propriety of conditioning probation on defendant's submission to drug testing, 87 A.L.R.4th 929.

Who may institute proceedings to revoke probation, 21 A.L.R.5th 275.

Propriety of probation condition exposing defendant to public shame or ridicule, 65 A.L.R.5th 187.

Propriety, as condition of probation granted pursuant to 18 USCS § 3651, of requiring that probationer refrain from consumption of alcoholic beverages, 37 A.L.R. Fed. 843.

Denial of state prisoner's application for, or revocation of, participation in work or study release program or furlough program as actionable under Civil Rights Act of 1871 (42 USCS § 1983), 55 A.L.R. Fed. 208.

Propriety, in criminal case, of Federal District Court order restricting defendant's right to re-enter or stay in United States, 94 A.L.R. Fed. 619.

24 C.J.S. Criminal Law § 1556.

31-21-22. Short title.

Sections 1 through 5 [31-21-22 to 31-21-26 NMSA 1978] of this act may be cited as the "Parole Board Act".

History: 1953 Comp., § 41-17-37, enacted by Laws 1975, ch. 194, § 1.

ANNOTATIONS

Law reviews. — For note, "Due Process, Equal Protection and the New Mexico Parole System," see 2 N.M.L. Rev. 234 (1972).

For note, "Parole Revocation and the Right to Counsel," see 5 N.M. L. Rev. 331 (1975).

31-21-23. Purpose.

The purpose of the Parole Board Act [31-21-22 to 31-21-26 NMSA 1978] is to create a professional parole board.

History: 1953 Comp., § 41-17-38, enacted by Laws 1975, ch. 194, § 2; 1999, ch. 202, § 2.

ANNOTATIONS

The 1999 amendment, effective July 1, 1999, deleted "full-time," preceding "professional" and "salaried" preceding "parole board".

31-21-24. Parole board; members; appointment; terms; qualifications; compensation; organization.

A. The "parole board" is created, consisting of fifteen members appointed by the governor with the consent of the senate.

B. The terms of the members of the parole board shall be six years. To provide for staggered terms, five members shall be appointed every two years. Members serve until their successors have been appointed and qualified.

C. Members of the parole board may be removed by the governor as provided in Article 5, Section 5 of the constitution of New Mexico. Vacancies shall be filled by appointment by the governor for the remainder of the unexpired term.

D. Members of the parole board shall be persons qualified by such academic training or professional experience as is deemed necessary to render them fit to serve as members of the board. No member of the board shall be an official or employee of any other federal, state or local government entity.

E. Members of the parole board shall receive per diem and mileage as provided for nonsalaried public officers in the Per Diem and Mileage Act and shall receive no other compensation, perquisite or allowance.

F. The governor shall designate one member of the parole board to serve as chair, who in addition to other duties shall coordinate with the corrections department in the furnishing of services pursuant to Section 9-3-11 NMSA 1978.

G. A parole may be granted, denied or revoked by a quorum of two on a panel consisting of three parole board members appointed on a rotating basis by the chair of the board.

History: 1953 Comp., § 41-17-39, enacted by Laws 1975, ch. 194, § 3; 1976, ch. 18, § 1; 1989, ch. 23, § 1; 1999, ch. 202, § 1; 2005, ch. 227, § 1.

ANNOTATIONS

The 1989 amendment, effective June 16, 1989, in Subsection A substituted "four" for "three" in the first sentence, deleted at the end of Subsection B "except that the members of the initial board shall be appointed for staggered terms of one, two and three years respectively", in Subsection E substituted "three" for "two" and "10-9-5 NMSA 1978" for "5-4-31.1 NMSA 1953" in the first sentence, and substituted all of the present language of Subsection G beginning with "majority of the board".

The 1999 amendment, effective July 1, 1999, in Subsection A, substituted "nine members" for "four members" and deleted the last sentence which read: "Each member of the board shall devote his full time to the duties of the board"; inserted "parole" preceding "board" in Subsections C, F and G; inserted "appointment by" preceding "the governor" in Subsection C; and rewrote Subsection E which read: "For purposes of salary for the chairman and the other three members of the board, the provisions of

Section 10-9-5 NMSA 1978 shall apply. Members of the board shall be reimbursed as provided in the Per Diem and Mileage Act in lieu of actual expenses for transportation, lodging and subsistence while on the official business of the board".

The 2005 amendment, effective July 1, 2005, increases the number of members of the parole board from nine to fifteen in Subsection A and provides in Subsection B that five members shall be appointed every two years and that members serve until their successors have been appointed and qualified.

Temporary provision. — Laws 2005, ch. 227, § 2, adds a temporary provision which provides that members of the parole board serving on July 1, 2005 may continue to serve until their terms expire and their successors have been appointed and qualified and that of the six additional members of the parole board to be appointed pursuant to the provisions of this act, two shall serve an initial term of two years, two shall serve an initial term of four years, and two shall serve an initial term of six years. Thereafter, all members shall serve six-year staggered terms.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 59 Am. Jur. 2d Pardon and Parole §§ 17, 32, 45, 76.

16A C.J.S. Constitutional Law §§ 262, 505.

31-21-25. Powers and duties of the board.

A. The parole board shall have the powers and duties of the former state board of probation and parole pursuant to Sections 31-21-6 and 31-21-10 through 31-21-17 NMSA 1978 and such additional powers and duties relating to the parole of adults as are enumerated in this section.

B. The parole board shall have the following powers and duties to:

(1) grant, deny or revoke parole;

(2) conduct or cause to be conducted such investigations, examinations, interviews, hearings and other proceedings as may be necessary for the effectual discharge of the duties of the board;

(3) summon witnesses, books, papers, reports, documents or tangible things and administer oaths as may be necessary for the effectual discharge of the duties of the board;

(4) maintain records of its acts, decisions and orders and notify each corrections facility of its decisions relating to persons who are or have been confined therein;

(5) adopt an official seal of which the courts shall take judicial notice;

(6) employ such officers, agents, assistants and other employees as may be necessary for the effectual discharge of the duties of the board;

(7) contract for services, supplies, equipment, office space and such other provisions as may be necessary for the effectual discharge of the duties of the board; and

(8) adopt such rules and regulations as may be necessary for the effectual discharge of the duties of the board.

C. The parole board shall provide a prisoner or parolee with a written statement of the reason or reasons for denying or revoking parole.

D. The parole board shall adopt a written policy specifying the criteria to be considered by the board in determining whether to grant, deny or revoke parole or to discharge a parolee.

E. When the parole board conducts a parole hearing for an offender, and upon request of the victim or family member the board shall allow the victim of the offender's crime or a family member of the victim to be present during the parole hearing. If the victim or a family member of the victim requests an opportunity to speak to the board during the hearing in public or private, the board shall grant that request. As used in this subsection, "family member of the victim" means a mother, father, sister, brother, child or spouse of the victim or a person who has custody of the victim.

History: 1953 Comp., § 41-17-40, enacted by Laws 1975, ch. 194, § 4; 1983, ch. 320, § 1; 1989, ch. 210, § 1; 2001, ch. 224, § 1.

ANNOTATIONS

Cross references. — For administrative attachment to the criminal justice department, see 9-3-11 NMSA 1978.

The 1989 amendment, effective July 1, 1989, deleted former Subsection E, regarding various notification requirements of the board in connection with its docket and in connection with release of prisoners.

The 2001 amendment, effective July 1, 2001, inserted "parole" preceding "board" in Subsections A, C and D; and added Subsection E.

Applicability. — Laws 1989, ch. 210, § 3 makes the provisions of that act applicable only to convictions that occur after the effective date of that act (April 4, 1989) and sets out the notification procedures to be followed in cases involving persons convicted of crimes prior to that date.

Generally as to granting or revoking of parole. — The power to grant parole and to revoke it is exercised pursuant to explicit statutory authority, and that power is exercised by a person or persons experienced in sifting, weighing and evaluating the factors involved in the grant or revocation of conditional freedom. The real problem before the parole board is one of rehabilitation, which must be measured, not by legal rules, but by the judgment of those who make it their professional business. Robinson v. Cox, 77 N.M. 55, 419 P.2d 253 (1966) (decided under prior law).

Release on parole is act of clemency or grace resting entirely within the discretion of the parole board. Robinson v. Cox, 77 N.M. 55, 419 P.2d 253 (1966) (decided under prior law).

Paroled prisoner is not discharged from custody of prison authorities, but is at all times under the complete custody and control, and subject to the orders of the parole board. Robinson v. Cox, 77 N.M. 55, 419 P.2d 253 (1966) (decided under prior law).

No constitutional right to hearing prior to revocation. — A prisoner on probation has no constitutional right to a hearing prior to its revocation, and any such right depends entirely upon the existence of a statutory provision. Robinson v. Cox, 77 N.M. 55, 419 P.2d 253 (1966) (decided under prior law).

No right to counsel at revocation hearing. — Neither due process nor the applicable statutes require that parolees be provided with appointed counsel or represented by employed counsel when they appear before the parole board in a revocation hearing. Robinson v. Cox, 77 N.M. 55, 419 P.2d 253 (1966) (decided under prior law).

Scope of evidence at parole revocation hearing. — A parole revocation hearing cannot be restricted to legal evidence derived from examinations and cross-examinations of witnesses in open hearing. Any information of probative value, even though it may be in the form of letters, reports of probation officers and similar matter, which can help the board in making its determination may properly be considered. Robinson v. Cox, 77 N.M. 55, 419 P.2d 253 (1966) (decided under prior law).

Effect of considering hearsay evidence. — The consideration of the board of hearsay evidence does not invalidate the action taken. Robinson v. Cox, 77 N.M. 55, 419 P.2d 253 (1966) (decided under prior law).

Law reviews. — For note, "Due Process, Equal Protection and the New Mexico Parole System," see 2 N.M.L. Rev. 234 (1972).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 59 Am. Jur. 2d Pardon and Parole §§ 17, 32, 45, 76.

Liability of governmental officer or entity for failure to warn or notify of release of potentially dangerous individual from custody, 12 A.L.R.4th 722.

Probation officer's liability for negligent supervision of probationer, 44 A.L.R.4th 638.

United States Parole Commission Guidelines for federal prisoners, 61 A.L.R. Fed. 135.

16A C.J.S. Constitutional Law §§ 262, 505; 31A C.J.S. Evidence § 159 et seq.; 39 C.J.S. Habeas Corpus § 77.

31-21-25.1. Parole board; additional powers and duties; medical and geriatric parole program.

A. The parole board shall:

(1) establish rules and implement a "medical and geriatric parole program", in cooperation with the corrections department, by December 31, 1994;

(2) determine the appropriate level of supervision following parole and develop a comprehensive discharge plan for geriatric, permanently incapacitated and terminally ill inmates released under the medical and geriatric parole program;

(3) report annually to the corrections department and the legislature the number of applications for medical and geriatric parole it receives, the nature of the illnesses, disease or condition of applicants, the reasons for denial of applications for medical or geriatric parole and the number of persons on medical and geriatric parole who have been returned to the custody of the department and the reasons for their return;

(4) make a determination whether to grant geriatric or medical parole within thirty days of receipt of an application and supporting documentation from the corrections department;

(5) at the time of release, prescribe terms and conditions of geriatric or medical parole, including medical supervision and intervals of periodic medical evaluations; and

(6) authorize the release of geriatric, permanently incapacitated and terminally ill inmates upon terms and conditions as the board may prescribe, if the board determines that an inmate is geriatric, permanently incapacitated or terminally ill, parole is not incompatible with the welfare of society and the inmate is not a first degree murder felon.

B. Inmates who have not served their minimum sentences may be considered eligible for parole under the medical and geriatric parole program. Medical and geriatric parole consideration shall be in addition to any other parole for which a geriatric, permanently incapacitated or terminally ill inmate may be eligible.

C. When considering an inmate for medical or geriatric parole, the parole board may request that certain medical evidence be produced or that reasonable medical examinations be conducted.

D. The parole term of a geriatric, permanently incapacitated or terminally ill inmate on medical or geriatric parole shall be for the remainder of the inmate's sentence, without diminution of sentence for good behavior.

E. When determining an inmate's eligibility for geriatric or medical parole, the parole board shall consider the following criteria concerning the inmate's:

(1) age;

(2) severity of illness, disease or infirmities;

(3) comprehensive health evaluation;

(4) institutional behavior;

(5) level of risk for violence;

(6) criminal history; and

(7) alternatives to maintaining geriatric or medical inmates in traditional settings.

F. As used in this section:

(1) "geriatric inmate" means a male or female offender who:

(a) is under sentence to or confined in a prison or other correctional institution under the control of the corrections department;

(b) is sixty-five years of age or older;

(c) suffers from a chronic infirmity, illness or disease related to aging; and

(d) does not constitute a danger to himself or society;

(2) "permanently incapacitated inmate" means a male or female offender who:

(a) is under sentence to or confined in a prison or other correctional institution under the control of the corrections department;

(b) by reason of an existing medical condition, is permanently and irreversibly physically incapacitated; and

(c) does not constitute a danger to himself or to society; and

(3) "terminally ill inmate" means a male or female offender who:

(a) is under sentence or confined in a prison or other correctional institution under the control of the corrections department;

(b) has an incurable condition caused by illness or disease that would, within reasonable medical judgment, produce death within six months; and

(c) does not constitute a danger to himself or society.

History: Laws 1994, ch. 21, § 3.

ANNOTATIONS

Cross references. — As to administration of medical and geriatric parole program by department, see 31-21-17.1 NMSA 1978.

31-21-26. Transitional provisions.

A. The records, property, equipment and unencumbered and unexpended funds previously belonging to or appropriated for the use of the former parole hearing board shall become, on the effective date of the Parole Board Act, a part of the property of the parole board.

B. The provisions of the Parole Board Act [31-21-22 to 31-21-26 NMSA 1978] apply to all persons who, on the effective date, are on parole or eligible to be placed on parole with the same effect as if that act had been in effect at the time they were placed on parole or became eligible to be placed on parole.

History: 1953 Comp., § 41-17-41, enacted by Laws 1975, ch. 194, § 5.

31-21-27. Reentry drug court program for inmates; district court supervision.

A. The corrections department shall develop criteria regarding the eligibility of an inmate for early release into a reentry drug court program, including requirements that the inmate:

(1) was incarcerated following conviction for a nonviolent, drug-related offense; and

(2) is within eighteen months of release or eligibility for parole.

B. The corrections department may petition a district court that operates a reentry drug court program to accept limited jurisdiction of an inmate. If the district court grants the petition, the district court shall have jurisdiction over the inmate and the corrections department shall retain its jurisdiction over the inmate pursuant to the terms of the inmate's judgment and sentence.

C. The provisions of this section shall not be interpreted to change the jurisdictional authority of the sentencing court, pursuant to the provisions of the Rules of Criminal Procedure for the District Courts, as promulgated by the supreme court. The jurisdictional authority conferred upon a reentry drug court pursuant to this section is limited to acceptance and supervision of a released inmate by the reentry drug court program.

D. The provisions of this section shall not be interpreted to limit the statutory authority vested in the adult probation and parole division of the corrections department, pursuant to the provisions of the Probation and Parole Act [31-21-3 NMSA 1978].

History: Laws 2001, ch. 35, § 1.

ANNOTATIONS

Cross references. — For Rules of Criminal procedure for the District Courts, see Rule 5-101 NMRA et seq.

Effective dates. — Laws 2001, ch. 35, § 2 makes the act effective on July 1, 2001.

ARTICLE 22
Crime Victims Reparations

31-22-1. Short title.

Chapter 31, Article 22 NMSA 1978 may be cited as the "Crime Victims Reparation Act".

History: Laws 1981, ch. 325, § 1; 1993, ch. 207, § 1.

ANNOTATIONS

The 1993 amendment, effective June 18, 1993, substituted "Chapter 31, Article 22 NMSA 1978" for "This act".

Compiler's notes. — Laws 1990, ch. 10, § 4 repeals Laws 1981, ch. 325, § 26, as amended, which had provided for delayed repeals of sections of this article on specified dates.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21A Am. Jur. 2d Criminal Law § 1321 et seq.

Statutes providing for governmental compensation for victims of crime, 20 A.L.R.4th 63.

31-22-2. Purpose.

The purpose of the Crime Victims Reparation Act [Chapter 31, Article 22 NMSA 1978] is to protect the citizens of New Mexico from the impact of crime and to promote a stronger criminal justice system through the encouragement of all citizens to cooperate with law enforcements efforts. Implementation of the Crime Victims Reparation Act will promote the public health, welfare and safety of the citizens of New Mexico.

History: Laws 1981, ch. 325, § 2.

31-22-3. Definitions.

As used in the Crime Victims Reparation Act [31-22-1 NMSA 1978]:

A. "child" means an unmarried person who is under the age of majority and includes a stepchild and an adopted child;

B. "collateral source" includes benefits for economic loss otherwise reparable under the Crime Victims Reparation Act which the victim or claimant has received or which are readily available to him from:

(1) the offender;

(2) social security, medicare and medicaid;

(3) workers' compensation;

(4) proceeds of a contract of insurance payable to the victim;

(5) a contract providing prepaid hospital and other health care services or benefits for disability, except for the benefits of any life insurance policy;

(6) applicable indigent funds; or

(7) cash donations;

C. "commission" means the crime victims reparation commission;

D. "dependents" means those relatives of the deceased or disabled victim who are more than fifty percent dependent upon the victim's income at the time of his death or disability and includes the child of a victim born after his death or disability;

E. "family relationship group" means any person related to another person within the fourth degree of consanguinity or affinity;

F. "injury" means actual bodily harm or disfigurement and includes pregnancy and extreme mental distress. For the purposes of this subsection, "extreme mental distress" means a substantial personal disorder of emotional processes, thought or cognition that impairs judgment, behavior or ability to cope with the ordinary demands of life;

G. "permanent total disability" means loss of both legs or arms, loss of one leg and one arm, total loss of eyesight, paralysis or other physical condition permanently incapacitating the worker from performing any work at any gainful occupation;

H. "relative" means a person's spouse, parent, grandparent, stepfather, stepmother, child, grandchild, brother, sister, half-brother, half-sister or spouse's parents; and

I. "victim" means:

(1) a person in New Mexico who is injured or killed by any act or omission of any other person that is a crime enumerated in Section 31-22-8 NMSA 1978;

(2) a resident of New Mexico who is injured or killed by such a crime occurring in a state other than New Mexico if that state does not have an eligible crime victims compensation program; or

(3) a resident of New Mexico who is injured or killed by an act of international terrorism, as provided in 18 U.S.C. Section 2331.

History: Laws 1981, ch. 325, § 3; 1985 (1st S.S.), ch. 5, § 1; 1989, ch. 246, § 1; 1990, ch. 10, § 1; 1993, ch. 207, § 2; 1997, ch. 268, § 1; 2001, ch. 214, § 1.

ANNOTATIONS

The 1989 amendment, effective June 16, 1989, made a minor stylistic change in Subsection B(3), substituted the present language of Subsection B(4) for "wage continuation programs of any employer", and added all of the language of Subsection B(6) following "disability".

The 1990 amendment, effective May 16, 1990, in Subsection H, inserted the paragraph designation "(1)", substituted "person that" for "person which", added "or" at the end, and added Paragraph (2).

The 1993 amendment, effective June 18, 1993, added Paragraphs (7) and (8) to Subsection B, making related grammatical changes.

The 1997 amendment, effective July 1, 1997, added Paragraph H(3) and made a stylistic change.

The 2001 amendment, effective June 15, 2001, deleted former Paragraph B(4), which read "any program of any employer for continuation of wages in the event of the illness or injury of an employee" and renumbered the remaining paragraphs accordingly; added Subsection G and renumbered the remaining subsections accordingly; and in Subsection H, deleted "minor" preceding "brother", "sister", "half-brother", and "half-sister".

31-22-4. Crime victims reparation commission created; membership; reimbursement.

A. There is created in the executive branch of government a "crime victims reparation commission" which shall consist of five members appointed by the governor for staggered terms of four years each. Not more than three of the members shall belong to the same political party. One of the members shall be an attorney licensed to practice law in the state, one of the members shall be a physician licensed to practice medicine in the state and one of the members shall be a representative of a law enforcement agency. In making the initial appointments, the governor shall appoint three members for a term of two years each and two members for a term of four years each. Thereafter, appointments shall be for a term of four years. The governor may appoint a person to fill a vacancy for the balance of the unexpired term.

B. The members of the commission shall annually elect from their membership a chairman and vice chairman.

C. Members of the commission, while in the actual performance of their duties pursuant to the Crime Victims Reparation Act [Chapter 31, Article 22 NSMA 1978], shall be reimbursed as provided in the Per Diem and Mileage Act [10-8-1 to 10-8-8 NMSA 1978].

D. The commission may employ a director and such staff as is necessary to perform its functions.

History: Laws 1981, ch. 325, § 4; 1989, ch. 246, § 2; 1993, ch. 207, § 3.

ANNOTATIONS

The 1989 amendment, effective June 16, 1989, inserted "a director and" in Subsection D.

The 1993 amendment, effective June 18, 1993, deleted "and" following "practice law in the state" and added the language beginning "and one of the members" to the end, in the third sentence of Subsection A.

Appropriations. — Laws 2000 (2nd S.S.), ch. 10, § 2P appropriates $175,000 from the general fund to the crime victims reparation commission for domestic violence against women programs.

31-22-5. Claims; review; hearings and evidence.

A. Where an application is made to the commission pursuant to the Crime Victims Reparation Act [Chapter 31, Article 22 NMSA 1978], the director of the commission shall determine if a claim for a reparation award is eligible for consideration pursuant to the provisions of the Crime Victims Reparation Act. All claims arising from the injury or death of a person as a direct result of a single crime shall be considered together by a single staff member. When the director determines that a claim for a reparation award is not eligible for consideration, the director shall notify the commission of his determination at the next regular meeting of the commission. If the commission concurs with the director's determination that a claim for a reparation award is not eligible for consideration, the claimant shall be notified that his claim was denied. When the director determines that a claim for a reparation award is eligible for consideration, the director shall order that the claim be processed and he shall assign the claim to a member of the commission staff.

B. The staff member to whom such claim is assigned shall examine the papers filed in support of the claim and shall cause an investigation to be conducted into the validity of the claim. The investigation may include, but not be limited to, an examination of police, court and official records and reports concerning the crime and an examination of medical and hospital reports relating to the injury or death upon which the claim is based and other benefits received or to be received.

C. The staff member to whom a claim is assigned may make his recommendation regarding the claim on the basis of the papers filed in support thereof and the report of the investigation of the claim. If the staff member is unable to make a recommendation upon the basis of the papers and report, he shall present the claim to the commission without a recommendation.

D. When the claim has been processed, the director shall assign the claim to a commission member.

E. After examining the papers filed in support of the claim and the report of investigation and after a hearing, if any, the commission member to whom the claim

was assigned shall make a recommendation to the entire commission either granting an award or denying the claim.

F. A quorum of the commission shall act upon the recommendation of the commission member. A quorum of the commission, by majority vote, may affirm, increase, decrease or deny the award.

G. Upon a request from a victim or claimant, the commission shall grant the victim or claimant an informal appearance at a commission meeting. The purpose of the informal appearance shall be for the victim or claimant to present any evidence or information in support of his claim.

H. A formal hearing may be called for by a majority of the commission. The purpose of the hearing shall be for the commission to hear evidence to assist it in making a determination regarding a claim.

I. At the hearing, the claimant and the commission's legal advisor shall be entitled to appear and be heard, and any other person may appear and be heard who has satisfied the commission member that he has a substantial interest in the proceedings. In any case in which the claimant is a child or is mentally incompetent, the application may be made on behalf of such claimant by his parent, guardian, custodian or any other person authorized to administer his estate.

J. Where any person is entitled to appear and be heard, that person may appear in person or by his attorney. All hearings shall be open to the public unless in a particular case the member of the commission assigned to the claim determines that the hearing or a portion thereof shall be held in private, having regard to the fact that the offender has not been convicted or in the interest of the victim of an alleged sexual offense.

K. Every person appearing under the provisions of this section shall have the right to produce evidence and to cross-examine witnesses. The commission member may receive in evidence any statement, document, information or matter that may, in his opinion, contribute to the functions of the hearing under the Crime Victims Reparation Act, whether or not such statement, document, information or other matter would be admissible in a court of law.

History: Laws 1981, ch. 325, § 5; 1989, ch. 246, § 3; 1991, ch. 36, § 1; 1993, ch. 207, § 4.

ANNOTATIONS

The 1989 amendment, effective June 16, 1989, in Subsection H substituted "A quorum of the commission" for "The entire commission" in the first sentence and "The commission" in the second sentence, and deleted the former third sentence which read: "No decision shall be valid unless a majority of the commission members are in agreement on the decision."

The 1991 amendment, effective July 1, 1991, in Subsection A, in the first sentence, substituted "director" for "chairman" and "to a member" for "to himself or to another member" and added "staff", in the second sentence, and, in Subsections B and C, substituted "staff member" for "commission member"; in the second sentence of Subsection C substituted "make a" for "decide his" and added the language beginning with "present the claim"; deleted former Subsections D to F pertaining to the appearance of a claimant at the hearings; added Subsection D; redesignated former Subsections G and H as Subsections E and F; and added Subsections G to K.

The 1993 amendment, effective June 18, 1993, in Subsection A, substituted the language beginning "determine if a claim" for "assign the claim to a member of the commission staff" at the end of the first sentence and added the last three sentences; in Subsection B, substituted "may" for "shall" before "include" in the second sentence; and in Subsection D, deleted "and a claim summary has been prepared" after "processed".

31-22-6. Medical examination; attorneys' fees; penalty.

A. The commission may appoint an impartial physician, licensed in New Mexico, to examine any person making an application for reparation under the Crime Victims Reparation Act [Chapter 31, Article 22 NMSA 1978], and the fees for the examination shall be paid from funds appropriated for the commission's administrative expenses.

B. None of the appropriation in this act [31-22-1 to 31-22-21 NMSA 1978] shall be used to pay attorney fees either as part of or in addition to awards of reparation. In cases where no reparation is awarded, attorney fees shall not be paid.

History: Laws 1981, ch. 325, § 6.

31-22-7. Eligibility for reparation.

A. In the event any person is injured or killed by any act or omission of any other person coming within the criminal jurisdiction of the state after the effective date of the Crime Victims Reparation Act, which act or omission includes a crime enumerated in Section 31-22-8 NMSA 1978, and upon application for reparation, the commission may award reparation in accordance with the Crime Victims Reparation Act [Chapter 31, Article 22 NMSA 1978]:

(1) to the victim;

(2) in the case of the victim's death, to or for the benefit of any one or more of the deceased victim's dependents; or

(3) to any individual who voluntarily assumes funeral or medical expenses of the victim.

B. For the purpose of the Crime Victims Reparation Act, a person shall be deemed to have intentionally committed an act or omission notwithstanding that by reason of age, insanity, drunkenness or otherwise he was legally incapable of forming a criminal intent.

C. In determining whether to make an order under this section, the commission may consider any circumstances it determines to be relevant. The commission shall consider the behavior of the victim and whether, because of provocation or otherwise, the victim bears responsibility for the crime that caused his injury or death and shall reduce the amount of reparation in accordance with its assessment of the degree of responsibility attributable to the victim.

D. An order may be made under this section whether or not any person is prosecuted for or convicted of a crime enumerated in Section 31-22-8 NMSA 1978, provided an arrest has been made or the act or omission constituting such a crime has been reported to the police in a reasonable time. No order may be made under this section unless the commission finds that:

(1) the crime did occur;

(2) the injury or death of the victim resulted from the crime; and

(3) the claimant or victim fully cooperated with the appropriate law enforcement agencies.

E. Upon application from the district attorney of the appropriate district, the commission may suspend proceedings under the Crime Victims Reparation Act for such period as it deems desirable on the ground that a prosecution for the crime has commenced or is imminent.

History: Laws 1981, ch. 325, § 7; 1993, ch. 207, § 5.

ANNOTATIONS

The 1993 amendment, effective June 18, 1993, substituted "31-22-8 NMSA 1978" for "9 of that act" in the introductory language of Subsection A and for "9 of the Crime Victims Reparation Act" in the first sentence of Subsection D; and made stylistic changes in Subsection A(3) and in Subsection E.

Compiler's notes. — The language "the effective date of the Crime Victims Reparation Act" in the introductory language of Subsection A refers to the effective date of Laws 1981, ch. 207, § 5, which is July 1, 1981.

31-22-8. Crimes enumerated.

A. The crimes to which the Crime Victims Reparation Act [31-22-1 NMSA 1978] applies and for which reparation to victims may be made are the following enumerated offenses and all other offenses in which any enumerated offense is necessarily included:

(1) arson resulting in bodily injury;

(2) aggravated arson;

(3) aggravated assault or aggravated battery;

(4) dangerous use of explosives;

(5) negligent use of a deadly weapon;

(6) murder;

(7) voluntary manslaughter;

(8) involuntary manslaughter;

(9) kidnapping;

(10) criminal sexual penetration;

(11) criminal sexual contact of a minor;

(12) homicide by vehicle or great bodily injury by vehicle, as provided in Section 66-8-101 NMSA 1978;

(13) abandonment or abuse of a child;

(14) aggravated indecent exposure, as provided in Section 30-9-14.3 NMSA 1978; and

(15) aggravated stalking, as provided in Section 30-3A-3.1 NMSA 1978.

B. No award shall be made for any loss or damage to property.

History: Laws 1981, ch. 325, § 8; 1983, ch. 319, § 1; 1989, ch. 246, § 4; 1990, ch. 10, § 2; 1997, ch. 268, § 2; 2001, ch. 214, § 2.

ANNOTATIONS

The 1989 amendment, effective June 16, 1989, substituted "kidnaping" for "kidnapping" in Subsection A(9), and added Subsection A(13).

The 1990 amendment, effective May 16, 1990, inserted "as defined in Section 66-8-101 NMSA 1978" in Paragraph (12) of Subsection A.

The 1997 amendment, effective July 1, 1997, added Paragraphs A(14) and A(15) and made stylistic changes.

The 2001 amendment, effective June 15, 2001, rewrote Paragraph A(15), which formerly read "stalking, as provided in Section 30-3A-3 NMSA 1978, when the offender has at least one prior conviction for stalking".

31-22-9. Award of reparation.

The commission may order payment of reparation for:

A. expenses actually and reasonably incurred as a result of the victim's injury or death;

B. loss to the victim of earning power as a result of total or partial incapacity;

C. any other pecuniary loss directly resulting from the victim's injury or death which the commission determines to be reasonable and proper; and

D. any expenses incurred for rehabilitation services provided to a victim of child abuse or neglect, including child sexual abuse, but awards made pursuant to this subsection shall be made directly to the provider of the rehabilitation services for payment of those services.

History: Laws 1981, ch. 325, § 9; 1989, ch. 246, § 5.

ANNOTATIONS

The 1989 amendment, effective June 16, 1989, added Subsection D.

31-22-10. Relationship to offender.

Except for amounts payable pursuant to Subsection D of Section 31-22-9 NMSA 1978, no reparation shall be awarded if the victim:

A. was a member of the offender's family relationship group where payment of reparation would unjustly enrich the offender; or

B. was an accomplice of the offender.

History: Laws 1981, ch. 325, § 10; 1989, ch. 246, § 6; 1990, ch. 10, § 3.

ANNOTATIONS

The 1989 amendment, effective June 16, 1989, added "Except for amounts payable pursuant to Subsection D of Section 31-22-9 NMSA 1978" at the beginning of the undesignated introductory paragraph, and added all of the language of Subsection B following "group".

The 1990 amendment, effective May 16, 1990, deleted former Subsection A which read "is a relative of the offender" and redesignated former Subsections B and C as present Subsections A and B.

31-22-11. No award to certain confined persons.

No award shall be made pursuant to the provisions of the Crime Victims Reparation Act [Chapter 31, Article 22 NMSA 1978] to a victim injured while confined in a county or municipal jail, penitentiary or other correctional facility.

History: Laws 1981, ch. 325, § 11.

31-22-12. Recovery from offender.

Whenever an award of reparation is made pursuant to the Crime Victims Reparation Act [Chapter 31, Article 22 NMSA 1978], the state is, upon payment of the award, subrogated to the right of action of the victim or his dependents against the person responsible for the injury or death and may bring an action against such person for the amount of the reparation paid.

History: Laws 1981, ch. 325, § 12.

31-22-13. Terms of order.

Any order for the payment of reparation under the Crime Victims Reparation Act [Chapter 31, Article 22 NMSA 1978] may be made on such terms as the commission deems appropriate. The order may provide for apportionment of reparation or for the holding of reparation or any part thereof in trust and for the payment of reparation in a lump sum or in periodic installments. All such orders shall contain words clearly informing the claimant that all awards and orders for reparation under the Crime Victims Reparation Act are subject to the making of an appropriation by the legislature to pay the claim.

History: Laws 1981, ch. 325, § 13.

31-22-14. Limitations on award; collateral recovery; preliminary award.

A. No order for the payment of reparation shall be made unless application has been made within two years after the date of the injury or death and the injury or death

was the result of a crime enumerated in Section 31-22-8 NMSA 1978 that had been reported to the police within thirty days after its occurrence unless a longer period is allowed pursuant to Subsection F of this section. In no event shall reparation be given unless application has been made within two years after the injury or death, except for minors who are victims of criminal activity under the provisions of Section 30-6-1 NMSA 1978, regarding abandonment or abuse of a child, Section 30-9-11 NMSA 1978, regarding criminal sexual penetration, or Section 30-9-13 NMSA 1978, regarding criminal sexual contact of a minor. The date of incident for minors who are victims of these types of criminal activity shall be the date the victim attains the age of eighteen years or the date that the criminal activity is reported to a law enforcement agency, whichever occurs first.

B. No award of reparation shall be in excess of twenty thousand dollars ($20,000) per victim except that the commission may award up to an additional thirty thousand dollars ($30,000) for extraordinary pecuniary losses, if the personal injury to a victim is catastrophic and results in a permanent total disability. The extraordinary losses compensated may include:

(1) loss of wages;

(2) the cost of home health care;

(3) the cost of making a home or automobile accessible;

(4) the cost of training in the use of special application; or

(5) job training.

C. Except as provided by Subsection E of this section, the commission shall deduct from any reparation awarded any payments received from a collateral source or from the United States or the state or any of its political subdivisions for injury or death subject to reparation under the Crime Victims Reparation Act [31-22-1 NMSA 1978]. If the claimant receives an award of reparation from the commission and also receives payment as set forth in the preceding sentence for which no deduction was made, the claimant shall refund to the state the lesser of the amount of reparation paid or the sums not so deducted.

D. If the claimant receives an award of reparation from the commission and also receives an award pursuant to a civil judgment arising from a criminal occurrence for which a reparation award was paid, the claimant shall refund to the state the amount of the reparation paid to him. The commission may negotiate a reasonable settlement regarding repayment of the reparation award if special circumstances exist.

E. If it appears that a final award of reparation will be made by the commission, a preliminary award may be authorized by the director of the commission or the

commission's designee when the commission chairman concurs. The amount of the preliminary award shall be deducted from any final award made by the commission.

F. The commission may grant a waiver to the requirement in Subsection A of this section that a crime be reported to the police within thirty days of its occurrence for:

(1) a victim of domestic violence or sexual assault if reported to the police within one hundred eighty days of the occurrence; or

(2) a crime against a child that was reported within thirty days of its occurrence to the children, youth and families department, a domestic violence or sexual assault service provider, a teacher or a health care provider; provided that a police report shall be filed before the commission approves payment.

History: Laws 1981, ch. 325, § 14; 1989, ch. 246, § 7; 1991, ch. 37, § 1; 1993, ch. 207, § 6; 1997, ch. 268, § 3; 2001, ch. 214, § 3.

ANNOTATIONS

The 1989 amendment, effective June 16, 1989, added "preliminary award" to the catchline; in Subsection A made a minor stylistic change in the first sentence and added all of the language of that sentence beginning with "unless", and added the second and third sentences; in Subsection B substituted "twenty thousand dollars ($20,000)" for "twelve thousand five hundred dollars ($12,500)"; in Subsection C added "Except as provided by Subsection D of this section" at the beginning of the first sentence; and added Subsection D.

The 1991 amendment, effective July 1, 1991, in Subsection A, added the exception at the end of the third sentence and added the last sentence.

The 1993 amendment, effective June 18, 1993, substituted a reference to 30-9-13 NMSA 1978 for a reference to 30-9-14 NMSA 1978 near the end of the third sentence of Subsection A; and added "when the commission chairman concurs" to the end of the first sentence of Subsection D.

The 1997 amendment, effective July 1, 1997, in Subsection A, substituted "two year" for "one year" near the beginning of the first sentence, and deleted language at the end of the first sentence and deleted the former second sentence relating to application allowed for good cause and providing for regulations specifying good cause; added Subsection D and redesignated former Subsection D as Subsection E, and made stylistic changes in Subsections A and C.

The 2001 amendment, effective June 15, 2001, inserted "unless a longer period is allowed pursuant to Subsection F of this section" in Subsection A; added the exception and Paragraphs B(1) through B(5) in Subsection B; deleted "not to exceed three

thousand five hundred dollars ($3,500)" following "preliminary award" in Subsection E; and added Subsection F.

31-22-15. Exemption from execution.

No reparation payable under the Crime Victims Reparation Act [Chapter 31, Article 22 NMSA 1978] shall be, prior to its actual receipt by the victim or dependents entitled thereto or their legal representatives, assignable or subject to garnishment, execution, attachment or other process whatsoever, including process to satisfy an order or judgment for support or alimony.

History: Laws 1981, ch. 325, § 15.

ANNOTATIONS

Cross references. — For rules governing garnishment and writs of execution in the district, magistrate, and metropolitan courts, see Rules 1-065.1, 2-801, and 3-801 NMRA, respectively.

For form for claim of exemptions on executions, see Rule 4-803 NMRA.

For form for order on claim of exemption and order to pay in execution proceedings, see Rule 4-804 NMRA.

For form for application for writ of garnishment and affidavit, see Rule 4-805 NMRA.

For form for notice of right to claim exemptions from execution, see Rule 4-808A NMRA.

For form for claim of exemption from garnishment, see Rule 4-809 NMRA.

31-22-16. Survival or abatement.

The rights to reparation created by the Crime Victims Reparation Act [Chapter 31, Article 22 NMSA 1978] are personal and shall not survive the death of the victim or dependents entitled thereto; provided that if such death occurs after an application for reparation has been filed with the commission, the proceeding shall not abate, but may be continued by the legal representative of the decedent's estate.

History: Laws 1981, ch. 325, § 16.

31-22-17. Rule-making powers.

In performance of its functions the commission may adopt, amend and repeal rules and regulations in accordance with the State Rules Act [Chapter 14, Article 4 NMSA 1978], not inconsistent with the Crime Victims Reparation Act [Chapter 31, Article 22 NMSA 1978], prescribing procedures to be followed in the filing of applications and the

proceedings under the Crime Victims Reparation Act and such other matters as the commission deems appropriate. Unless otherwise provided by law, no regulation affecting any person or agency outside the commission shall be adopted, amended or repealed without a public hearing on the proposed action before the commission or a hearing officer designated by them. Notice of the subject matter of the regulation, the action proposed to be taken, the time and place of the hearing, the manner in which interested persons may present their views and the method by which copies of the proposed regulation, proposed amendment or repeal of an existing regulation may be obtained shall be published once at least thirty days prior to the hearing date in a newspaper of general circulation and mailed at least thirty days prior to the hearing date to all persons who have made a written request for advance notice of hearing. All rules and regulations shall be filed in accordance with the State Rules Act. In filing the rule or regulation with the state records center, the commission shall certify that the record contains arguments presented both for and against each rule or regulation promulgated.

History: Laws 1981, ch. 325, § 17.

31-22-18. Confidentiality of records, reports and claim files.

Any record or report acquired by the commission, the confidentiality of which is protected by law, rule or regulation, shall be disclosed only under the same terms and conditions which protected its confidentiality prior to such acquisition. The claim file, which contains confidential reports, records and personal information, shall not be released.

History: Laws 1981, ch. 325, § 18; 1993, ch. 207, § 7; 2001, ch. 214, § 4.

ANNOTATIONS

The 1993 amendment, effective June 18, 1993, substituted "reports and claim files" for "and reports" in the catchline and added the second sentence.

The 2001 amendment, effective June 15, 2001, substituted "confidential reports, records and personal information" for "the victim's name, address, telephone number and other personal information regarding the victim" in the last sentence.

31-22-19. Annual report.

At least thirty days prior to the convening of each regular session of the legislature, the commission shall transmit to the governor, the department of finance and administration and the legislature a report of its activities under the Crime Victims Reparation Act [Chapter 31, Article 22 NMSA 1978]. The department of finance and administration shall, within five days after the opening of the legislative session, transmit the report, together with a tabulation of the total amount awarded and the amount of any judgments collected, to the senate finance committee and to the house appropriations and finance committee or any successor committees.

History: Laws 1981, ch. 325, § 19; 1989, ch. 246, § 8; 1993, ch. 207, § 8.

ANNOTATIONS

The 1989 amendment, effective June 16, 1989, deleted "the name of each applicant," following "including" in the first sentence.

The 1993 amendment, effective June 18, 1993, deleted "including a brief description of the facts in each case and the amount, if any, of reparation awarded" from the end of the first sentence.

31-22-20. Penalty.

Any person who knowingly makes a false claim or a false statement in connection with a claim filed pursuant to the Crime Victims Reparation Act [Chapter 31, Article 22 NMSA 1978] shall be guilty of a fourth degree felony and for conviction thereof shall:

A. be punished by imprisonment in the state penitentiary for a determinate term of not less than one year nor more than five years; or by the payment of a fine not to exceed five thousand dollars ($5,000) or both such imprisonment and fine in the discretion of the court; and

B. forfeit any reparation paid pursuant to the Crime Victims Reparation Act.

History: Laws 1981, ch. 325, § 20.

31-22-21. Crime victims reparation fund created; purposes.

A. There is created in the state treasury the "crime victims reparation fund".

B. Money in the crime victims reparation fund may be expended by the commission to:

(1) pay any award of reparation to victims made pursuant to the Crime Victims Reparation Act [Chapter 31, Article 22 NMSA 1978];

(2) pay costs and expenses including staff salaries and expenses incurred in carrying out the provisions of the Crime Victims Reparation Act; and

(3) contract with one or more attorneys or law firms on a per hour basis to provide legal services to the commission.

C. The provisions of this section are effective July 1, 1990.

History: Laws 1981, ch. 325, § 21; 1989, ch. 324, § 24.

ANNOTATIONS

The 1989 amendment, effective July 1, 1990, in Subsection A, inserted "in the state treasury" and deleted the former second sentence which read " The fund and any income from the fund shall be held in trust, deposited in a segregated account and invested by the department of finance and administration with the prior approval of the state board of finance".

31-22-22. Distribution of money received as result of crime; escrow account.

A. Every firm, person, corporation, association or other legal entity contracting with a person or the representative or assignee of any person charged or convicted of a violent crime in this state, with respect to the reenactment of the crime in a movie, book, magazine article, tape recording, phonograph record, radio or television presentation or live entertainment or with respect to the expression of the accused or convicted person's thoughts, feelings, opinions or emotions regarding the crime shall submit a copy of the contract to the crime victims reparation commission and pay to the commission any money that would otherwise by terms of such contract be owing to the accused or convicted person or his representatives. The commission shall deposit the money in an escrow account.

B. Money placed in an escrow account pursuant to this section shall be available to satisfy a civil judgment against the convicted person or the accused person, if eventually convicted of the crime, in favor of a victim of the crime if the court in which the civil judgment is taken finds that the judgment is for damages incurred by the victim caused by the commission of the crime.

C. Upon dismissal of charges or acquittal of any accused person, the commission shall immediately pay over to the accused person the money in the escrow account.

D. For purposes of this section, a person found not guilty by reason of insanity at the time of commission of an offense shall be deemed to be a convicted person.

E. Notwithstanding the provisions of Subsections A through C of this section, the commission shall make payments from the escrow account to any person accused or convicted of a crime upon the order of a court of competent jurisdiction after a showing by such person that the money shall be used for the exclusive purpose of retaining legal representation at any stage of the criminal proceedings against such person, including the appeals process.

F. Upon a showing by any accused or convicted person that five years have elapsed from the establishment of the escrow account, that any claims brought pursuant to this section have been disposed of and that no such claims are pending against him, the commission shall immediately pay over to such accused or convicted person any money in the escrow account.

G. Any action taken by any person accused or convicted of a crime, whether by way of execution of a power of attorney, creation of corporate entities or otherwise to defeat the purpose of this section, shall be null and void as against the public policy of the state.

History: 1978 Comp., § 31-22-22, enacted by Laws 1983, ch. 321, § 1.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — Validity, construction, and application of "Son of Sam" laws regulating or prohibiting distribution of crime-related book, film, or comparable revenues to criminals, 60 A.L.R.4th 1210.

31-22-23. Authority to compel production.

The commission has the power to compel the production of books, records and papers pertinent to any investigation or hearing authorized by the Crime Victims Reparation Act [Chapter 31, Article 22 NMSA 1978] and can seek enforcement of any subpoena so issued through the district court in the county in which the custodian of the document is located to be held in camera.

History: 1978 Comp., § 31-22-23, enacted by Laws 1989, ch. 246, § 9.

31-22-24. Repealed.

History: Laws 1993, ch. 207, § 10; 2000, ch. 4, § 3; repealed Laws 2005, ch. 208, § 27.

ANNOTATIONS

Repeals. — Laws 2005, ch. 208, § 27 repeals 31-22-24 NMSA 1978, relating to termination of the crime victims reparation commission, effective June 17, 2005. For provisions of former section, see 2000 Replacement Pamphlet.

ARTICLE 23
Crime Victims Immunity

31-23-1. Civil action; crime; damages; immunity.

No person shall be liable to a plaintiff in any civil action for damages if by a preponderance of the evidence the damages were incurred as a consequence of:

A. the commission, attempted commission or flight subsequent to the commission of a crime by the plaintiff; and

B. the use of force or deadly force by the defendant which is justified pursuant to common law or the law of the state.

History: Laws 1985, ch. 152, § 1.

ARTICLE 24
Crime Victims' and Witnesses' Bill of Rights

(Repealed by Laws 1994, ch. 144, § 15.)

31-24-1 to 31-24-7. Repealed.

ANNOTATIONS

Repeals. — Laws 1994, ch. 144, § 15 repeals 31-24-1 to 31-24-7 NMSA 1978, as enacted by Laws 1989, ch. 210, §§ 2, 3 and Laws 1987, ch. 19, §§ 1-7, relating to crime victims' and witnessess' bill of rights, effective January 1, 1995. For provisions of former sections, see 1994 Replacement Pamphlet. For present comparable provisions, see 31-26-1 NMSA 1978 et seq.

ARTICLE 25
Victim Counselor Confidentiality

31-25-1. Short title.

This act [31-25-1 to 31-25-6 NMSA 1978] may be cited as the "Victim Counselor Confidentiality Act".

History: Laws 1987, ch. 349, § 1.

31-25-2. Definitions.

As used in the Victim Counselor Confidentiality Act [31-25-1 to 31-25-6 NMSA 1978]:

A. "confidential communication" means any information exchanged between a victim and a victim counselor in private or in the presence of a third party who is necessary to facilitate communication or further the counseling process and which is disclosed in the course of the counselor's treatment of the victim for any emotional or psychological condition resulting from a sexual assault or family violence;

B. "victim" means a person who consults a victim counselor for assistance in overcoming adverse emotional or psychological effects of a sexual assault or family violence;

C. "victim counseling" means assessment, diagnosis and treatment to alleviate the adverse emotional or psychological impact of a sexual assault or family violence on the victim. Victim counseling includes crisis intervention;

D. "victim counseling center" means a private organization or unit of a government agency which has as one of its primary purposes the treatment of victims for any emotional or psychological condition resulting from a sexual assault or family violence; and

E. "victim counselor" means any employee or supervised volunteer of a victim counseling center or other agency, business or organization that provides counseling to victims who is not affiliated with a law enforcement agency or the office of a district attorney, has successfully completed forty hours of academic or other formal victim counseling training or has had a minimum of one year of experience in providing victim counseling and whose duties include victim counseling.

History: Laws 1987, ch. 349, § 2.

31-25-3. Confidential communications; information; privileged.

A. A victim, a victim counselor without the consent of the victim or a minor or incapacitated victim without the consent of a custodial guardian or a guardian ad litem appointed upon application of either party shall not be compelled to provide testimony or to produce records concerning confidential communications for any purpose in any criminal action or other judicial, legislative or administrative proceeding.

B. A victim counselor or a victim shall not be compelled to provide testimony in any civil or criminal proceeding that would identify the name, address, location or telephone number of a safe house, abuse shelter or other facility that provided temporary emergency shelter to the victim of the offense or occurrence that is the subject of a judicial, legislative or administrative proceeding unless the facility is a party to the proceeding.

History: Laws 1987, ch. 349, § 3.

31-25-4. Waiver.

A. A victim does not waive the protections afforded by the Victim Counselor Confidentiality Act [31-25-1 to 31-25-6 NMSA 1978] by testifying in court about the crime; provided that if the victim partially discloses the contents of a confidential communication in the course of his testimony, then either party to the action may request the court to rule that justice requires the protections of that act be waived to the extent they apply to that portion of the communication. Waiver shall apply only to the extent necessary to require any witness to respond to questions concerning the confidential communication that are relevant to the facts and circumstances of the case.

B. A victim counselor shall not have authority to waive the protections afforded to a victim under the Victim Counselor Confidentiality Act; provided that if a victim brings suit against a victim counselor or the agency, business or organization in which the victim counselor was employed or served as a volunteer at the time of the counseling relationship and the suit alleges malpractice during the counseling relationship, the victim counselor may testify or produce records regarding confidential communications with the victim without liability for those actions.

History: Laws 1987, ch. 349, § 4.

31-25-5. Interpretation.

The Victim Counselor Confidentiality Act [31-25-1 to 31-25-6 NMSA 1978] shall not be construed to relieve a victim counselor of a duty to report suspected child abuse or neglect pursuant to Section 32-1-15 NMSA 1978, to report any evidence that the victim is about to commit a crime or to limit any testimonial privileges available to any person pursuant to other provisions of law.

History: Laws 1987, ch. 349, § 5.

ANNOTATIONS

Compiler's notes. — Section 32-1-15 NMSA 1978 was repealed in 1993. For present comparable provisions, see 32A-4-3 NMSA 1978.

31-25-6. Rules.

The supreme court may adopt rules of procedure and evidence to govern and implement the provisions of the Victim Counselor Confidentiality Act [31-25-1 to 31-25-6 NMSA 1978].

History: Laws 1987, ch. 349, § 6.

ARTICLE 26
Victims of Crime

31-26-1. Short title.

Chapter 31, Article 26 NMSA 1978 may be cited as the "Victims of Crime Act".

History: Laws 1994, ch. 144, § 1; 2005, ch. 283, § 2.

ANNOTATIONS

The 2005 amendment, effective June 17, 2005, adds the statutory reference to the act.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Validity, construction, and application of state constitutional or statutory victims' bill of rights, 91 A.L.R.5th 343.

31-26-2. Purpose of act.

Recognizing the state's concern for victims of crime, it is the purpose of the Victims of Crime Act [31-26-1 to 31-26-14 NMSA 1978] to assure that:

A. the full impact of a crime is brought to the attention of a court;

B. victims of violent crimes are treated with dignity, respect and sensitivity at all stages of the criminal justice process;

C. victims' rights are protected by law enforcement agencies, prosecutors and judges as vigorously as are the rights of criminal defendants; and

D. the provisions of Article 2, Section 24 of the constitution of New Mexico are implemented in statute.

History: Laws 1994, ch. 144, § 2.

31-26-3. Definitions.

As used in the Victims of Crime Act [31-26-1 NMSA 1978]:

A. "court" means magistrate court, metropolitan court, children's court, district court, the court of appeals or the supreme court;

B. "criminal offense" means:

(1) negligent arson resulting in death or bodily injury, as provided in Subsection B of Section 30-17-5 NMSA 1978;

(2) aggravated arson, as provided in Section 30-17-6 NMSA 1978;

(3) aggravated assault, as provided in Section 30-3-2 NMSA 1978;

(4) aggravated battery, as provided in Section 30-3-5 NMSA 1978;

(5) dangerous use of explosives, as provided in Section 30-7-5 NMSA 1978;

(6) negligent use of a deadly weapon, as provided in Section 30-7-4 NMSA 1978;

(7) murder, as provided in Section 30-2-1 NMSA 1978;

(8) voluntary manslaughter, as provided in Section 30-2-3 NMSA 1978;

(9) involuntary manslaughter, as provided in Section 30-2-3 NMSA 1978;

(10) kidnapping, as provided in Section 30-4-1 NMSA 1978;

(11) criminal sexual penetration, as provided in Section 30-9-11 NMSA 1978;

(12) criminal sexual contact of a minor, as provided in Section 30-9-13 NMSA 1978;

(13) armed robbery, as provided in Section 30-16-2 NMSA 1978;

(14) homicide by vehicle, as provided in Section 66-8-101 NMSA 1978;

(15) great bodily injury by vehicle, as provided in Section 66-8-101 NMSA 1978;

(16) abandonment or abuse of a child, as provided in Section 30-6-1 NMSA 1978;

(17) stalking or aggravated stalking, as provided in the Harassment and Stalking Act [30-3A-1 to 30-3A-4 NMSA 1978];

(18) aggravated assault against a household member, as provided in Section 30-3-13 NMSA 1978;

(19) assault against a household member with intent to commit a violent felony, as provided in Section 30-3-14 NMSA 1978;

(20) battery against a household member, as provided in Section 30-3-15 NMSA 1978; or

(21) aggravated battery against a household member, as provided in Section 30-3-16 NMSA 1978;

C. "court proceeding" means a hearing, argument or other action scheduled by and held before a court;

D. "family member" means a spouse, child, sibling, parent or grandparent;

E. "formally charged" means the filing of an indictment, the filing of a criminal information pursuant to a bind-over order, the filing of a petition or the setting of a preliminary hearing;

F. "victim" means an individual against whom a criminal offense is committed. "Victim" also means a family member or a victim's representative when the individual against whom a criminal offense was committed is a minor, is incompetent or is a homicide victim; and

G. "victim's representative" means an individual designated by a victim or appointed by the court to act in the best interests of the victim.

History: Laws 1994, ch. 144, § 3; 1997, ch. 10, § 6; 2003, ch. 411, § 1.

ANNOTATIONS

The 1997 amendment, effective July 1, 1997, inserted "negligent" and "death or" in Paragraph B(1), substituted "kidnapping" for "kidnaping" in Paragraph B(10), added Paragraph B(13) and redesignated the remaining paragraphs, and added Paragraph B(17).

The 2003 amendment, effective July 1, 2003, inserted "Harassment and" in Paragraph B(17) and added Paragraphs B(18) to (21).

31-26-4. Victim's rights.

A victim shall have the right to:

A. be treated with fairness and respect for the victim's dignity and privacy throughout the criminal justice process;

B. timely disposition of the case;

C. be reasonably protected from the accused throughout the criminal justice process;

D. notification of court proceedings;

E. attend all public court proceedings the accused has the right to attend;

F. confer with the prosecution;

G. make a statement to the court at sentencing and at any post-sentencing hearings for the accused;

H. restitution from the person convicted of the criminal offense that caused the victim's loss or injury;

I. information about the conviction, sentencing, imprisonment, escape or release of the accused;

J. have the prosecuting attorney notify the victim's employer, if requested by the victim, of the necessity of the victim's cooperation and testimony in a court proceeding that may necessitate the absence of the victim from work for good cause;

K. promptly receive any property belonging to the victim that is being held for evidentiary purposes by a law enforcement agency or the prosecuting attorney, unless there are compelling evidentiary reasons for retention of the victim's property; and

L. be informed by the court at a sentencing proceeding that the offender is eligible to earn meritorious deductions from the offender's sentence and the amount of meritorious deductions that may be earned by the offender.

History: Laws 1994, ch. 144, § 4; 1999, ch. 238, § 6.

ANNOTATIONS

The 1999 amendment, effective July 1, 1999, added Subsection L.

Victim impact testimony. — The application of N.M. Const., art. II, § 24 and Subsection G of this section, granting the representatives of a murder victim the right to make a statement to the court at sentencing and at any post-sentencing hearings, does not violate ex post facto prohibitions. Nor do these provisions prevent the jury from hearing victim impact testimony. State v. Clark, 1999-NMSC-035, 128 N.M. 119, 990 P.2d 793.

The Rules of Evidence requiring relevance and the balancing of unfair prejudice also apply to testimony and exhibits that are introduced in a capital felony sentencing proceeding for the purpose of showing victim impact. State v. Allen, 2000-NMSC-002, 128 N.M. 482, 994 P.2d 728, cert. denied, 530 U.S. 1218, 120 S. Ct. 2225, 147 L. Ed. 2d 256 (2000).

Defendant was not unfairly prejudiced by impact evidence that included a videotaped depiction of the victim prior to her death in addition to the testimony of two witnesses. State v. Allen, 2000-NMSC-002, 128 N.M. 482, 994 P.2d 728, cert. denied, 530 U.S. 1218, 120 S. Ct. 2225, 147 L. Ed. 2d 256 (2000).

Testimony of the victim's mother regarding actions of defendant while he was awaiting trial should not have been admitted as victim impact testimony because it was not relevant to the crimes for which he was standing trial. State v. Jacobs, 2000-NMSC-026, 129 N.M. 448, 10 P.3d 127.

Crimes committed before effective date of victim's rights laws — The effective date of the victim's rights laws did not affect the admission of victim impact evidence in a death penalty case. States are free to admit this type of evidence following the United States Supreme Court's ruling in *Payne v. Tennessee*, 501 U.S. 808 (1991), and 31-20A-1C NMSA 1978 and 31-20A-2B NMSA 1978 already provide authority for the

admission of this type of evidence. State v. Allen, 2000-NMSC-002, 128 N.M. 482, 994 P.2d 728, cert. denied, 530 U.S. 1218, 120 S. Ct. 2225, 147 L. Ed. 2d 256 (2000).

Law reviews. — For comment, "State v. Jacobs: A Comment on One State's Choice to Restrict Victim Impact Evidence at Death Penalty Sentencing," see 31 N.M.L. Rev. 539 (2001).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Victim impact evidence in capital sentencing hearings - post-*Payne v. Tennessee*, 79 A.L.R.5th 33.

31-26-5. Exercise of rights; requirements for victim.

A victim may exercise his rights pursuant to the provisions of the Victims of Crime Act [31-26-1 to 31-26-14 NMSA 1978] only if he:

A. reports the criminal offense within five days of the occurrence or discovery of the criminal offense, unless the district attorney determines that the victim had a reasonable excuse for failing to do so;

B. provides the district attorney with current and updated information regarding the victim's name, address and telephone number; and

C. fully cooperates with and fully responds to reasonable requests made by law enforcement agencies and district attorneys.

History: Laws 1994, ch. 144, § 5.

31-26-6. When rights and duties take effect; termination of rights and duties.

The rights and duties established pursuant to the provisions of the Victims of Crime Act [31-26-1 to 31-26-14 NMSA 1978] take effect when an individual is formally charged by a district attorney for allegedly committing a criminal offense against a victim. Those rights and duties remain in effect until final disposition of the court proceedings attendant to the charged criminal offense.

History: Laws 1994, ch. 144, § 6.

31-26-7. Designation or appointment of victim's representative.

A. A victim may designate a victim's representative to exercise all rights provided to the victim pursuant to the provisions of the Victims of Crime Act [31-26-1 to 31-26-14 NMSA 1978]. A victim may revoke his designation of a victim's representative at any time.

B. When a victim is deceased, incompetent or unable to designate a victim's representative, the court may appoint a victim's representative for the victim. If a victim regains his competency, he may revoke the court's appointment of a victim's representative.

C. When the victim is a minor, the victim's parent or grandparent may exercise the victim's rights; provided, that when the person accused of committing the criminal offense against the victim is the parent or grandparent of the victim, the court may appoint a victim's representative for the victim.

History: Laws 1994, ch. 144, § 7.

31-26-8. Procedures for providing victims with preliminary information; law enforcement agencies.

The law enforcement agency that investigates a criminal offense shall:

A. inform the victim of medical services and crisis intervention services available to victims;

B. provide the victim with the police report number for the criminal offense and a copy of the following statement: "If within thirty days you are not notified of an arrest in your case, you may call (telephone number for the law enforcement agency) to obtain information on the status of your case."; and

C. provide the victim with the name of the district attorney for the judicial district in which the criminal offense was committed and the address and telephone number for that district attorney's office.

History: Laws 1994, ch. 144, § 8.

31-26-9. Procedures for providing victims with notice of rights and information regarding prosecution of a criminal offense; district attorneys.

A. Within seven working days after a district attorney files a formal charge against the accused for a criminal offense, the district attorney shall provide the victim of the criminal offense with:

(1) a copy of Article 2, Section 24 of the constitution of New Mexico, regarding victims' rights;

(2) a copy of the Victims of Crime Act [31-26-1 NMSA 1978];

(3) a copy of the charge filed against the accused for the criminal offense;

(4) a clear and concise statement of the procedural steps generally involved in prosecuting a criminal offense; and

(5) the name of a person within the district attorney's office whom the victim may contact for additional information regarding prosecution of the criminal offense.

B. The district attorney's office shall provide the victim with oral or written notice, in a timely fashion, of a scheduled court proceeding attendant to the criminal offense.

History: Laws 1994, ch. 144, § 9; 2005, ch. 283, § 3.

ANNOTATIONS

The 2005 amendment, effective June 17, 2005, changes the former reference to the legislation that implements the provisions of art. 11, § 24 of the N.M. Const. to the Victims of Crime Act in Subsection A(2) and deletes the phrase "if requested by the victim" in Subsection B.

31-26-10. Procedures for providing victims with notice of a court proceeding; courts; district attorneys.

A court shall provide a district attorney's office with oral or written notice no later than seven working days prior to a scheduled court proceeding attendant to a criminal offense, unless a shorter notice period is reasonable under the circumstances. The district attorney's office shall convey the information concerning the scheduled court proceeding to the victim, as provided in Subsection B of Section 9 [31-26-9 NMSA 1978] of the Victims of Crime Act.

History: Laws 1994, ch. 144, § 10.

31-26-10.1. Crime victim presence at court proceedings; plea agreement notification.

A. At any scheduled court proceeding, the court shall inquire on the record whether a victim is present for the purpose of making an oral statement or submitting a written statement respecting the victim's rights enumerated in Section 31-26-4 NMSA 1978. If the victim is not present, the court shall inquire on the record whether an attempt has been made to notify the victim of the proceeding. If the district attorney cannot verify that an attempt has been made, the court shall:

(1) reschedule the hearing; or

(2) continue with the hearing but reserve ruling until the victim has been notified and given an opportunity to make a statement; and

(3) order the district attorney to notify the victim of the rescheduled hearing.

B. The provisions of this section shall not limit the district attorney's ability to exercise prosecutorial discretion on behalf of the state in a criminal case.

C. The provisions of this section shall not require the court to continue or reschedule any proceedings if it would result in a violation of a jurisdictional rule.

History: Laws 2005, ch. 283, § 1.

ANNOTATIONS

Effective dates. — Laws 2005, ch. 283 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective June 17, 2005, 90 days after adjournment of the legislature.

31-26-11. Procedures when an inmate or delinquent child escapes; corrections department; children, youth and families department.

A. The corrections department or the children, youth and families department shall immediately notify the sentencing judge or the children's court judge, the district attorney of the judicial district from which the inmate or delinquent child was committed and the probation officer who authored the presentence report when an inmate or delinquent child:

(1) escapes from a correctional facility or juvenile justice facility under the jurisdiction of the corrections department or the children, youth and families department; or

(2) convicted in New Mexico of a capital, first degree or second degree felony and transferred to a facility under the jurisdiction of another state escapes from that facility.

B. The district attorney shall immediately notify any person known to reside in his district who was a victim of the criminal or delinquent offense for which the inmate or delinquent child was committed.

History: Laws 1994, ch. 144, § 11; 1999, ch. 103, § 1.

ANNOTATIONS

The 1999 amendment, effective July 1, 1999, inserted "or delinquent child" and "children, youth and families department" in the catchline and throughout the section; in Subsection A inserted "or the children's court judge" in the introductory language and "or juvenile justice facility" in Paragraph (1); and inserted "or delinquent" preceding "offense" in Subsection B.

31-26-12. Procedures when an inmate is released from incarceration; adult parole board; corrections department; procedures when a delinquent child is released from custody; juvenile parole board; children, youth and families department; district attorneys.

A. The adult parole board and the juvenile parole board shall provide a copy of their respective regular release dockets to each district attorney in the state at least ten working days before the docket is considered by the board. The district attorney shall notify any person known to reside in his district who was a victim of the criminal offense for which the inmate was incarcerated or the delinquent child was committed.

B. The adult parole board and the juvenile parole board shall provide a copy of a supplemental, addendum or special docket to each district attorney at least five working days before the release docket is considered by the board.

C. Following consideration of a release docket by the adult parole board or the juvenile parole board, each board shall promptly notify each district attorney of any recommendations adopted by the board for release of an inmate from incarceration or a delinquent child from custody. The district attorney shall notify any person known to reside in his district who was a victim of the criminal offense for which the inmate was incarcerated or the delinquent child was committed.

D. In the case of an inmate scheduled to be released from incarceration without parole or prior to parole for any reason, or a delinquent child scheduled to be released from custody, the corrections department or the children, youth and families department shall notify each district attorney at least fifteen working days before the inmate's or delinquent child's release. The district attorney shall notify any person known to reside in his district who was a victim of the criminal offense for which the inmate was incarcerated or the delinquent child was committed.

History: Laws 1994, ch. 144, § 12; 1999, ch. 103, § 2.

ANNOTATIONS

The 1999 amendment, effective July 1, 1999, inserted "adult" in the catchline and in Subsections A and B; added "procedures when a delinquent child is released from custody; juvenile parole board; children, youth and families department" to the catchline; inserted references to the juvenile parole board and "release" throughout the section; in Subsection A added the second sentence; in Subsection C added "or a delinquent child from custody" at the end of the first sentence and added "or the delinquent child was committed" at the end of the second sentence; in Subsection D in the first sentence, inserted the language beginning "or prior" and ending "from custody", inserted "or the children, youth and families department", and inserted "or delinquent child's", and at the

end of the second sentence added "or the delinquent child was committed"; and made minor stylistic changes.

31-26-13. Disclaimer.

Nothing in the Victims of Crime Act [31-26-1 to 31-26-14 NMSA 1978] creates a cause of action on behalf of a person against a public employer, public employee, public agency, the state or any agency responsible for the enforcement of rights or provision of services set forth in that act.

History: Laws 1994, ch. 144, § 13.

31-26-14. Effect of noncompliance.

A person accused or convicted of a crime against a victim shall have no standing to object to any failure by any person to comply with the provisions of the Victims of Crime Act [31-26-1 to 31-26-14 NMSA 1978].

History: Laws 1994, ch. 144, § 14.

ARTICLE 27
Forfeiture

31-27-1. Short title.

Sections 1 through 8 [31-27-1 to 31-27-8 NMSA 1978] of this act may be cited as the "Forfeiture Act".

History: Laws 2002, ch. 4, § 1.

ANNOTATIONS

Cross references. — As to forfeitures for violations of hunting and fishing regulations, see 17-2-20.1 NMSA 1978.

As to forfeitures under the Cultural Properties Act, see 18-6-9.3 NMSA 1978.

As to forfeitures for offenses of shooting at or from motor vehicles, see 30-3-8.1 NMSA 1978.

As to forfeitures for offense of unlawful possession of a handgun, see 30-7-2.3 NMSA 1978.

As to forfeitures under the Unauthorized Recording Act, see 30-16B-9 NMSA 1978.

As to forfeitures under the Controlled Substances Act, see 30-31-35 NMSA 1978.

As to forfeitures under the Imitation Controlled Substances Act, see 30-31A-10 NMSA 1978.

As to forfeitures under the Racketeering Act, see 30-42-4 NMSA 1978.

As to forfeitures under the Computer Crimes Act, see 30-45-7 NMSA 1978.

As to forfeitures for crimes related to the unlawful sale of alcoholic beverages, see 60-7A-4.1 NMSA 1978.

As to forfeitures under the Liquor Control Act, see 60-7A-5 NMSA 1978.

As to forfeitures for crimes related to unlawful manufacture or transportation of alcoholic beverages, see 60-7A-6 NMSA 1978.

Effective dates. — Laws 2002, ch. 4, § 23 makes the act effective on July 1, 2002.

31-27-2. Purpose of act; applicability.

A. The purposes of the Forfeiture Act [31-27-1 NMSA 1978] are:

(1) to make uniform the standards and procedures for the seizure and forfeiture of property subject to forfeiture; and

(2) to protect the constitutional rights of persons accused of a crime and of innocent persons holding interests in property subject to forfeiture.

B. The Forfeiture Act [31-27-1 NMSA 1978] applies to:

(1) seizures, forfeitures and dispositions of property subject to forfeiture pursuant to laws that specifically apply the Forfeiture Act; and

(2) seizures, forfeitures and dispositions of property subject to forfeiture pursuant to other laws; but only to the extent that the procedures in the Forfeiture Act for seizing, forfeiting or disposing of property are consistent with any procedures specified in those laws.

History: Laws 2002, ch. 4, § 2.

ANNOTATIONS

Effective dates. — Laws 2002, ch. 4, § 23 makes the act effective on July 1, 2002.

31-27-3. Definitions.

As used in the Forfeiture Act [31-27-1 NMSA 1978]:

A. "conviction" or "convicted" means that a person has been found guilty of a crime in the trial court whether by a plea of guilty or nolo contendere or otherwise and whether the sentence is deferred or suspended;

B. "crime" means a violation of a criminal statute for which property of the offender is subject to seizure and forfeiture;

C. "law enforcement agency" means the employer of a law enforcement officer that has made a seizure of property pursuant to the Forfeiture Act;

D. "law enforcement officer" means a state or municipal police officer, county sheriff, deputy sheriff, conservation officer, motor transportation enforcement officer or other state employee authorized by state law to enforce criminal statutes, but "law enforcement officer" does not include correctional officers;

E. "owner" means a person who has a legal or equitable ownership interest in property;

F. "property" means tangible or intangible personal property or real property;

G. "property subject to forfeiture" means property described and declared to be subject to forfeiture by a state law outside of the Forfeiture Act; and

H. "secured party" means a person with a security or other protected interest in property, whether arising by mortgage, security agreement, lien, lease or otherwise; the purpose of which interest is to secure the payment of a debt or protect a potential debt owed to the secured party.

History: Laws 2002, ch. 4, § 3.

ANNOTATIONS

Effective dates. — Laws 2002, ch. 4, § 23 makes the act effective on July 1, 2002.

31-27-4. Seizure of property.

Property may be seized by a law enforcement officer:

A. pursuant to an order of seizure issued by a district court based on a sworn application of a law enforcement officer from which a determination is made by the court that:

(1) there is a substantial probability that:

(a) the property is subject to forfeiture;

(b) the state will prevail on the issue of forfeiture; and

(c) failure to enter the order will result in the property being destroyed, removed from the state or otherwise made unavailable for forfeiture; and

(2) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship to the owner and other parties known to be claiming interests in the property; and

B. without a prior court order, if the property alleged to be property subject to forfeiture is not a residence or a business, when:

(1) the seizure is incident to an arrest for a crime, a search conducted pursuant to a search warrant or an inspection conducted pursuant to an administrative inspection warrant and the law enforcement officer making the arrest or executing the search or inspection warrant has probable cause to believe the property to be property subject to forfeiture and that the subject of the arrest, search warrant or inspection warrant is an owner of the property; or

(2) the law enforcement officer making the seizure has probable cause to believe the property is property subject to forfeiture and that the delay occasioned by the need to obtain a court order would frustrate the seizure.

History: Laws 2002, ch. 4, § 4.

ANNOTATIONS

Effective dates. — Laws 2002, ch. 4, § 23 makes the act effective on July 1, 2002.

31-27-5. Complaint of forfeiture; service of process.

A. Within thirty days of making a seizure, the state shall file a complaint of forfeiture or return the property to the person from whom it was seized. A complaint of forfeiture shall include:

(1) a description of the property seized;

(2) the date and place of seizure of the property;

(3) the name and address of the law enforcement agency making the seizure;

(4) the specific statutory and factual grounds for the seizure;

(5) if the property was seized pursuant to an order of seizure, the sworn application of the law enforcement officer for the order, and if the property was seized without an order of seizure, an affidavit from a law enforcement officer stating the legal and factual grounds why an order of seizure was not required; and

(6) the names of persons known to the state who may claim an interest in the property set forth in both the caption and in the complaint and the basis for each person's alleged interest.

B. The complaint shall be served upon the person from whom the property was seized, and, if that person is a criminal defendant, upon the person's attorney of record and upon all persons known or reasonably believed by the state to claim an interest in the property. A copy of the complaint shall also be published no less than three times in a newspaper of general circulation in the district of the court having jurisdiction.

History: Laws 2002, ch. 4, § 5.

ANNOTATIONS

Effective dates. — Laws 2002, ch. 4, § 23 makes the act effective on July 1, 2002.

31-27-6. Court hearing and determination.

A. Claims to the property shall be filed by way of answer to the complaint of forfeiture and shall be filed within thirty days of the date of service of the complaint.

B. The district courts have jurisdiction over forfeiture proceedings, and venue for a forfeiture proceeding is in the same court in which venue lies for the criminal matter for which the property is alleged to be subject to forfeiture.

C. The forfeiture proceeding shall be brought in the same proceeding as the criminal matter and presented to the same trier of fact; provided:

(1) the two issues shall be bifurcated;

(2) the rules of criminal procedure shall apply in the criminal matter and the rules of civil procedure shall apply in the forfeiture proceeding; and

(3) if the criminal defendant is represented by the public defender department, the chief public defender or the district public defender may authorize department representation of the defendant in the forfeiture proceeding.

D. If the state fails to prove, by clear and convincing evidence, that the person charged with the crime for which the property is alleged to be property subject to forfeiture is the owner of the property:

(1) the forfeiture proceeding shall be dismissed and the property shall be delivered to the owner, unless possession of the property is illegal; and

(2) the owner shall not be subject to any charges by the state for storage of the property or expenses incurred in the preservation of the property.

E. The court shall enter a judgment of forfeiture and the property shall be forfeited to the state if the state proves by clear and convincing evidence that:

(1) the property is subject to forfeiture;

(2) the criminal prosecution of the owner has resulted in a conviction; and

(3) the value of the property to be forfeited does not unreasonably exceed:

(a) the pecuniary gain derived or sought to be derived by the crime;

(b) the pecuniary loss caused or sought to be caused by the crime; or

(c) the value of the convicted owner's interest in the property.

History: Laws 2002, ch. 4, § 6.

ANNOTATIONS

Effective dates. — Laws 2002, ch. 4, § 23 makes the act effective on July 1, 2002.

31-27-7. Disposition of forfeited property.

A. Unless possession of the property is illegal or a different disposition is specifically provided for by law and except as provided in Subsection C of this section, forfeited property, if it is not currency, shall be sold at public sale by the law enforcement agency in possession of the property. Forfeited currency and all sale proceeds of the sale of forfeited property shall be distributed:

(1) first, to pay reasonable expenses incurred for storage, protection and sale of the property;

(2) second, any remaining balance to pay restitution to or on behalf of victims, if any, of the crime related to the forfeiture; and

(3) third, any remaining balance to the general fund of the governing body of the seizing law enforcement agency to be used for drug abuse treatment services, for drug prevention and education programs, for other substance abuse demand-reduction initiatives or for enforcing narcotics law violations, except:

(a) for forfeitures of property arising from Chapter 17 NMSA 1978, the balance shall be deposited in the game protection fund in an amount equal to the expenditures to prosecute the forfeiture and the crime, with the net balance to be deposited in the general fund; and

(b) for forfeiture of property arising from Chapter 18, Article 6 NMSA 1978, the balance shall be used for the restoration, stabilization, protection and preservation of the affected cultural property, with the net balance to be deposited in the general fund.

B. Any property interest forfeited to the state and disposed of pursuant to the Forfeiture Act [31-27-1 NMSA 1978] is subject to the interest of a secured party unless, at the forfeiture proceeding, the state proves by clear and convincing evidence that the secured party knew or should have known of the crime.

C. If, at the forfeiture proceeding, the state proves, by clear and convincing evidence, that the person convicted of the crime for which the property is subject to forfeiture is a co-owner of the property but fails to prove that the other co-owner knew or should have known of the crime then, at the option of the co-owner not convicted of the crime:

(1) the co-owner not convicted of the crime may buy the forfeited interest from the law enforcement agency at a private sale for the fair market value. Proceeds received by the state from the sale shall be disposed of pursuant to Paragraphs (1) through (3) of Subsection A of this section;

(2) the law enforcement agency shall sell the entire ownership interest at a public sale pursuant to Subsection A of this section except that the proceeds shall first be used to purchase the ownership interest, at fair market value, of the co-owner not convicted of the crime; or

(3) the law enforcement agency shall sell only the forfeited interest at a public sale pursuant to Subsection A of this section and the purchaser becomes a co-owner with the co-owner not convicted of the crime.

D. The law enforcement agency shall notify all known co-owners of forfeited property that were not convicted of the crime not less than thirty days before a proposed public sale of the property. If, within the thirty days, the co-owners notify the law enforcement agency of an option made pursuant to Subsection C of this section, the law enforcement agency shall make the sale pursuant to the option selected. If no option is selected by the co-owners or if all of the co-owners not convicted of the crime cannot agree on one option, then the sale shall be made pursuant to Paragraph (3) of Subsection C of this section.

History: Laws 2002, ch. 4, § 7.

ANNOTATIONS

Effective dates. — Laws 2002, ch. 4, § 23 makes the act effective on July 1, 2002.

31-27-8. Safekeeping of seized property pending disposition.

A. Seized currency alleged to be subject to forfeiture shall be deposited with the clerk of the district court in an interest-bearing account.

B. Seized property other than currency or real property, not required by federal or state law to be destroyed, shall be:

(1) placed under seal; and

(2) removed to a place designated by the district court; or

(3) held in the custody of a law enforcement agency.

C. Property shall be kept by the custodian in a manner to protect it from theft or damage and, if ordered by the district court, insured against those risks.

History: Laws 2002, ch. 4, § 8.

ANNOTATIONS

Effective dates. — Laws 2002, ch. 4, § 23 makes the act effective on July 1, 2002.