Rules of Criminal Procedure for the District Courts

ARTICLE 1
General Provisions

5-101. Scope and title.

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

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

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

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

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

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

ANNOTATIONS

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

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for the District Courts, provided in part that "any rules of civil procedure governing criminal proceedings are hereby repealed .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

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

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

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

22 C.J.S. Criminal Law § 1 et seq.

5-102. Rules and forms.

A. **Approval procedure.** Each district court by action of the judge of such court, or of a majority of the judges thereof, may from time to time recommend to the Supreme Court local rules governing its practice in criminal cases. Copies of proposed local rules and amendments shall be submitted to the Supreme Court and to the chair of the Supreme Court's Rules of Criminal Procedure for the District Courts Committee ("the committee") for review. If the proposed local rule amends an existing local rule, a mark-up copy shall be submitted to the Supreme Court and the committee. The committee shall review any proposed local rule for content, appropriateness, style and consistency with the other local rules, statewide rules and forms and the laws of New Mexico, and shall advise the Supreme Court and the chief judge of the district of its opinion and recommendation regarding the proposed rules. Local rules and forms shall not conflict with, duplicate or paraphrase statewide rules or statutes. The criminal procedure committee shall consult with the chief judge, or the chief judge's designee, regarding any revisions recommended by the committee. Following such consultation, the committee shall report its recommendations to the Supreme Court, and shall bring to the Court's attention any differences of opinion between the committee and the chief judge. No local rule shall take effect unless:

(1) approved by an order of the Supreme Court;

(2) filed with the clerk of the Supreme Court; and

(3) published in the bar bulletin or in the judicial volumes of the NMSA 1978.

B. **Definition.** A "local rule" whether called a rule, order or other directive, is a rule which governs the procedure in a judicial district in suits of a criminal nature. An order, which is consistent with local rules, statewide rules and forms and the laws of New Mexico, that is entered in an individual case and served on the parties shall not be considered a local rule.

C. **Applicability.** This rule shall not apply to technical specifications for electronic transmission adopted by a district court to permit electronic transmission of documents to the court if the technical specifications are limited to the form of the documents to be

transmitted and are consistent with any technical specifications approved by the Supreme Court and the provisions of Rule 5-103.2 of these rules.

[As amended, effective September 1, 1991; January 1, 1997; July 1, 1997; April 1, 1999.]

ANNOTATIONS

The 1991 amendment, effective for local district court rules governing practice and procedure in criminal cases which are amended on or after September 1, 1991, rewrote Paragraph A.

The first 1997 amendment, effective January 1, 1997, substituted "Approval procedure" for "Rules" in the paragraph heading in Paragraph A, and added Paragraph C.

The second 1997 amendment, effective July 1, 1997, made identical changes as the first 1997 amendment.

The 1999 amendment, effective April 1, 1999, rewrote the rule delineating the review duties of the Rules of Criminal Procedure for the District Courts Committee.

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

A. **Service; when required.** Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the initial indictment, information or complaint, every order not entered in open court, every paper relating to discovery required to be served upon a party, unless the court otherwise orders, every written motion other than one which may be heard *ex parte* and every written notice, appearance, demand, designation of record on appeal, and similar paper shall be served upon each of the parties.

B. **Service; how made.** Whenever under these rules service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to the attorney or party, or by mailing a copy to the attorney or party at the attorney's or party's last known address, or, if no address is known, by leaving it with the clerk of the court. Service by mail is complete upon mailing.

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

(1) "delivery of a copy" means:

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

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

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

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

(e) depositing it in an outgoing mail container which is maintained in the usual and ordinary course of business of the serving attorney; and

(2) "mailing a copy" means sending a copy by first class mail with proper postage.

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

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

F. **Filing with the court defined.** The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with the judge, in which event the judge shall note thereon the filing date and forthwith transmit them to the office of the clerk. "Filing" shall include filing a facsimile copy or filing an electronic copy as may be permitted pursuant to Rule 5-103.1 NMRA or 5-103.2 NMRA of these rules. A paper filed by electronic means in compliance with Rule 5-103.1 NMRA constitutes a written paper for the purpose of applying these rules. The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or any local rules or practices.

G. **Proof of service.** Except as otherwise provided in these rules or by order of court, proof of service shall be made by the certificate of service indicating the date and method of service signed by an attorney of record, or if made by any other person, by

the affidavit of such person. Such certificate or affidavit shall be filed with the clerk or endorsed on the pleading, motion or other paper required to be served.

[As amended, effective December 1, 1998; as amended by Supreme Court Order 05-8300-13, effective September 15, 2005.]

Committee commentary. — Paragraphs A, B, C and D of this rule are substantially the same as Paragraphs A, B, C and E of Rule 1-005. The exceptions from filing papers with the court found in Paragraph C of Rule 1-005 have been omitted from this rule. [Revised October 15, 1998.]

ANNOTATIONS

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

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

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

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

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

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

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

The 2005 amendment, effective September 15, 2005, conformed this rule with the 2004 amendments of Rule 1-005 NMRA of the Rules of Civil Procedure for the District Courts. The 2005 amendment substituted "a copy" for "it" in the second sentence of Paragraph B, designated the language therein as Subparagraph (1), deleted "within this rule" preceding "means" in the introductory language of that subparagraph and added Subparagraph (2), redesignated former designated the Paragraph C as present Paragraph D and inserted "indicating the date and method of service", added Paragraph E relating to filing of papers and pleadings by a party represented by counsel, redesignated former Paragraphs D and E as Paragraphs F and G and inserted "indicating the date and method of service" in redesignated Paragraph G.

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

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

71 C.J.S. Pleading §§ 407 to 415.

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

A. **Facsimile copies permitted to be filed.** Subject to the provisions of this rule, a party may file a facsimile copy of any pleading or paper by faxing a copy directly to the court or by faxing a copy to an intermediary agent who files it in person with the court. A facsimile copy of a pleading or paper has the same effect as any other filing for all procedural and statutory purposes. The filing of pleadings and other papers with the court by facsimile copy shall be made by faxing them to the clerk of the court at a number designated by the clerk, except if the paper or pleading is to be filed directly with the judge, the judge may permit the papers to be faxed to a number designated by the judge, in which event the judge shall note thereon the filing date and forthwith transmit them to the office of the clerk. Each judicial district shall designate one or more telephone numbers to receive fax filings.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[Adopted, effective January 1, 1997; as amended by Supreme Court Order 05-8300-13, effective September 15, 2005.]

ANNOTATIONS

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

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

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

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

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

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

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

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

(2) "document" includes the electronic representation of pleadings and other papers.

B. **Service by electronic transmission.** Any document required to be served by Paragraph A of Rule 5-103 NMRA may be served on a party or attorney by electronic transmission of the document if the party or attorney has agreed to be served with pleadings or papers by electronic mail. Electronic service is accomplished when the transmission of the pleading or paper is completed. If within two (2) days after service by electronic mail, a party served by electronic mail notifies the sender of the electronic mail that the pleading or paper cannot be read, the pleading or paper shall be served by any other method authorized by Rule 5-103 NMRA designated by the party to be served.

C. **Service by electronic transmission by the court.** The court may serve any document by electronic service to an attorney or party pursuant to Paragraph B of this rule and to any other person who has agreed to receive documents by electronic transmission.

D. **Filing by electronic transmission.** Documents may be filed with the court by electronic transmission in accordance with this rule if:

(1) the Supreme Court has adopted technical specifications for electronic transmission; and

(2) the court in which documents are filed by electronic transmission has complied with the technical specifications for electronic transmission adopted by the Supreme Court.

E. **Single transmission.** Whenever a rule requires multiple copies of a document to be filed only a single transmission is necessary.

F. **Time of filing.** For purposes of filing by electronic transmission, a "day" begins at 12:01 a.m. and ends at midnight. If electronic transmission of a document is received before midnight on the day preceding the next business day of the court it will be considered filed on the immediately preceding business day of the court. For any questions of timeliness, the time and date registered by the court's computer will be determinative.

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

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

[Approved, effective July 1, 1997; as amended, effective January 1, 1999; as amended by Supreme Court Order 06-8300-28, effective January 15, 2007.]

ANNOTATIONS

Cross references. — *See* Rule 5-206 NMRA for definition of a computer generated "signature".

See Rule 1-105.2 NMRA for service by electronic transmission in civil cases.

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

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

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

the filing of a fee, deleted former Paragraph F, which dealt with service by electronic transmission, and redesignated former Paragraphs G and H as present Paragraphs F and G, and deleted former Paragraph I, which dealt with proof of service by electronic transmission, and redesignated former Paragraph J as present Paragraph H.

5-104. Time.

A. **Computation.** In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court or by any applicable statute, the day of the act, event or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday or a legal holiday, or, when the act to be done is the filing of a paper in court, a day on which weather or other conditions have made the office of the clerk of the district court inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days. When the period of time prescribed or allowed is less than eleven (11) days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation. As used in this rule, "legal holiday" includes New Year's day, Martin Luther King, Jr.'s birthday, Presidents day, Memorial day, Independence day, Labor day, Columbus day, Veterans' day, Thanksgiving day, Christmas day and any other day designated as a state or judicial holiday.

B. **Enlargement.** When by these rules or by a notice given thereunder or by order of court, an act is required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion:

(1) with or without motion or notice, order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order; or

(2) upon motion made after the expiration of the specified period permit the act to be done. Except as otherwise provided in these rules, the court may not extend the time for filing a motion for new trial, for filing a notice of appeal, for filing a motion for acquittal, for filing a notice of intent to seek the death penalty, for filing petitions for writs of certiorari seeking review of denials of habeas corpus petitions by the district court or for filing a motion for an extension of time for commencement of trial.

C. **For motions** A written motion, other than one which may be heard ex parte, and notice of the hearing thereon shall be served not later than five (5) days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and opposing affidavits may be served not later than one (1) day before the hearing, unless the court permits them to be served at some other time.

D. **Additional time after service by mail.** Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party by mail, three (3) days shall be added to the prescribed period.

[As amended, effective October 1, 1995; as amended by Supreme Court Order 06-8300-23, effective December 18, 2006; by Supreme Court Order No. 09-8300-009, effective May 6, 2009.]

Committee commentary. — This rule is derived from and is identical with Paragraphs A, B, C, and D of Rule 1-006. For important rules setting forth specific limitations, see Rules 5-601 and 5-604. *See also*, Appendix 5-901.

[As amended by Supreme Court Order No. 09-8300-009, effective May 6, 2009.]

ANNOTATIONS

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

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

Federal rule. — For comparable federal rule, *see* Rule 45 of the Federal Rules of Criminal Procedure.

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

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

The 2009 amendment, approved by Supreme Court Order 09-8300-009, effective May 6, 2009, in Paragraph B(2), at the beginning of the sentence in the last paragraph, added "Except as otherwise provided in these rules," and at the end of the same sentence, added ", for filing a notice of intent to seek the death penalty, for filing petitions for writs of certiorari seeking review of denials of habeas corpus petitions by the district court".

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

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

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

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

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

5-105. Designation of judge.

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

B. **Procedure for replacing a district judge who has been excused or recused.** In the event a district judge has been excused or recused, counsel for all parties may agree to a district judge to hear all further proceedings and if that district judge so agrees, the clerk of the district court shall assign the case to such district judge. In the event counsel for all parties do not stipulate upon a district judge to try the case or the district judge upon whom they agree refuses to accept the case, within ten (10) days, or in the event that one party notifies the clerk of the district court in writing that they will be unable to agree on a replacement district judge, the clerk shall assign a district judge of another division at random, in the same fashion as cases are originally assigned or pursuant to local district court rule. If all district judges in the district have been excused or recused, and counsel for all parties have not agreed within ten (10) days on a judge to hear the case, the clerk of the district court shall notify the chief justice of the

Supreme Court of New Mexico, who shall designate a judge, justice or judge pro tempore to hear all further proceedings.

C. **Automatic recusal.** If a criminal proceeding is filed in any county of a judicial district against a judge or an employee of the district, no judge of the district may hear the matter without written agreement of the parties. If within ten (10) days after the proceeding is filed, the parties have not filed a stipulation designating a judge to preside over the matter, the clerk shall request the Supreme Court to designate a judge.

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

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

[As amended, effective November 15, 2000.]

ANNOTATIONS

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

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

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

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

B. **Extent of excuse or challenge.** No judge may be excused from conducting an arraignment or first appearance or setting initial conditions of release. No party shall excuse more than one judge.

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

D. **Procedure for excusing a district judge.** The statutory right to excuse the judge before whom the case is pending must be exercised by a party filing a peremptory

election to excuse with the clerk of the district court within ten (10) days after the later of:

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

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

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

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

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

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

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

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

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

[As amended, effective August 1, 1989; September 1, 1990; June 1, 1994; as amended by Supreme Court Order No. 08-8300-39, effective December 15, 2008.]

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

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

The 2008 amendment formally incorporates into Rule 5-106 NMRA the use of notice by publication in such a situation — now identified as a "mass reassignment". The amended rule requires that the specified notice be published in four (4) consecutive issues of the New Mexico Bar Bulletin and provides that a party who has not yet exercised a peremptory recusal may do so within ten (10) days after the fourth and final publication.

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

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

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

[Adopted by Supreme Court Order No. 08-8300-39, effective December 15, 2008.]

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

The 2008 amendment, approved by Supreme Court Order No. 08-8300-39, effective December 15, 2008, added a new Paragraph C and relettered former Paragraph C as Paragraph D; added Subparagraphs (3) and (4) of Paragraph D; relettered former Paragraph D as Paragraph E; in Paragraph E, added the second and third sentences; relettered the last sentence of former Paragraph D as Paragraph F and added the title; and relettered former Paragraphs E through G as Paragraphs G through I.

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

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

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

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

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

Peremptory excusal rejected. — Where defendant's notice of peremptory excusal was not filed until 10 months after notice of the judge's assignment, was mailed to defense counsel, and defendant had already exercised his right to excuse another judge, the

excusal was properly rejected. State v. Harris, 1997-NMCA-119, 124 N.M. 293, 949 P.2d 1190, cert. denied, 124 N.M. 268, 949 P.2d 282 (1997).

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

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

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

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

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

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

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

5-107. Entry of appearance.

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

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

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

5-108. Nonadmitted and nonresident counsel.

A. **Nonadmitted counsel.** Except as otherwise provided in Paragraph C of this rule, counsel not admitted to practice law in New Mexico, but who are licensed to practice law and in good standing in another state or territory, may participate in proceedings before New Mexico courts only in association with counsel licensed to practice law and in good standing in New Mexico, who, unless excused by the court, must be present in person in all proceedings before the court. New Mexico counsel must sign the first motion or pleading and New Mexico counsel's name and address must appear on all subsequent pleadings. New Mexico counsel shall be deemed to have signed every

subsequent pleading and shall therefore be subject to the provisions of Rule 1-011 of the Rules of Civil Procedure for the District Courts.

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

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

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

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

5-109. Court-appointed attorneys.

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

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

(2) exceptional circumstances otherwise exist.

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

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

5-110. Clinical education.

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

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

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

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

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

[Adopted, effective October 1, 1995.]

5-111. Record.

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

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

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

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

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

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

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Rule pertains to district and magistrate courts. — This rule pertains equally to proceedings in district court and to preliminary examinations, pursuant to Rule 20 (see now Rule 5-302 NMRA), in magistrate courts. State ex rel. Moreno v. Floyd, 85 N.M. 699, 516 P.2d 670 (1973)(decided prior to adoption of N.M.R. Crim. P. (Magis. Cts.))

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

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

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

5-112. Failure to observe rules.

An attorney who willfully fails to observe the requirements of these rules, including prescribed time limitations, may be held in contempt of court and subject to disciplinary action.

Committee commentary. — This rule provides a method for assuring compliance with the Rules of Criminal Procedure by both the state and defendant. It may be the only effective way to deal with violations of the rules by the defendant. Cf. State v. Lucero, 87 N.M. 369, 533 P.2d 758 (1975). Under Paragraph D of Rule 5-604, the state's case may be dismissed with prejudice if the case is not brought to trial within the time provided. See commentary to Rule 5-604.

New Mexico courts have used the contempt power with increasing frequency. Because of the procedural complexity of adjudging a person in contempt of court, a reporter's addendum to these rules has been prepared by the reporter to the committee which discusses contempt power in New Mexico district and appellate courts. It immediately follows these rules.

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Behavior negligent but not contemptuous. — Although defense counsel was negligent in failing to inform the court and opposing counsel that a scheduled hearing was unnecessary, there was not sufficient basis to hold him in "implicit" contempt of court in the absence of an actual contempt ruling by the court, or to hold him liable for court costs. State v. Rivera, 1998-NMSC-024, 125 N.M. 532, 964 P.2d 93.

Negligent contempt punishable. — Since a willfulness requirement for contempt is not present under the rules of criminal procedure or the court's inherent contempt powers, the district court did not err in issuing contempt citations to district attorneys and police officers on the basis of their negligent failure to disclose information required by Rule 27 (see now Rule 5-501) and the court's discovery order. State v. Wisniewski, 103 N.M. 430, 708 P.2d 1031 (1985).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 17 Am. Jur. 2d Contempt §§ 80 to 96.

Attorney's failure to attend court, or tardiness, as contempt, 13 A.L.R.4th 122.

Intoxication of witness or attorney as contempt of court, 46 A.L.R.4th 238.

Attorney's conduct as justifying summary contempt order under Rule 42(a) of the Federal Rules of Criminal Procedure, 58 A.L.R. Fed. 22.

Refusal to obey court order relating to proposed testimony as constituting criminal contempt under 18 USCS § 401(3), 63 A.L.R. Fed. 878.

Lack of notice to contemnor at time of contemptuous conduct of possible criminal contempt sanctions as affecting prosecution for contempt in federal court, 76 A.L.R. Fed. 797.

5-113. Harmless error; clerical mistakes.

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

B. **Clerical mistakes.** Clerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter, while the appeal is pending, may be so corrected with leave of the appellate court.

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

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

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

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

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

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

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

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

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

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

No non-constitutional harmless error. — Where the trial court improperly admitted a videotaped statement of a witness in the defendant's trial; the defendant's confession provided strong evidence against the defendant and was corroborated by the witness's testimony and the physical evidence; the improperly admitted evidence contained

mostly irrelevant speculation which had no direct to the murder of the victim; and even though the defendant presented substantial evidence to challenge the extraneous discussion in the videotaped statement through witnesses who testified to the peaceful character of the defendant, there was no reasonable probability that the admission of the videotaped statement contributed to the defendant's conviction and the admission of the videotaped statement was harmless error. State v. Barr, 2009-NMSC-024, 146 N.M. 301, 210 P.3d 198.

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

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

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

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

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

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

Error, to be reversible, must be prejudicial. State v. Wright, 84 N.M. 3, 498 P.2d 695 (Ct. App. 1972); State v. Baca, 80 N.M. 488, 458 P.2d 92 (Ct. App. 1969); State v. Wesson, 83 N.M. 480, 493 P.2d 965 (Ct. App. 1972).

Violation of defendant's constitutional rights is never harmless. State v. Barela, 86 N.M. 104, 519 P.2d 1185 (Ct. App. 1974).

Infringement of right of confrontation cannot be harmless error. — Unless there has been a waiver of the right of confrontation, or it has been shown that the witness is

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

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

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

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

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

Doctrine of cumulative error is recognized in New Mexico. State v. Parker, 85 N.M. 80, 509 P.2d 272 (Ct. App. 1973).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Questions as to race of friend of defendant. — Where defendant convicted of distribution of a controlled substance was a Negro, and the transactions complained of occurred between defendant and an undercover agent at the home of a white female friend of defendant, prosecutor's questions which asked that the woman be identified as "white or black" did not, as a matter of law, constitute fundamental error. State v. Parker, 85 N.M. 80, 509 P.2d 272 (Ct. App. 1973).

Racial composition of jury. — One is not entitled to relief simply because there is no member of his race on the jury unless he shows that the absence results from

purposeful discrimination. State v. Newman, 83 N.M. 165, 489 P.2d 673 (Ct. App. 1971) (decided under former law).

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

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

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

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

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

Allowing jury to hear tape after case submitted to jury. — Where trial court allowed the jury to listen again to a tape recording allegedly containing defendant's voice after the case had been submitted to the jury for decision, there was a presumption of prejudicial error and the burden was upon the state to overcome the presumption by showing that the jury was not prejudiced by the playing of the tape. State v. Ross, 85 N.M. 176, 510 P.2d 109 (Ct. App. 1973).

Refusing to hear evidence about fairness of lineup procedure. — Trial court's error in refusing to hear defendant's evidence concerning fairness of lineup procedure was

not harmless where evidence as to the lineup identification was the only evidence which directly identified the defendant. State v. Torres, 81 N.M. 521, 469 P.2d 166 (Ct. App.), cert. denied, 81 N.M. 506, 469 P.2d 151 (1970) (decided under former law).

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

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

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

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

Failure of state to show that witness unavailable before admitting prior testimony. — Although admission of a material witness's preliminary hearing testimony was improper because the state failed to show that the witness was unavailable, it was not prejudicial since testimony of several other witnesses established the essential elements of the crime, and a trial court may in its discretion permit cumulative testimony. State v. Mann, 87 N.M. 427, 535 P.2d 70 (Ct. App. 1975).

Inference of defendant's guilt from refusal of defendant's witness to testify. — Once the state has obtained the benefit of the inference of defendant's guilt by a witness and associate of defendant invoking his fifth amendment right not to testify, which is not subject to cross-examination, then the state cannot have the benefit of a

presumption that this inference was not prejudicial and shift the burden to defendant to show there was prejudice. State v. Vega, 85 N.M. 269, 511 P.2d 755 (Ct. App. 1973).

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

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

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

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

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

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

Refusal to strike testimony where witness does not remember making statement. — It was not abuse of discretion by trial court to refuse to strike expert testimony from

record where witness did not deny that he gave testimony appearing in record, but claimed only to not remember making statement. State v. Chavez, 84 N.M. 247, 501 P.2d 691 (Ct. App. 1972).

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

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

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

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

Not keeping jury together. — Where there is absolutely no showing of any prejudice that the jury was not kept together constitutes no error. State v. Rose, 79 N.M. 277, 442 P.2d 589 (1968), cert. denied, 393 U.S. 1028, 89 S. Ct. 626, 21 L. Ed. 2d 571 (1969) (decided under former law).

Inadvertent reference to other charges pending against defendant. — Where the inadvertent conduct of the trial court in referring to other charges pending against defendant was of such minor significance that the appellate court was unable to ascribe to it any improper suggestion by the court or improper effect upon the jury, there was no

prejudicial error. State v. Foster, 83 N.M. 128, 489 P.2d 408 (Ct. App. 1971) (decided under former law).

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

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

Failure to instruct jury on essential elements of crime charged. — A jury must be instructed on the essential elements of the crime charged. State v. Kendall, 90 N.M. 236, 561 P.2d 935 (Ct. App.), modified, 90 N.M. 191, 561 P.2d 464 (1977).

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

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

Laying of no foundation for testimony found harmless. — Even if no foundation had been laid for the witness to characterize the substance sold as marijuana, the error in allowing testimony was harmless because that fact had been stipulated by expert witness. State v. Latham, 83 N.M. 530, 494 P.2d 192 (Ct. App. 1972).

Waiver of defect in instructions by failure to object. — Although appellant moved at the close of the state's case as well as at the close of all testimony, and by motion for a new trial after verdict, to dismiss the charges because of a failure of proof to support a conviction of murder either in the first or second degree or of manslaughter, where no objection to the jury being instructed on manslaughter along with the two degrees of

murder was stated in the record, this constitutes a waiver of errors or defects in the instructions. State v. Lopez, 79 N.M. 282, 442 P.2d 594 (1968) (decided under former law).

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

Motion for mistrial is addressed to trial court's discretion and is reviewable for an abuse of discretion. State v. King, 90 N.M. 377, 563 P.2d 1170 (Ct. App. 1977).

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

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

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

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

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

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

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

5-114. Decorum of grand jury proceedings.

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

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

Subsequent to the adoption of this rule, the legislature amended Section 31-6-4 NMSA 1978 to provide during the taking of testimony before the grand jury for the presence of security officers. Section 31-6-7 NMSA 1978 provides that "the district court shall assign court reporters, bailiffs, interpreters, clerks or other persons as required to aid the grand jury in carrying out its duties". See Davis v. Traub, 90 N.M. 498, 565 P.2d 1015 (1977), where prior to the adoption of this rule and the amendment of Section 31-6-4 NMSA 1978, the New Mexico Supreme Court held under former Sections 31-6-4 and 31-6-7 NMSA 1978 that only members of the legal staff of the attorney general and district attorney were authorized to be present during the taking of testimony of the grand jury. Under this rule a bailiff or security officer may be designated to be present at the grand jury only during the taking of testimony, upon a showing that a witness may disrupt the decorum of the proceedings or otherwise create a risk to the safety of the grand jurors. Section 31-6-4 NMSA 1978 (as amended by Laws 1981, Chapter 262, Section 2) provides that such security personnel may be present only by leave of the court and only if they are not potential witnesses or interested parties.

ANNOTATIONS

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

5-115. Conduct of court proceedings.

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

B. **Nonjudicial proceedings.** Proceedings, other than judicial proceedings, designed and carried out primarily as ceremonies, and conducted with dignity by judges

in open court, may properly be photographed in, or broadcast from, the courtroom with the permission and under the supervision of the court.

C. **Appearance of the defendant before the court.** A defendant shall not be required to appear before the jury in distinctive clothing that would give the appearance that the defendant is incarcerated. Except by order of the court, the defendant may not appear before the jury in any visible restraint devices, including handcuffs, chains or stun belts, a visible bullet proof vest or any other item which, if visible to the jury, would prejudice the defendant in the eyes of the jury.

[As amended by Supreme Court Order 05-8300-17, effective October 11, 2005.]

Committee commentary. — The Committee added Paragraph C to ensure that defendants are not prejudiced because of being unduly restrained before the court.

ANNOTATIONS

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

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

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

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

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

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

5-116. Witness immunity.

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

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

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

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

Committee commentary. — This rule, together with Rule 11-412, creates a procedure for supplanting the privilege against self-incrimination by a grant of immunity from the court on written application of the prosecuting attorney. This rule was amended in 1979 to implement the general witness immunity statute (Section 31-6-15 NMSA 1978) enacted by the 1979 session of the legislature and to eliminate the conflict between the Rules of Evidence and Rules of Criminal Procedure. Section 31-6-15 NMSA 1978 is arguably broader than its federal counterpart, 18 USCA §§ 6002 and 6003.

It has been argued that Section 31-3A-1 NMSA 1978 (recompiled as Section 31-6-15 NMSA 1978) is limited to grand jury cases. The court of appeals in State v. Romero, 96 N.M. 795, 635 P.2d 998 (Ct. App.), cert. denied, 97 N.M. 483, 641 P.2d 514 (1981) held that even if the court were to limit the statutory provision to grand jury proceedings, Rule 11-412 provides for immunity in other cases.

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

Although prior to the 1980 amendments, this rule did not specifically require a party to make a written application for the court to issue a written order granting immunity, the New Mexico Supreme Court held that the application and order must be written. See Campos v. State, 91 N.M. 745, 580 P.2d 966 (1978). This rule was amended in 1979 to require a written application in accordance with the Campos decision.

In addition to Section 31-6-15 NMSA 1978, New Mexico has several specific statutes providing for witness immunity: (all references to NMSA 1978) Section 28-1-4A, transactional immunity, human rights commission cases; Section 17-2-11, transactional and use immunity, game and fish violations; Section 30-9-6, transactional immunity, prostitution cases; Section 30-19-14, transactional immunity, gambling; Section 51-1-30, transactional immunity, unemployment compensation; transactional immunity,

superintendent of insurance; Section 63-7-7 [now repealed], use immunity, corporation commission (now public regulation commission); and Section 70-2-8, transactional immunity, oil conservation commission.

This commentary was amended in 1982 to comply with the court of appeals decision in State v. Sanchez, 98 N.M. 428, 649 P.2d 496 (Ct. App.), cert. denied, 98 N.M. 478, 649 P.2d 1391 (1982). Originally, the committee was of the opinion that either the prosecution or the defense could apply for a witness to be granted immunity. In Sanchez, supra, the court of appeals expressly negated this view.

We find that Rule 58 [see now this rule] controls the procedural method for seeking a grant of witness immunity and restricts applications for immunity to those initiated by the prosecution. Except where coupled with a showing of prosecutional misconduct, refusal of the prosecution to seek a grant of witness immunity for a defense witness or refusal of the trial court to fashion a remedy to extend use immunity to a defense witness, does not constitute a denial of due process to the defendant.

Id. at 503.

ANNOTATIONS

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

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

Witness use immunity and transactional immunity distinguished. — Transactional immunity involves a promise by prosecutors that a witness will not be prosecuted for crimes related to the events about which the witness testifies. Transaction immunity affords the witness immunity related to the entire transaction, not just the witness's testimony. Transactional immunity is a legislative prerogative defined by statute. Under a grant of use immunity, the prosecution promises only to refrain from using the testimony in any future prosecution, as well as any evidence derived from the protected testimony. Under use immunity, the prosecution may proceed with charges against the witness so long as it does not use or rely on the witness's testimony or its fruits. The grant of use immunity is a power that the Supreme Court defines in the exercise of its inherent judicial authority. State v. Belanger, 2009-NMSC-025, 146 N.M. 357, 210 P.3d 783, reversing State v. Belanger, 2007-NMCA-143, 142 N.M. 751, 170 P.3d 530 and overruling State v. Cheadle, 101 N.M. 282, 681 P.2d 708 (1983); State v. Baca, 1997-NMSC-045, 124 N.M. 55, 946 P.2d 1066; and State v. Sanchez, 98 N.M. 428, 649 P.2d 496 (Ct. App. 1982).

Authority to grant witness use immunity. — New Mexico courts have the authority to grant a witness use immunity under certain limited circumstances. State v. Belanger, 2009-NMSC-025, 146 N.M. 357, 210 P.3d 783, reversing 2007-NMCA-143, 142 N.M. 751, 170 P.3d 530 and overruling State v. Cheadle, 101 N.M. 282, 681 P.2d 708 (1983);

State v. Baca, 1997-NMSC-045, 124 N.M. 55, 946 P.2d 1066; State v. Sanchez, 98 N.M. 428, 649 P.2d 496 (Ct. App. 1982).

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

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

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

Compliance with the procedural requirements of this rule is mandatory. State v. Sanchez, 98 N.M. 428, 649 P.2d 496 (Ct. App. 1982).

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

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

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

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

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

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

Validity of rule. — This rule is valid. State v. Gabaldon, 92 N.M. 230, 585 P.2d 1352 (Ct. App.), cert. denied, 92 N.M. 260, 586 P.2d 1089 (1978).

Although the validity of Subdivision (a) (see now Paragraph A) is questionable because immunity from prosecution is qualitatively different from the privilege not to testify and the granting of immunity is a legislative function, nevertheless the court of appeals has no authority to set aside a rule adopted by the New Mexico Supreme Court. State v.

Thoreen, 91 N.M. 624, 578 P.2d 325 (Ct. App.), cert. denied, 91 N.M. 610, 577 P.2d 1256 (1978) (decided prior to 1980 amendment).

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

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

Limitations to derivative use immunity. — Section 31-6-15 NMSA 1986, and its implementing rules, 11-412 NMRA and this rule, allow the government to compel a witness to testify and then prosecute the witness for the crimes mentioned in the compelled testimony, as long as neither the testimony itself nor any information directly or indirectly derived from the testimony is used in the prosecution. However, it is not enough for the prosecutor to simply assert that all evidence to be used at trial was obtained prior to the defendant's immunized testimony; instead the state should have included testimony from key witnesses, along with testimony from the prosecutor and the investigators, that the witnesses had not had access or otherwise been exposed to the defendant's immunized testimony. State v. Vallejos, 118 N.M. 572, 883 P.2d 1269 (1994).

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

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

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

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

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

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

22 C.J.S. Criminal Law § 78 et seq.

5-117. Record; exhibits.

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

(1) the trial;

(2) arraignment;

(3) release proceedings;

(4) motion hearings;

(5) plea agreement proceedings;

(6) sentencing and habitual offender proceedings;

(7) habeas corpus proceedings; and

(8) extradition proceedings.

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

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

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

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

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

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

[Adopted, effective August 1, 1989; as amended, effective November 15, 2000.]

5-118. Form of papers.

Except exhibits and papers filed by electronic transmission pursuant to Rule 5-103.2 of these rules, all pleadings and papers filed in the district court shall be clearly legible, shall be on good quality white paper eight and one-half by eleven (8½ x 11) inches in size, with a left margin of (1) inch, a right margin of one (1) inch, and top and bottom margins of one and one-half (1½) inches; with consecutive page numbers at the bottom; and stapled at the upper left hand corner; and, except for a cover page, shall be typed or printed using pica (10 pitch) type style or a twelve (12) point typeface. A space of at least two and one-half (2½) by two and one-half (2½) inches for the clerk's recording stamp shall be left in the upper right-hand corner of the first page of each pleading. The contents, except quotations and footnotes, shall be double spaced. Exhibits which are copies of original documents may be reproduced from originals by any duplicating or copying process which produces a clear black image on white paper. The size of any exhibits shall be their original size or any smaller size not less than eight and one-half by eleven (8½ x 11) inches.

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

ANNOTATIONS

Cross references. — For citation format to appellate opinions, New Mexico Statutes Annotated, Court Rules and Uniform Jury Instructions, see Supreme Court Order dated January 12, 1998 following rule set 23, Supreme Court General Rules.

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

5-119. Witnesses.

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

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

ANNOTATIONS

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

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

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

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

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

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

5-120. Motions.

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

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

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

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

(1) motion to dismiss;

(2) motions regarding bonds and conditions of release;

(3) motion for new trial;

(4) motion for judgment notwithstanding the verdict;

(5) motion to suppress evidence; or

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

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

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

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

[Approved, effective May 3, 1999.]

ANNOTATIONS

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

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

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

5-121. Orders; preparation and entry.

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

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

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

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

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

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

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

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

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

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

ANNOTATIONS

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

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

The 2009 amendment, approved by Supreme Court Order 09-8300-006, effective May 6, 2009, in Paragraph C, at the beginning of the sentence, added "Notwithstanding Section 39-1-1 NMSA 1978".

ARTICLE 2
Initiation of Proceedings

5-201. Methods of prosecution.

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

(1) a complaint;

(2) an information; or

(3) an indictment.

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

C. **Information.** An information is a written statement, signed by the district attorney, containing the essential facts, common name of the offense and, if applicable, a specific section number of the New Mexico Statutes which defines the offense. It may be filed only in the district court. Informations shall be substantially in the form approved by the court administrator, and shall state the names of all witnesses upon whose

testimony the information is based. An information shall be filed within thirty (30) days after completion of a preliminary examination or waiver thereof unless such time is extended by the court upon motion of the district attorney.

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

Committee commentary. — The Complaint. This rule governs complaints filed in the district court. In almost all cases a complaint will be filed in the magistrate court and will be governed by Rule 6-201. If the complaint charges a petty misdemeanor or misdemeanor, the magistrate will have jurisdiction to try the case. See 35-3-4A NMSA 1978. If the complaint charges a capital, felonious or other infamous crime, the defendant may be held to answer only on an information or indictment. N.M. Const., art. 2, § 14. See State v. Marrujo, 79 N.M. 363, 443 P.2d 856 (1968). If the complaint charges a crime which is not within the magistrate court jurisdiction, the magistrate may only:

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

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

(3) set and review conditions of release; and

(4) conduct preliminary examinations. See 35-3-4 NMSA 1978.

Under this rule, Rule 6-201 and Rule 7-201, a complaint must state the common name of the offense, and, if applicable, the specific section number of the New Mexico Statutes which defines the offense. Two decisions of the court of appeals interpreting the former magistrate rule indicate that the complaint must carefully set forth the name and section number. In State v. Raley, 86 N.M. 190, 521 P.2d 1031 (Ct. App.), cert. denied, 86 N.M. 189, 521 P.2d 1030 (1974), the court held that the initials "D.W.I." were insufficient to state the common name of the offense. In State v. Nixon, 89 N.M. 129, 548 P.2d 91 (Ct. App. 1976), the court held that it is not necessary to charge a specific subsection of the statutes. In both cases the court determined that the complaint must be dismissed. However, since the cases were decided under the former magistrate rules, there is no discussion of Rule 6-303 of the present magistrate rules governing technical defects in the pleadings. See also Rule 5-204 NMRA, an identical rule in the Rules of Criminal Procedure for the District Courts, and commentary.

The Information. This rule allows a prosecution to be commenced by the filing of the information. As a practical matter, the prosecution is generally commenced by the filing

of the complaint in the magistrate court followed by either an indictment or a preliminary hearing and information. Nothing, however, prohibits the prosecution from first filing the information. See State v. Bailey, 62 N.M. 111, 305 P.2d 725 (1957). See also Pearce v. Cox, 354 F.2d 884 (10th Cir. 1965). In that event the accused is not required to plead to the information and may move the court to remand the case for a preliminary hearing. See Paragraph C of Rule 5-601 and commentary. After the preliminary hearing, the defendant can then be tried upon the information filed prior to the preliminary hearing. State v. Nelson, 63 N.M. 428, 321 P.2d 202 (1958).

If the prosecution has been commenced by the filing of a complaint in the magistrate court and a preliminary hearing has been held, Paragraph C of this rule requires that the information be filed within thirty (30) days after completion of the preliminary examination. The information must conform to the bind-over order of the magistrate. State v. Melendrez, 49 N.M. 181, 159 P.2d 768 (1945). It does not have to conform to the complaint which initiated the prosecution in the magistrate court. State v. Vasquez, 80 N.M. 586, 458 P.2d 838 (Ct. App. 1968).

The provision of Paragraph C of this rule requiring the information to contain the essential facts was taken from Rule 7 of the Federal Rules of Criminal Procedure. See generally, 1 Orfield, Criminal Procedure under the Federal Rules § § 7:83-7:87 (1966). The United States Supreme Court has indicated that the pleading under Federal Rule 7 must be tested by two general criteria: (1) whether the pleading contains the elements of the offense to sufficiently apprise the defendant of what he must be prepared to meet; (2) whether he is accurately apprised of the charge so as to know if he is entitled to plead a former acquittal or conviction under the double jeopardy clause of the fifth amendment to the United States constitution. Russell v. United States, 369 U.S. 749, 763-64, 82 S. Ct. 1038, 1046-49, 8 L. Ed. 2d 240, 250 (1962). Compare State v. Vigil, 85 N.M. 328, 512 P.2d 88 (Ct. App. 1973), with State v. Foster, 87 N.M. 155, 530 P.2d 949 (Ct. App. 1974).

This rule must also be read in conjunction with Rule 5-204 and Paragraphs A and B of Rule 5-205. Paragraphs A and B of Rule 5-205 identify certain allegations which need not be included in the pleading. Rule 5-204 indicates that the pleading is not invalid because of defects, errors and omissions. In addition, the court of appeals has held that any asserted failure of the pleading to allege essential facts must be accompanied by a showing of prejudice due to that failure. State v. Cutnose, 87 N.M. 307, 532 P.2d 896 (Ct. App.), cert. denied, 87 N.M. 299, 532 P.2d 888 (1974).

Paragraph C of this rule requires that the information be signed by the district attorney. See N.M. Const., art. II, § 14. This requirement can be met by the signature of an assistant district attorney. See 36-1-2 NMSA 1978. The constitution also indicates that the information may be filed by the attorney general. See also 8-5-3 NMSA 1978. The deputy or an assistant attorney general would have the same authority as the attorney general. See 8-5-5 NMSA 1978.

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

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

The Indictment. For the law governing the grand jury procedure and return of indictments, see 31-6-1 NMSA 1978 et seq. The elements of an indictment are the same as required for an information and would be interpreted by the same criteria. See e.g., State v. Cutnose, 87 N.M. 307, 532 P.2d 896 (Ct. App.), cert. denied, 87 N.M. 299, 532 P.2d 888 (1974). The state may proceed by indictment in the district court even if the prosecution was initiated originally by the filing of a complaint in the magistrate court. See State v. Peavler, 88 N.M. 125, 537 P.2d 1387 (1975); State v. Ergenbright, 84 N.M. 662, 506 P.2d 1209 (1973); State v. Burk, 82 N.M. 466, 483 P.2d 940 (Ct. App.), cert. denied, 404 U.S. 955, 92 S. Ct. 309, 30 L. Ed. 2d 271 (1971). This practice was recognized by the supreme court in the adoption of Paragraph E of Rule 6-202 which provides that if the defendant is indicted prior to the preliminary examination, the magistrate shall take no further action.

ANNOTATIONS

I. GENERAL CONSIDERATION.

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

For filing of complaint, see Rule 5-207 NMRA.

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

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

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

Compiler's notes. — Paragraph A is similar to Rule 12(a) of the Federal Rules of Criminal Procedure.

Paragraph B is similar to Rule 3 of the Federal Rules of Criminal Procedure.

Paragraphs C and D are similar to Rule 7(c) of the Federal Rules of Criminal Procedure.

Constitutional rights not denied where information used rather than indictment. — There is no denial of a state or federal constitutional right where a defendant is

proceeded against by information rather than by grand jury indictment. State v. Franklin, 79 N.M. 608, 446 P.2d 883 (1968), cert. denied, 394 U.S. 965, 89 S. Ct. 1318, 22 L. Ed. 2d 566 (1969).

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

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

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

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

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

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

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

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

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

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

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

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

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

1A C.J.S. Actions §§ 237 to 242.

II. COMMENCEMENT OF PROSECUTION.

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

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

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

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

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

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

Investigation not basis for malicious prosecution claim. — The investigative report of a drug inspector regarding the filling of forged prescriptions by a pharmacist did not

initiate criminal proceedings against the pharmacist and could not be used as the basis for a claim of malicious prosecution. Johnson v. Weast, 1997-NMCA-066, 123 N.M. 470, 943 P.2d 117.

III. COMPLAINT.

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

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

IV. INFORMATION.

A. IN GENERAL.

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

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

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

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

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

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

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

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

B. ESSENTIAL FACTS.

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

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

C. SUFFICIENCY OF REFERENCE TO OFFENSE.

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

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

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

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

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

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

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

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

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

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

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

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

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

Reference to specific section of municipal code sufficiently alleged offense of disturbing the peace. Village of Deming v. Marquez, 74 N.M. 747, 398 P.2d 266 (1964) (decided under former law).

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

V. INDICTMENTS.

A. IN GENERAL.

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

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

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

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.), cert. denied, 99 N.M. 148, 655 P.2d 160 (1982).

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

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

B. ESSENTIAL FACTS.

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

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

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

Sufficiency of reference to diverse dates. — Where the indictment charged defendant with receiving and concealing stolen property contrary to statutory provisions and further charged that: "On diverse dates between March 20, 1965, and the 19th day of March, 1968 . . . [the defendant] did buy, procure, receive, or conceal things of value knowing the same to have been stolen or acquired by fraud or embezzlement" the indictment was in substantially the form prescribed by statute, and, insofar as form is

concerned, no greater degree of conformity was required. State v. Lindsey, 81 N.M. 173, 464 P.2d 903 (Ct. App. 1969), cert. denied, 398 U.S. 904, 90 S. Ct. 1692, 26 L. Ed. 2d 62 (1970) (decided under former law).

C. SUFFICIENCY OF REFERENCE TO OFFENSE.

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

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

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

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

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

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

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

5-202. General rules of pleadings.

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

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

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

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

[As amended, effective March 1, 1991.]

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

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

ANNOTATIONS

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

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

5-203. Joinder; severance.

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

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

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

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

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

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

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

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

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

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

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

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

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

The 1979 supreme court order provided as follows:

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

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

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

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

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

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

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

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

An accused's right of cross-examination, secured by the confrontation clause of the sixth amendment, is violated at the accused's joint trial with a codefendant who does not testify by admission of codefendant's confession inculpating accused, notwithstanding jury instructions that codefendant's confession must be disregarded in determining accused's guilt or innocence. Bruton v. United States, 391 U.S. 123 (1968), 88 S. Ct. 1620, 20 L. Ed. 2d 476. See Parker v. Randolph, 442 U.S. 62, 99 S. Ct. 2132, 60 L. Ed. 2d 713 (1979) for an exception to the Bruton rule allowing the admission of interlocking confessions of codefendants in certain circumstances when accompanied by an appropriate limiting instruction to the jury. See also State v. Shade & Vincent, 104 N.M. 710, 726, 726 P.2d 864 (Ct. App. 1986) (cert. quashed, Vincent v. State, 104 N.M. 702, 726 P.2d 856).

Even though the court may review the confession or statement given by a codefendant which is produced to show reason for severance, such review may be held in camera, and the statement or confession need not be made part of the record. [As revised, April 9, 1992.]

ANNOTATIONS

I. GENERAL CONSIDERATION.

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

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

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

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

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

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

Am. Jur. 2d, A.L.R. and C.J.S. references. — 1 Am. Jur. 2d Actions § 70 et seq.; 21 Am. Jur. 2d Criminal Law § 20.

Appealability of order sustaining demurrer, or its equivalent, to complaint on ground of misjoinder or nonjoinder of parties or misjoinder of causes of action, 56 A.L.R.2d 1238.

Consolidated trial upon several indictments or informations against same accused, over his objection, 59 A.L.R.2d 841.

Propriety of use of multiple juries at joint trial of multiple defendants in state criminal prosecution, 41 A.L.R.4th 1189.

Joinder of offenses under Rule 8(a), Federal Rules of Criminal Procedure, 39 A.L.R. Fed. 479.

Defendant's right, under Rule 14, Federal Rules of Criminal Procedure, to severance in federal criminal trial because of codefendant's identification with an unpopular group, 40 A.L.R. Fed. 937.

What constitutes "series of acts or transaction" for purposes of Rule 8(b) of Federal Rules of Criminal Procedure, providing for joinder of defendants who are alleged to have participated in same series of acts or transaction, 62 A.L.R. Fed. 106.

1A C.J.S. Actions §§ 154 to 176.

II. JOINDER OF OFFENSES.

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

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

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

in mind and trying all charges together. State v. Tanton, 88 N.M. 333, 540 P.2d 813 (1975).

Review of evidence on motion for consolidation. — A motion for consolidation necessitates a review of the evidence to determine whether the charges logically arise from the same episode or acts of a similar nature. State v. Burdex, 100 N.M. 197, 668 P.2d 313 (Ct. App. 1983).

Abatement of inferior court proceedings. — Proceedings pending in an inferior court ought to be abated when charges are instituted in district court in relation to the same episode. Since such procedures would promote judicial economy, the overriding state interest being the efficient prosecution of all crimes and especially felonies, a defendant in such a situation would have a right to move the inferior court for an abatement to abide the event in district court and should a defendant in such a case, for whatever reason, fail to so move, he might well have thereby waived any right to complain of piecemeal prosecution. State v. Tanton, 88 N.M. 333, 540 P.2d 813 (1975).

Effect of misjoinder. — An information shall not be invalid or insufficient because of a misjoinder of the offenses charged. State v. Everitt, 80 N.M. 41, 450 P.2d 927 (Ct. App. 1969).

Where joinder proper. — Where two counts of fraud and one count of conspiracy to defraud arose from unfinished construction contracts, including contracts for the remodeling of homes and contracts for the purchase of materials for such remodelings, joinder was proper. State v. McCallum, 87 N.M. 459, 535 P.2d 1085 (Ct. App.), cert. denied, 87 N.M. 457, 535 P.2d 1083 (1975).

Three sales of controlled substances by the defendant to the same individual in the same community and all within a comparatively short period of time clearly constitute the kind of situation intended to be covered by this rule. State v. Riordan, 86 N.M. 92, 519 P.2d 1029 (Ct. App. 1974).

It is not a denial of due process for a prosecutor to include in a criminal information two misdemeanor charges arising out of the same incident as the felony charge. State v. Riddall, 112 N.M. 78, 811 P.2d 576 (Ct. App. 1991).

In this case, the bank robberies were similar and distinctive and the cars used in the bank robberies were stolen using a distinctive method. The tampering-with-evidence charge involved altering or hiding a gun allegedly used in both the murder and the bank robberies. All of the charges were clearly related to crimes that were the same, similar, a series of connected acts, or part of a single scheme or plan. Thus, all of the crimes charged were subject to joinder under Paragraph A. State v. Griffin, 116 N.M. 689, 866 P.2d 1156 (1993).

Since there was admissible evidence tending to show that the two alleged offenses were committed in a similar manner and by a single individual, the trial court did not err

in rejecting the defendant's motion for severance. State v. Jones, 1996-NMCA-020, 121 N.M. 383, 911 P.2d 891, aff'd, 1997-NMSC-016, 123 N.M. 73, 934 P.2d 267.

Alternative charge held improper. — A complaint charging defendants with larceny over $2,500 or, in the alternative, possession of stolen property having a value over $2,500, did not comply with this Rule. State v. Stephens, 110 N.M. 525, 797 P.2d 314 (Ct. App. 1990).

Failure to sever not ineffective assistance. — Defendant's right to effective assistance of counsel was not violated by defense counsel's failure to move to sever the count of possession of a firearm by a felon from counts of first-degree murder and shooting into an occupied motor vehicle. Joinder of the felon in possession charge with the other charges was not per se prejudicial and the prior felony of vehicular homicide was so dissimilar from charges of murder or shooting into an occupied vehicle that its introduction into evidence was insufficient to cause defendant undue prejudice and require severance. State v. Gonzales, 113 N.M. 221, 824 P.2d 1023 (1992).

Insufficient showing of prejudice. — Assertion by defendant, charged with attempted murder and attempted armed robbery, that attempted murder charge was over-emphasized and poisoned the minds of the jury and that the two charges were not part of the same transaction did not make sufficient affirmative showing of prejudice to show error in motion for severance. State v. Paul, 83 N.M. 619, 495 P.2d 797 (Ct. App. 1972).

Joinder of two informations, one charging three counts of aggravated burglary, three counts of second degree criminal sexual penetration (CSP II), and one count of CSP III, and the other, one count of aggravated burglary and one count of attempted CSP II, did not result in prejudice so great as to deny defendant a fair trial. Lucero v. Kerby, 133 F.3d 1299 (10th Cir.), cert. denied, 523 U.S. 1110, 118 S. Ct. 1684, 140 L. Ed. 2d 821 (1998).

Severance within trial court's discretion. — Though joinder of offenses in an indictment is authorized by this rule, severance of the counts for trial is a matter of discretion for the trial court. State v. McCall, 101 N.M. 616, 686 P.2d 958 (Ct. App. 1983), rev'd on other grounds, 101 N.M. 32, 677 P.2d 1068 (1984).

Where no prejudice, no error in refusing to sever counts. — Where the strength and quality of the evidence on the various counts convinces the appellate court that the defendant was not prejudiced by the failure to sever multiple counts submitted to the jury, the trial court did not err in refusing to sever. State v. Montano, 93 N.M. 436, 601 P.2d 69 (Ct. App.), cert. denied, 93 N.M. 683, 604 P.2d 821 (1979).

Defendant was not prejudiced by court's denial of his motion to sever trial on robbery and murder charges from trial on drug paraphernalia charges; jury was competent to evaluate the drug evidence separately from the robbery and murder evidence. State v. Duffy, 1998-NMSC-014, 126 N.M. 132, 967 P.2d 807.

In a prosecution for murder, the trial court did not abuse its discretion in joining escape charges because the court determined properly that escape evidence would be cross-admissible in separate trials and weighed the probative value against the danger of unfair prejudice. State v. Jacobs, 2000-NMSC-026, 129 N.M. 448, 10 P.3d 127.

III. JOINDER OF DEFENDANTS.

Generally. — So far as concerns essentials in the ascertainment of truth and the administration of justice, a joint trial of two defendants on two separate indictments for one crime differs in no respect from a single trial of the same defendants joined in one indictment for the identical crime. State v. Fagan, 78 N.M. 618, 435 P.2d 771 (Ct. App. 1967) (decided under former law).

Conspiracy charge. — Trial of multiple defendants was properly joined under Subdivisions (b) and (c) (see now Paragraphs B(1) and B(2)) where conspiracy was charged against all and it was difficult, if not impossible, to separate the proof as to each defendant without leaving gaps in the testimony. State v. Johnston, 98 N.M. 92, 645 P.2d 448 (Ct. App. 1982).

Denial of motion to sever is not error where the charges contained in the indictment grew out of an alleged crime spree by the defendant and his codefendants and the victims of the robberies testify as to certain similarities in the modus operandi and patterns of the crimes. State v. Burdex, 100 N.M. 197, 668 P.2d 313 (Ct. App. 1983).

IV. MOTION FOR SEVERANCE.

Severance as matter of right. — Where it was obvious to the trial court that the prosecution intended to use one defendant's illegally induced confession at the joint trial, and that evidence would not have been admissible at separate trials of either of the other two defendants, those defendants were entitled to severance of their trials as a matter of right, and failure to sever their trials constituted reversible error. State v. Benavidez, 87 N.M. 223, 531 P.2d 957 (Ct. App. 1975) (decided prior to 1980 amendment).

Rule explicitly requires prejudice and prejudice only. State v. Volkman, 86 N.M. 529, 525 P.2d 889 (Ct. App. 1974).

Fact that two charges are joined in one trial does not, in itself, show legal prejudice to defendant. State v. Silver, 83 N.M. 1, 487 P.2d 910 (Ct. App. 1971) (decided under former law).

To obtain a severance, defendant must prove he was prejudiced. State v. Gallegos, 109 N.M. 55, 781 P.2d 783 (Ct. App. 1989).

Failure to sever multiple counts not error where defendant not prejudiced. — Where the strength and quality of the evidence on various counts convinces the

appellate court that the defendant was not prejudiced by the failure to sever multiple counts submitted to the jury, the trial court did not err in refusing to sever. State v. Montano, 93 N.M. 436, 601 P.2d 69 (Ct. App.), cert. denied, 93 N.M. 683, 604 P.2d 821 (1979).

Failure to sever two counts of forgery arising from two separate incidents involving alteration of bingo cards did not prejudice defendant where evidence of the two offenses would be independently admissible in separate trials to prove the essential elements of intent and knowledge. State v. Nguyen, 1997-NMCA-037, 123 N.M. 290, 939 P.2d 1098.

When failure to request findings constitutes waiver. — The failure to request findings by the trial court when they are required by this rule could be construed as a waiver. However, where the state stipulated that it would present a confession against one defendant and admitted that this hearsay evidence would not be admissible in a separate trial of the moving defendants, no findings were necessary and there was no waiver. State v. Volkman, 86 N.M. 529, 525 P.2d 889 (Ct. App. 1974).

Motion for severance of defendants is waived if it is not made before trial or before or at the close of all the evidence. State v. Garcia, 84 N.M. 519, 505 P.2d 862 (Ct. App.), cert. denied, 84 N.M. 512, 505 P.2d 855 (1972).

Bad reputation or conviction not sufficient ground for severance. — It is insufficient ground for severance that other defendants have bad reputations or have confessed to or been convicted of other crimes. State v. Aull, 78 N.M. 607, 435 P.2d 437 (1967), cert. denied, 391 U.S. 927, 88 S. Ct. 1829, 20 L. Ed. 2d 668 (1968) (decided under former law).

The bad reputation of codefendants does not require severance. State v. Johnston, 98 N.M. 92, 645 P.2d 448 (Ct. App. 1982).

Defendant prejudiced where evidence of one burglary interspersed with that of another burglary. — Where defendant objected to consolidated trials and filed a motion for separate trials of two burglaries because the alleged felonies occurred at different times and places, and related to property belonging to different owners, but where the motion was denied, and evidence given at trial of facts pertaining to the one alleged burglary was interspersed with that of other alleged burglary, the trial court's denial of severance was prejudicial to defendant and constituted an abuse of discretion. State v. Johnson, 84 N.M. 29, 498 P.2d 1372 (Ct. App. 1972).

Control of procedural matters where defendant acts contrary to counsel's advice. — Where defendant claimed there was an abuse of discretion because the trial court acceded to his express wish not to have the counts severed when court-appointed counsel, directed to remain on the case by the trial court, was asking for a severance, and that the trial court thus ignored counsel's control over procedural matters, then defendant was representing himself in connection with the motion and proceeding

contrary to counsel's advice and the court could not say that counsel, at the time, was controlling the matter. There was no abuse of discretion in these circumstances. State v. Clark, 83 N.M. 484, 493 P.2d 969 (Ct. App. 1971), cert. denied, 83 N.M. 473, 493 P.2d 958 (1972) (decided under former law).

Review of evidence on motion for severance. — A motion for severance necessitates a review of the evidence to determine whether the charges logically arise from the same episode or acts of a similar nature. State v. Burdex, 100 N.M. 197, 668 P.2d 313 (Ct. App. 1983).

Numerous counts insufficient to establish prejudice to defendant. — A claim that a criminal prosecution involves too many counts to try at one time is insufficient in and of itself to establish prejudice to the defendant. State v. Burdex, 100 N.M. 197, 668 P.2d 313 (Ct. App. 1983).

Conviction not reversed if evidence against joint defendant is not crucial. — Even where the trial court errs in failing to find that the prosecution will probably present evidence against a joint defendant which would not be admissible in a separate trial of the moving defendant, supreme court will not reverse a defendant's conviction if said error is harmless and the evidence admitted is not crucial to a determination of the defendant's guilt. State v. Rondeau, 89 N.M. 408, 553 P.2d 688 (1976).

Where no showing, that joinder of counts was prejudicial. — The trial court did not abuse its discretion in denying the defendant's motion for a complete severance as to all counts of fraud and conspiracy where there was no showing by the defendant that joinder of the counts in the trial resulted in prejudice, and evidence of the other counts was admissible whether the counts were severed or not. State v. McCallum, 87 N.M. 459, 535 P.2d 1085 (Ct. App.), cert. denied, 87 N.M. 457, 535 P.2d 1083 (1975).

No severance where jury separates evidence. — Where several codefendants were jointly indicted for aggravated battery, but where the jury was able to separate the evidence against each defendant and differentiate among degrees of culpability, the trial court correctly refused to sever the defendants' trial. State v. Dominguez, 115 N.M. 445, 853 P.2d 147 (Ct. App. 1993).

Severance is within court's discretion. — Severance of cases is a matter of procedure which is addressed to the sound discretion of the trial court. State v. Baca, 85 N.M. 55, 508 P.2d 1352 (Ct. App. 1973); State v. Robinson, 93 N.M. 340, 600 P.2d 286 (Ct. App.), cert. denied, 92 N.M. 532, 591 P.2d 286 (1979), overruled on other grounds, Santillanes v. State, 115 N.M. 215, 849 P.2d 358 (1993); State v. Pacheco, 110 N.M. 599, 798 P.2d 200 (Ct. App. 1990).

This rule leaves the decision to grant or deny a separate trial largely in the hands of the trial court. State v. McGill, 89 N.M. 631, 556 P.2d 39 (Ct. App. 1976); State v. Schifani, 92 N.M. 127, 584 P.2d 174 (Ct. App.), cert. denied, 92 N.M. 180, 585 P.2d 324 (1978).

Though joinder of offenses in an indictment is authorized, severance of the counts for trial is a matter of discretion for the trial court. State v. McCall, 101 N.M. 616, 686 P.2d 958 (Ct. App. 1983), rev'd on other grounds, 101 N.M. 32, 677 P.2d 1068 (1984).

And there is no error unless abuse prejudices defendant. — Granting or denial of severance of cases must not be disturbed unless there is a clear showing of abuse of discretion which results in prejudice to the defendant. State v. Baca, 85 N.M. 55, 508 P.2d 1352 (Ct. App. 1973).

Trial court's denial of motion for severance of offenses is not error absent a showing of an abuse of discretion which results in prejudice to defendant. State v. Clark, 83 N.M. 484, 493 P.2d 969 (Ct. App. 1971), cert. denied, 83 N.M. 473, 493 P.2d 958 (1972).

The appellate issue is whether the trial court abused its discretion in denying the motion to sever. State v. McGill, 89 N.M. 631, 556 P.2d 39 (Ct. App. 1976); State v. Schifani, 92 N.M. 127, 584 P.2d 174 (Ct. App.), cert. denied, 92 N.M. 180, 585 P.2d 324 (1978); State v. Robinson, 93 N.M. 340, 600 P.2d 286 (Ct. App.), cert. denied, 92 N.M. 532, 591 P.2d 286 (1979), overruled on other grounds, Santillanes v. State, 115 N.M. 215, 849 P.2d 358 (1993).

The denial of the request for severance is not a basis for reversal unless abuse of discretion and prejudice is shown. State v. Silver, 83 N.M. 1, 487 P.2d 910 (Ct. App. 1971) (decided under former law).

Abuse of discretion in denying severance. — District court abused its discretion in denying a severance at defendant's trial for three crimes involving larceny and fraudulent signing of a credit card, where the crimes charged in the indictment were remote in both time and place of occurrence, defendant's modi operandi were not similar in each crime, and the victims of the crimes were all different, as were the articles stolen or attempted to be stolen. State v. Gallegos, 109 N.M. 55, 781 P.2d 783 (Ct. App. 1989).

One test for abuse of discretion in denying motion to sever charges is whether prejudicial testimony, inadmissible in a separate trial, is admitted in a joint trial. State v. Jones, 120 N.M. 185, 899 P.2d 1139 (Ct. App. 1995).

Denial of severance held proper. — On defendant's claim that the number of armed robbery charges (six), for which he was jointly tried, prejudiced him as a matter of law, consideration was given to the fact severance was discretionary with the trial court, that evidence as to certain of the charges was admissible on other charges and that the jury acquitted the defendant of some of the charges, and the trial court's denial of the motion to sever was upheld. State v. McGill, 89 N.M. 631, 556 P.2d 39 (Ct. App. 1976).

A denial of a motion to sever is not error where the charges contained in the indictment grew out of an alleged crime spree by the defendant and his codefendants and the

victims of the robberies testify as to certain similarities in the modus operandi and patterns of the crimes. State v. Burdex, 100 N.M. 197, 668 P.2d 313 (Ct. App. 1983).

A severance is not required when defendant simply wants to testify on one count but not on the other. State v. Foye, 100 N.M. 385, 671 P.2d 46 (Ct. App. 1983).

Trial court's decision denying defendant's motion to sever his trial did not result in reversible error where evidence of defendant's guilt on drug possession charge was overwhelming and trial court's instruction would have sufficed to cure any prejudice had the possession offense been the only charge. State v. Roybal, 115 N.M. 27, 846 P.2d 333 (Ct. App. 1992).

The trial court did not err in denying defendant's motion to sever counts of fraud and receiving a bribe from other counts where there was no evidence the multiplicity of charges confused the jury, the multiplicity of charges were not cumulative, and the counts were predicate offenses for a racketeering charge. State v. Armijo, 1997-NMCA-080, 123 N.M. 690, 944 P.2d 919.

Where substantial evidence supported each conviction, adverse evidence was relevant to each charge and jury applied evidence to each count, trial court did not abuse its discretion in denying motion to sever the three counts against the defendant for trial. State v. Schifani, 92 N.M. 127, 584 P.2d 174 (Ct. App.), cert. denied, 92 N.M. 180, 585 P.2d 324 (1978).

Dual jury trials. — The use of dual juries is a modified form of severance and is reviewed under the same standard of review as an action on a motion to sever, i.e., defendant must show abuse of discretion and prejudice. State v. Padilla, 1998-NMCA-088, 125 N.M. 665, 964 P.2d 829, cert. denied, 125 N.M. 322, 961 P.2d 167 (1998).

5-204. Amendment or dismissal of complaint, information and indictment.

A. **Defects, errors and omissions.** A complaint, indictment or information shall not be deemed invalid, nor shall the trial, judgment or other proceedings thereon be stayed, arrested or in any manner affected, because of any defect, error, omission, imperfection or repugnancy therein which does not prejudice the substantial rights of the defendant upon the merits. The court may at any time prior to a verdict cause the complaint, indictment or information to be amended in respect to any such defect, error, omission or repugnancy if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced.

B. **Surplusage.** Any unnecessary allegation contained in a complaint, information or indictment may be disregarded as surplusage.

C. **Variances.** No variance between those allegations of a complaint, indictment, information or any supplemental pleading which state the particulars of the offense,

whether amended or not, and the evidence offered in support thereof shall be grounds for the acquittal of the defendant unless such variance prejudices substantial rights of the defendant. The court may at any time allow the indictment or information to be amended in respect to any variance to conform to the evidence. If the court finds that the defendant has been prejudiced by an amendment, the court may postpone the trial or grant such other relief as may be proper under the circumstances.

D. **Effect.** No appeal, or motion made after verdict, based on any such defect, error, omission, repugnancy, imperfection, variance or failure to prove surplusage shall be sustained unless it is affirmatively shown that the defendant was in fact prejudiced in the defendant's defense on the merits.

E. **Refiled proceedings.** If an indictment or information is dismissed and a subsequent indictment or information is filed arising out of the same incident, the bond shall continue in effect pending review by the district court.

F. **Effect on bail.** The dismissal of an indictment or information shall not exonerate a bond prior to the expiration of the time for automatic exoneration pursuant to Subparagraphs (1) or (2) of Paragraph A of Rule 5-406 NMRA of these rules.

[As amended by Supreme Court Order 05-8300-12, effective September 1, 2005.]

Committee commentary. — This rule was designed to make clear that criminal pleadings should not be held invalid for any technical defect, error, or omission. See e.g., State v. Lucero, 79 N.M. 131, 440 P.2d 806 (Ct. App. 1968). The defendant must show that prejudice resulted from the allowance of an amendment to the pleading. State v. Padilla, 86 N.M. 282, 523 P.2d 17 (Ct. App.), cert. denied, 86 N.M. 281, 523 P.2d 16 (1974).

ANNOTATIONS

I. GENERAL CONSIDERATION.

Cross references. — For motion for severance of offenses or defendants, see Rule 5-203 NMRA.

For pretrial motions, defenses and objections, see Rule 5-601 NMRA.

For post-conviction motions, see Rule 5-802 NMRA.

The 2005 amendment, effective September 1, 2005, added Paragraphs E and F relating to refiled proceedings and the effect on bail.

Compiler's notes. — Paragraphs A and C of this rule are similar to Rule 52 of the Federal Rules of Criminal Procedure.

Paragraph B of this rule is similar to Rule 7(d) of the Federal Rules of Criminal Procedure.

The annotations listed under "Defects, errors and omissions" make no distinction between pre- or post- verdict motions or appeals.

Amendment of indictment. — Where the defendant was indicted for possession of child pornography with intent to distribute under the 1993 version of Section 30-6A-3 NMSA 1978 which required intent to distribute, and the trial court found the defendant guilty of sexual exploitation by possession under the 2001 version of the statute which does not require intent to distribute because the time frames for the corresponding criminal acts fell under the 2001 version, the amendment of the indictment did not charge an additional or different offense and the defendant's substantial rights were not prejudiced. State v. Dietrich, 2009-NMCA-031, 145 N.M. 733, 204 P.3d 748.

Changing the date on the charges listed on the indictment does not create an entirely new charge. State v. Dombos, 2008-NMCA-035, 143 N.M. 668, 180 P.3d 675, cert. denied, 2008-NMCERT-002.

Generally. — That a person may not be punished for a crime without a formal and sufficient accusation even if he voluntarily submits to the jurisdiction of the court cannot be questioned as it is regarded as fundamental that the accused must be tried only for the offense charged in the information. State v. Villa, 85 N.M. 537, 514 P.2d 56 (Ct. App. 1973).

Information not required to charge identical crime as complaint. — The information is not required to charge the identical crime stated in the complaint. State v. Vasquez, 80 N.M. 586, 458 P.2d 838 (Ct. App. 1969) (decided under former law).

Showing of prejudice required. — Subdivisions (a) and (d) (see now Paragraphs A and D) require a showing of prejudice due to a defect, error or omission in an indictment, and where defendant has not made such showing, the indictment is legally sufficient. State v. Cutnose, 87 N.M. 307, 532 P.2d 896 (Ct. App.), cert. denied, 87 N.M. 299, 532 P.2d 888 (1975).

Sufficiency of criminal trespass charge. — Where defendant's indictment for criminal trespass charged him with violation of a specific statutory section, stating the common name of the offense, the date and the county, it sufficiently informed defendant of what he must be prepared to meet and did not deprive him of due process. State v. Cutnose, 87 N.M. 307, 532 P.2d 896 (Ct. App.), cert. denied, 87 N.M. 299, 532 P.2d 888 (1975).

Waiver of preliminary hearing or defects. — Pleading to an information waives the right to a preliminary hearing or any formal defects therein. State v. Paul, 82 N.M. 619, 485 P.2d 375 (Ct. App.), cert. denied, 82 N.M. 601, 485 P.2d 357 (1971) (decided under former law).

Effect of failure to request bill of particulars. — A defendant failing, as here, to request a bill of particulars, if he deems the information insufficient, will not be heard on appeal to complain of a deficiency in the information. State v. Lott, 73 N.M. 280, 387 P.2d 855 (1963) (decided under former law).

Advance notice. — Lack of advance notice concerning the motion to amend the information which erroneously cited the wrong statute is not a meritorious claim since the amendment can be made at any time and, absent a showing of prejudice (here, defendant was given 24 hours' notice), is not grounds for reversal. State v. Wesson, 83 N.M. 480, 493 P.2d 965 (Ct. App. 1972) (decided under former law).

Period of cross-examination of victims following amendment not prejudicial. — When, based on evidence presented in depositions of the victims, the information was amended to delete and amend certain charges without adding any charges, the failure to give the defendant the opportunity to cross-examine the victims on the charges in the amended information was not prejudicial. State v. Trujillo, 119 N.M. 772, 895 P.2d 672 (Ct. App. 1995).

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

Am. Jur. 2d, A.L.R. and C.J.S. references. — Failure to swear or irregularity in swearing witnesses appearing before grand jury as ground for dismissal of indictment, 23 A.L.R.4th 154.

When is dismissal of indictment appropriate remedy for misconduct of government official, 57 A.L.R. Fed. 824.

71 C.J.S. Pleading §§ 286 to 293.

II. DEFECTS, ERRORS AND OMISSIONS.

Where the defendant covertly videotaped minor female victims using the bathroom; the indictment failed to specify which photographs provided the factual basis for each count of the indictment for sexual exploitation of children but three months prior to trial the prosecution notified the defendant of the images that provided the factual basis for each count of the charge, the defendant was not prejudiced. State v. Myers, 2009-NMSC-016, ____ N.M. ____, ____ P.3d ____, overruling, in part, State v. Rendleman, 2003-NMCA-150, 134 N.M. 744, 82 P.3d 554.

Delay in filing information. — Where the procedural defect is the delay in filing the information, absent a showing of prejudice from this delay, a prosecution under the information is proper. State v. Keener, 97 N.M. 295, 639 P.2d 582 (Ct. App. 1981).

Explanation as to resubmitted matter entails no prejudice. — Where the prosecutor does no more than explain why a matter, previously considered, is again being

presented to the grand jury, no prejudice to the defendant exists. State v. Saiz, 92 N.M. 776, 595 P.2d 414 (Ct. App. 1979).

Omission of date. — To the extent that the complaint against defendant, standing alone, could be considered defective as not including the date, any such defect was cured by the bill of particulars, alleging the date of violation, filed by the state. State v. Pina, 90 N.M. 181, 561 P.2d 43 (Ct. App. 1977).

Specified date of offense is a material allegation. — When the state elects to proceed on a specific date, and so alleges in the charging document, the date specified becomes a material allegation of the offense charged, thereby precluding the state from establishing guilt based on a different date. State v. Mankiller, 104 N.M. 461, 722 P.2d 1183 (Ct. App. 1986).

Date of acts. — The information charging defendant with sodomy (now criminal sexual penetration) was void for failure to give him notice of the charges against him where it failed to state the date of the offense so as to specify which of three different acts subsequently testified to by the state's principal witness was charged, and defendant's conviction was reversed. State v. Foster, 87 N.M. 155, 530 P.2d 949 (Ct. App. 1974).

Correction of date did not prejudice defendant. — Trial court did not err in allowing the indictment to be amended to correct the date of the alleged incident since the defendant was not prejudiced thereby. State v. Marquez, 1998-NMCA-010, 124 N.M. 409, 951 P.2d 1070, cert. denied, 124 N.M. 311, 950 P.2d 284 (1998).

Failure to note date of filing. — Jurisdiction of district court is not lost by the failure of the trial court to note the date of filing on the information, where there is nothing showing defendant was prejudiced in his defense on the merits. State v. Vigil, 85 N.M. 328, 512 P.2d 88 (Ct. App. 1973).

Time of offense. — An indictment or information is not required to allege the time of the offense. State v. Selgado, 78 N.M. 165, 429 P.2d 363 (1967) (decided under former law).

Misjoinder of offenses. — An information shall not be invalid or insufficient because of a misjoinder of the offenses charged. State v. Everitt, 80 N.M. 41, 450 P.2d 927 (Ct. App. 1969) (decided under former law).

Meaning of "duplicity". — "Duplicity" is the joinder of two or more distinct and separate offenses in the same count. State v. King, 90 N.M. 377, 563 P.2d 1170 (Ct. App. 1977), overruled on other grounds State v. Reynolds, 98 N.M. 527, 650 P.2d 811 (1982).

Failure to charge offense. — In prosecution for evasion of gross receipts tax, indictment that was defective, because it failed to inform defendants of the charge that they attempted to evade a tax owed by the corporation that they owned, could properly

be amended under this rule to include that defendants were officers and owners of the corporation and committed the offenses in their capacity as officers and owners, without prejudice to the substantial rights of the defendants on the merits. State v. Dunlap, 90 N.M. 732, 568 P.2d 258 (Ct. App. 1977).

Omission of entrustment from embezzlement charge. — A pleading expressly charging embezzlement does not fail by omitting entrustment as a factor. State v. Konviser, 57 N.M. 418, 259 P.2d 785 (1953) (decided under former law).

Hearing of evidence by jury where joinder of crimes. — The fact that the jury heard evidence for two separate crimes under one information does not in itself afford proof of prejudice, as such proof is usually present where joinder is properly allowed. State v. Brewer, 56 N.M. 226, 242 P.2d 996 (1952) (decided under former law).

Addition of new charges. — Defendant was prejudiced when trial court permitted state to amend indictment, after all evidence was in, to allege three methods by which offense of criminal sexual penetration in the second degree could be committed rather than only one method as alleged in the original indictment, since the jury was permitted by such amendment to convict the defendant under a theory which had not been tried. State v. Armijo, 90 N.M. 614, 566 P.2d 1152 (Ct. App. 1977).

Amended information to correct omission of count, not vindictive prosecution. — Where two counts were added by amendment to an information after they had inadvertently been omitted from the magistrate's written bind over order and from the original information, the filing of the amended information following the defendant's successful motion for a mistrial did not amount to vindictive prosecution. State v. Coates, 103 N.M. 353, 707 P.2d 1163 (1985).

Reinstatement of deleted charge. — Where the taking of evidence had been concluded before counts 2, 3 and 4, charging various degrees of murder with a firearm, were stricken and any defense to the firearm charge had been presented in defending against the firearm charge in those counts, there was no prejudice in the reinstatement of the firearm charge. State v. King, 90 N.M. 377, 563 P.2d 1170 (Ct. App. 1977), overruled on other grounds State v. Reynolds, 98 N.M. 527, 650 P.2d 811 (1982).

Conviction under necessarily included offense. — Conviction of first-degree murder under the felony-murder rule for an attempt to commit a felony when the charge under the indictment alleged the completion of the felony did not infringe fundamental rights of defendant, since the attempt to commit the crime charged is a necessarily included offense. State v. Turnbow, 67 N.M. 241, 354 P.2d 533 (1960) (decided under former law).

Conviction for voluntary manslaughter under information charging first-degree murder will be sustained where defendant fails to object to charge. State v. Parker, 34 N.M. 486, 285 P. 490 (1930) (decided under former law).

Charging in the alternative. — There was nothing unfair about charging the defendant in the alternative with fraud or embezzlement, particularly since the charges arose out of the same events and carried the same penalties, and defendant was furnished with a most detailed statement of fact including the complete district attorney's file, police reports and a citation of authorities the state was relying on in support of each of the alternative charges. State v. Ortiz, 90 N.M. 319, 563 P.2d 113 (Ct. App. 1977).

Statutory misreference. — A statutory misreference did not make the information fatally defective when the amendment, to correct the statutory misreference, was proper. State v. Wesson, 83 N.M. 480, 493 P.2d 965 (Ct. App. 1972).

Where allegations, notwithstanding the misreference to offense, are sufficient to charge the offense they provide no grounds for error. State v. Holly, 79 N.M. 516, 445 P.2d 393 (Ct. App. 1968) (decided under former law).

If the acts charged in an indictment are sufficient to constitute an offense under any statutes, a misreference, whether in the caption of the indictment or in the body thereof, to the statutes violated, does not render the indictment invalid. Smith v. Abram, 58 N.M. 404, 271 P.2d 1010 (1954) (decided under former law).

Motion to dismiss because of statutory misreference in indictment was frivolous where misreference was patent typing error. State v. Trujillo, 91 N.M. 641, 578 P.2d 342 (Ct. App.), cert. denied, 91 N.M. 751, 580 P.2d 972 (1978).

Miswriting. — Where the indictment charged an offense under the statutes the indictment is not to be held invalid or insufficient because of a "miswriting" or similar defect. Rather, the indictment may be amended in respect to such defect, however, if defendant is prejudiced by any such defect the court may postpone the trial. No appeal "based on any such defect" is to be sustained "unless it is affirmatively shown that the defendant was in fact prejudiced thereby in his defense upon the merits." State v. Lucero, 79 N.M. 131, 440 P.2d 806 (Ct. App. 1968) (decided under former law).

Where original indictment charged a common name - kidnapping, and referred to a specific section which defined kidnapping, and where the deficiency in charging kidnapping in the original indictment was limited to the use of "confined" rather than "held to service" against the will, that deficiency could not, as defendant contended, be considered as a charge of false imprisonment because the original indictment did not attempt to frame a false imprisonment charge. Correcting the deficiency merely involved amendment of the indictment to cure a drafting defect, which is authorized in Subdivision (a) (see now Paragraph A). State v. Padilla, 86 N.M. 282, 523 P.2d 17 (Ct. App.), cert. denied, 86 N.M. 281, 523 P.2d 16 (1974).

Failure to name victim. — An information is not fatally defective in failing to name the victim of the statutory rape (now criminal sexual penetration) charged. Ex parte Kelley, 57 N.M. 161, 256 P.2d 211 (1953) (decided under former law).

Inserting defendant's first name by amending information after testimony was closed but before case went to jury, where there was no surprise or prejudice, was not error. State v. Martinez, 34 N.M. 112, 278 P. 210 (1929) (decided under former law).

Failure to include exact baptismal name of deceased was not a fatal variance where there was no doubt of his identity. State v. Martinez, 34 N.M. 112, 278 P. 210 (1929) (decided under former law).

Use of witnesses not appearing on original charge. — Failure to endorse informer's name as witness on indictment was not grounds for reversal on basis of surprise appearance since no claim was made that the testimony could not be reasonably anticipated and since defendants never asserted they desired a delay in order to rebut the surprise testimony. State v. Maes, 81 N.M. 550, 469 P.2d 529 (Ct. App.), cert. denied, 81 N.M. 588, 470 P.2d 309 (1970) (decided under former law).

Whether names of witnesses may be endorsed on the information during trial is a matter resting within the sound discretion of the court. It is not enough that a defendant claim surprise or prejudice in the calling of an adverse witness or one whose name does not appear upon the information charging him with crime. Nor is the mere admission of testimony of such witness error; rather, error follows from a denial of an opportunity to rebut the objectionable evidence. Here, defendant knew the day before that the witness would testify, knew the nature of the testimony, did not request postponement or continuance and admission of testimony was not an abuse of discretion. State v. Carlton, 83 N.M. 644, 495 P.2d 1091 (Ct. App.), cert. denied, 83 N.M. 631, 495 P.2d 1078 (1972) (decided under former law).

That the court granted the prosecutor's motion to endorse the information thereby adding the witness's name who had testified, in the absence of abuse of discretion, was not error. State v. Lujan, 79 N.M. 200, 441 P.2d 497 (1968) (decided under former law).

Incorrect address. — When after the amendment the address of the offense is correctly stated, defendant has not asked for a postponement and has not shown that he is prejudiced by the amendment correcting the typing error, contention that indictment is fatally defective is without merit. State v. Lucero, 79 N.M. 131, 440 P.2d 806 (Ct. App. 1968) (decided under former law).

III. SURPLUSAGE.

Proof of identity of victim is not surplusage. State v. Vallo, 81 N.M. 148, 464 P.2d 567 (Ct. App. 1970) (decided under former law).

Address and ownership of burglarized residence. — The allegations as to address and ownership of burglarized residence are unnecessary, and may be disregarded as surplusage. State v. Lucero, 79 N.M. 131, 440 P.2d 806 (Ct. App. 1968) (decided under former law).

IV. VARIANCES.

Generally. — Variance between evidence and allegations was not sufficient grounds for acquittal where no prejudice was shown, and failure of defense counsel to object did not establish ineffective counsel. State v. Chacon, 80 N.M. 799, 461 P.2d 932 (Ct. App. 1969) (decided under former law).

Under Paragraph C a variance is not treated as a different offense; a defendant would be able to preclude a second prosecution and avoid double jeopardy by demonstrating the variance. State v. Johnson, 105 N.M. 63, 728 P.2d 473 (Ct. App. 1986), cert. denied, 481 U.S. 1051, 107 S. Ct. 2185, 95 L. Ed. 2d 84 (1987).

The defendant was properly convicted of resisting, evading or obstructing an officer, because the evidence supported the verdict of the jury to that charge, and his opportunity to prepare and defend against the charge was not impaired by the fact that such an offense varied from the crime charged in the criminal information, i.e., aggravated assault upon a peace officer. State v. Hamilton, 107 N.M. 186, 754 P.2d 857 (Ct. App. 1988).

Failure to allege offense. — Information may be quashed where the acts alleged in the information and bill of particulars, when read together, do not constitute the offense which is charged. State v. Putman, 78 N.M. 552, 434 P.2d 77 (Ct. App. 1967) (decided under former law).

Variance of name. — When the indictment named Yolanda Duran as the owner of the burglarized residence and upon questioning she testified that she was divorced, that her married name had been Romero and that she goes by both "Duran" and "Romero," "Yolanda Duran" is either her true name or a name by which she is known and is sufficient identification for the purpose of identifying the owner of the burglarized residence. State v. Lucero, 79 N.M. 131, 440 P.2d 806 (Ct. App. 1968).

Specified date of offense is material allegation. — When the state elects to proceed on a specific date, and so alleges in the charging document, the date specified becomes a material allegation of the offense charged, thereby precluding the state from establishing guilt based on a different date. State v. Mankiller, 104 N.M. 461, 722 P.2d 1183 (Ct. App. 1986).

Variance of date. — Although the complaint charged that a sheep slaughter without inspection occurred on or about March 17, 1976, the bill of particulars stated the killing occurred on March 17, 1976, and the proof at trial was that the slaughter occurred on March 16, 1976, there was nothing showing the variance prejudiced defendant's rights. State v. Pina, 90 N.M. 181, 561 P.2d 43 (Ct. App. 1977).

Variance of ownership. — Where the amendment of the information charging larceny was made to conform to the evidence, that three people instead of one owned the trailer involved, the trial court was of the opinion that the defendant was not prejudiced

thereby, especially since defendant made no request for a continuance or postponement and did not show that he was in fact prejudiced by the amendment. State v. Parker, 80 N.M. 551, 458 P.2d 803 (Ct. App.), cert. denied, 80 N.M. 607, 458 P.2d 859 (1969) (decided under former law).

Variance in verb tense. — In a criminal fraud case, the defendants' argument that the instruction using the words "would pay" constituted a material variance from the language of the indictment using the words "were paying," was without merit. State v. Crews, 110 N.M. 723, 799 P.2d 592 (Ct. App. 1989).

Amendment to add alternative murder theory. — Allowing the state to amend the indictment to add the charge of depraved mind murder did not add a different offense, but rather added an alternative theory of first degree murder, and defendant was thus not prejudiced by the amendment. State v. Lucero, 1998-NMSC-044, 126 N.M. 552, 972 P.2d 1143.

Amendment charging new offense not permitted. — Paragraph C of this rule does not authorize the trial court to permit an amended information that charges defendant with an additional or different offense. State v. Roman, 1998-NMCA-132, 125 N.M. 688, 964 P.2d 852.

No prejudice by amendment where defendant on notice. — There is no surprise to the defendant as a result of an amendment of an indictment where he is on notice from the beginning that he must defend against each element originally alleged. State v. Vialpando, 93 N.M. 289, 599 P.2d 1086 (Ct. App.), cert. denied, 93 N.M. 172, 598 P.2d 215 (1979).

Effect of jury verdict on variance. — Variance between indictment and proof offered at trial as to the name and address of the party and place burglarized is not jurisdictional as the error can be cured by verdict of the jury. State v. Jaramillo, 85 N.M. 19, 508 P.2d 1316 (Ct. App.), cert. denied, 85 N.M. 5, 508 P.2d 1302, 414 U.S. 1000, 94 S. Ct. 353, 38 L. Ed. 2d 236 (1973); State v. Montgomery, 28 N.M. 344, 212 P. 341 (1923) (cases decided under former law).

V. EFFECT.

Generally, as to deficiencies raised through habeas corpus. — In habeas corpus proceeding the information or indictment under which a petitioner was sentenced is not open to review on grounds of deficiencies therein on claim embezzlement charge failed to allege value or property embezzled. Such proceeding is a collateral attack upon the judgment and the only question for decision is whether the trial court possessed jurisdiction of the parties, jurisdiction of the subject matter, and the power impose the sentence. Roehm v. Woodruff, 64 N.M. 278, 327 P.2d 339 (1958) (decided under former law).

Variance. — Variance, relating to name and address of parties and place burglarized, between the particulars stated in the indictment and the proof thereof at the trial is not sufficient to warrant a reversal when raised for the first time on appeal. State v. Jaramillo, 85 N.M. 19, 508 P.2d 1316 (Ct. App.), cert. denied, 85 N.M. 5, 508 P.2d 1302, 414 U.S. 1000, 94 S. Ct. 353, 38 L. Ed. 2d 236 (1973) (decided under former law).

A variance between charge and proof cannot be raised for the first time after verdict by a motion for new trial or in arrest of judgment. State v. Mares, 61 N.M. 46, 294 P.2d 284 (1956) (decided under former law).

5-205. Unnecessary allegations.

A. **Generally unnecessary allegations.** It shall be unnecessary for a complaint, indictment or an information to contain the following allegations unless such allegations are necessary to give the defendant notice of the crime charged:

(1) time of the commission of offense;

(2) place of the commission of offense;

(3) means by which the offense was committed;

(4) value or price of any property;

(5) ownership of property;

(6) intent with which an act was done;

(7) description of any place or thing;

(8) the particular character, number, denomination, kind, species or nature of money, checks, drafts, bills of exchange or other currency;

(9) the specific degree of the offense charged;

(10) any statutory exceptions to the offense charged; or

(11) any other similar allegation.

B. **Inclusion by state.** The state may include any of the unnecessary allegations set forth in Paragraph A of this rule in a complaint, indictment or information without thereby enlarging or amending such complaint, indictment or information, and such allegations shall be treated as surplusage the same as if contained in a statement of facts.

C. **Statement of facts.** Upon motion of the defendant, the court may order the state to file a statement of facts setting forth any or all of the unnecessary allegations set forth in Paragraph A of this rule. Such statement of facts shall not enlarge or amend the complaint, indictment or information, and such allegations shall be treated as surplusage.

Committee commentary. — For a prerule decision holding that the place of the commission of the offense or the owner of the property were not necessary allegations, see State v. Lucero, 79 N.M. 131, 440 P.2d 806 (Ct. App. 1968). For a prerule decision holding that the degrees of the crime need not be set forth in the charge, see State v. Roy, 40 N.M. 397, 60 P.2d 647 (1936). As indicated in the rule, any of these allegations could be necessary under certain circumstances to give the defendant notice of the crime charged. State v. Foster, 87 N.M. 155, 530 P.2d 949 (Ct. App. 1974).

Section 14 of Article 2 of the New Mexico Constitution gives the defendant a right to "demand the nature and cause of the accusation." This rule provides basic procedure for the exercise of that right. See also Rule 5-501 and Paragraph C of Rule 5-503. It replaces the bill of particulars, former Trial Court Rule 35-4409 (compiled as 41-6-8 NMSA, 1953 Comp., abrogated by the supreme court with the adoption of these rules). This rule is designed to avoid the technicalities of the bill of particulars without diminishing the basic constitutional right of the defendant. See State v. Campos, 79 N.M. 611, 447 P.2d 20 (1968); State v. Graves, 73 N.M. 79, 385 P.2d 635 (1963).

ANNOTATIONS

I. GENERAL CONSIDERATION.

Cross references. — For methods of prosecution, see Rule 5-201 NMRA.

For defects, errors or omissions, see Rule 5-204 NMRA.

For pretrial motions, see Rule 5-601 NMRA.

For right to demand the nature and cause of accusation against defendant, see N.M. Const., art. II, § 14.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 61A Am. Jur. 2d Pleading §§ 31 to 33, 35 to 37, 57, 58, 623.

71 C.J.S. Pleading §§ 6, 26, 36.

II. UNNECESSARY ALLEGATIONS.

Time of offense. — An indictment or information is not required to allege the time of the offense. State v. Selgado, 78 N.M. 165, 429 P.2d 363 (1967) (decided under former law).

A charging document need not allege time or date of offense charged unless such allegations are necessary to give a defendant notice of the crime charged. Thus, where the time of commission of the alleged offenses was an element unessential to the crimes charged, and thus an allegation unnecessary to the information, the criminal information sufficiently charged the offenses. State v. Cawley, 110 N.M. 705, 799 P.2d 574 (1990).

Exception to time as unnecessary allegation. — The information charging defendant with sodomy was void for failure to give him notice of the charges against him where it failed to state the date of the offense so as to specify which of three different acts subsequently testified to by the state's principal witness was charged, and defendant's conviction was reversed. State v. Foster, 87 N.M. 155, 530 P.2d 949 (Ct. App. 1974).

Where a criminal offense is charged generally, and is then followed with a detailed statement of the facts, the prosecution is limited to establishing the facts so detailed; therefore, surplusage provisions of these rules making an allegation of the time of the offense unnecessary are inapplicable where the amended indictment gave defendant notice that he was charged with crimes on specific dates and the trial court's refusal to instruct that guilt was to be determined on the basis of acts occurring on or about the dates of the two burglaries charged was reversible error where there was evidence of several burglaries, and evidence connecting the defendant to at least one additional burglary for which defendant was not being tried. State v. Salazar, 86 N.M. 172, 521 P.2d 134 (Ct. App. 1974).

Address and ownership. — The allegations as to address and ownership of burglarized residence are unnecessary and may be disregarded as surplusage. State v. Lucero, 79 N.M. 131, 440 P.2d 806 (Ct. App. 1968) (decided under former law).

Means by which offense committed. — The means or elements of embezzlement are not required to be alleged. Smith v. Abram, 58 N.M. 404, 271 P.2d 1010 (1954) (decided under former law).

Criminal information charging defendant with "possession of cocaine to-wit: by consumption" charged the usual crime of possession of cocaine; the additional language concerning consumption was simply additional information provided by the state to show how it planned to prove possession and including the method of proof in the charging instrument did not change the basic charge of possession of cocaine that is criminalized pursuant to 30-31-23 NMSA 1978. State v. McCoy, 116 N.M. 491, 864 P.2d 307 (Ct. App. 1993), rev'd in part on other grounds sub nom. State v. Hodge, 118 N.M. 410, 882 P.2d 1 (1994).

Value. — Although information should have alleged value, jurisdiction does not depend upon the value of the property embezzled; value merely denotes the grade of the offense. Roehm v. Woodruff, 64 N.M. 278, 327 P.2d 339 (1958) (decided under former law).

Ownership. — Laws making allegations regarding ownership unnecessary in an information which charges larceny and provides for a bill of particulars is not unconstitutional since ownership in any particular person is not an element of the offense. State v. Shroyer, 49 N.M. 196, 160 P.2d 444 (1945) (decided under former law).

Intent. — Where criminal intent is an essential part of the offense, failure to allege such intent would be a fatal defect, although intent may be alleged in general terms, or by use of equivalent terms. State v. Shedoudy, 45 N.M. 516, 118 P.2d 280 (1941), rev'd on other grounds, 48 N.M. 354, 151 P.2d 57 (1944) (decided under former law).

Checks included as money. — Checks are included within scope of information which charged embezzlement of money. State v. Peke, 70 N.M. 108, 371 P.2d 226, cert. denied, 371 U.S. 924, 83 S. Ct. 293, 9 L. Ed. 2d 232 (1962) (decided under former law).

III. STATEMENT OF FACTS.

Failure to request statement of facts is waiver. — Where an information charged conspiracy to commit a felony as well as three other separate felonies, it provided sufficient notice of the underlying felony or felonies. When the defendant did not request a statement of facts, he waived any claim that he did not know which of the three felonies, or whether all of them, constituted the felony he was charged with conspiring to commit. State v. Martin, 94 N.M. 251, 609 P.2d 333 (Ct. App.), cert. denied, 94 N.M. 628, 614 P.2d 545 (1980).

Notice by other means. — Although a defendant may not have requested a statement of facts, the purpose of this rule has been fulfilled when, through some other method, e.g., affidavits attached to criminal complaints, the defendant was put fully on notice of the crimes with which he was charged and the circumstances surrounding them. State v. Hernandez, 104 N.M. 268, 720 P.2d 303 (Ct. App.), cert. denied, 104 N.M. 201, 718 P.2d 1349 (1986).

Providing grand jury tapes fulfilled purpose of statement of facts. — Where a defendant was provided with grand jury tapes, the purpose of a statement of facts was fulfilled, as the defendant was provided with adequate information upon which to prepare his defense. State v. Aaron, 102 N.M. 187, 692 P.2d 1336 (Ct. App. 1984).

Where error to deny bill of particulars. — In prosecution for burglary, court committed reversible error when it failed to grant motion for bill of particulars as to where robbery occurred, the type of building wherein it occurred and the type of container valuables were allegedly taken from. State v. Graves, 73 N.M. 79, 385 P.2d 635 (1963) (decided under former law).

Charge of larceny of "certain articles of personal property" of a certain value, in possession of sheriff, was such that motion for bill of particulars should not have been denied. State v. Campos, 79 N.M. 611, 447 P.2d 20 (1968) (decided under former law).

Bill to be provided despite valid information. — Validity of information under constitutional statutes does not satisfy requirement of bill of particulars if requested. State v. Graves, 73 N.M. 79, 385 P.2d 635 (1963) (decided under former law).

But not where defendant given entire transcript and exhibits. — Defendant who was given entire transcript of 172 pages and 11 exhibits from the preliminary hearing, and asked for bill of particulars yet was evasive when asked by the court what he wanted, and did not answer the question, was not entitled to bill of particulars, was afforded reasonable information, and state was not required to plead the evidence. State v. Archuleta, 82 N.M. 378, 482 P.2d 242 (Ct. App. 1970), cert. denied, 82 N.M. 377, 482 P.2d 241 (1971) (decided under former law).

Or where bill not requested. — Defendant who never requested bill of particulars will not be heard to complain on appeal that bill was not furnished him. State v. Gibby, 78 N.M. 414, 432 P.2d 258 (1967) (decided under former law).

Bill of particulars to become matter of record. State v. Roy, 40 N.M. 397, 60 P.2d 646 (1936) (decided under former law).

Where sufficient notice of offense. — Charge of murder "by shooting with a gun" was sufficient to enable defendant to prepare defense without bill of particulars. State v. Smith, 76 N.M. 477, 416 P.2d 146 (1966) (decided under former law).

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

Denial of motion upheld. — District court did not err in denying defendant's motion for a statement of facts, where it was admitted that trial counsel did receive a copy of the grand jury indictment and police report and interviewed the state's witnesses. State v. Serna, 112 N.M. 738, 819 P.2d 688 (Ct. App. 1991).

5-206. Signing of pleadings.

Every pleading, motion and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address and telephone number shall be stated. A party who is not represented by an attorney shall sign the party's pleading and state the party's address and telephone number. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion or other paper and that to the best of the signer's knowledge, information and belief it is not interposed for delay. If a pleading, motion or other paper is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. If a pleading, motion or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is

called to the attention of the pleader or movant. For a willful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted. A "signature" means an original signature, a copy of an original signature, a computer generated signature or any other signature otherwise authorized by law.

[As amended, effective August 1, 1989; January 1, 1997.]

Committee commentary. — This rule is substantially the same as Rule 1-011.

New Mexico has enacted an Electronic Authentication Documentation Act which provides for the Secretary of State to register electronic signatures using the public key technology. See Section 14-15-4 NMSA 1978.

ANNOTATIONS

The 1997 amendment, effective January 1, 1997, added the last sentence defining "signature".

Am. Jur. 2d, A.L.R. and C.J.S. references. — 22 C.J.S. Criminal Law § 324 et seq.

5-207. Withdrawn.

ANNOTATIONS

Compiler's notes. — Pursuant to Supreme Court Order No. 09-8300-006, Rule 5-207 NMRA, relating to filings of complaints, was withdrawn effective May 6, 2009.

5-208. Issuance of warrant for arrest and summons.

A. **Time.** Upon the docketing of any criminal action the court may issue a summons or arrest warrant.

B. **Form for warrant.** The warrant shall be signed by the court and shall contain the name of the defendant or, if his name is unknown, any name or description by which he can be identified with reasonable certainty. It shall describe the offense charged. It shall command that the defendant be arrested and brought before the court.

C. **Form for summons.** The summons shall be in the same form as the warrant except that it shall summon the defendant to appear before the court at a stated time and place. A summons or arrest warrant shall be substantially in the form approved by the court administrator.

D. **Basis for warrant.** The court may issue a warrant for arrest upon an indictment or a sworn written statement of the facts showing probable cause for issuance of a warrant. The showing of probable cause shall be based upon substantial evidence,

which may be hearsay in whole or in part, provided there is a substantial basis for believing the source of the hearsay to be credible and for believing that there is a factual basis for the information furnished. Before ruling on a request for a warrant the court may require the affiant to appear personally and may examine under oath the affiant and any witnesses he may produce, provided that such additional evidence shall be reduced to writing and supported by oath or affirmation.

Committee commentary. — When a criminal action is docketed in the magistrate court by the filing of a complaint, Rule 6-204, substantially identical to this rule, will govern the procedure. Paragraph A of Rule 6-204 adds to Paragraph A of this rule by indicating a preference for the use of summons when practicable. See also, 31-1-6 NMSA 1978.

Paragraphs B and C of this rule were derived from Rule 4(c) of the Federal Rules of Criminal Procedure. See 62 F.R.D. 271-72 (1974).

Paragraph D of this rule requires a written showing of probable cause before an arrest warrant may be issued. The constitutional basis for this requirement is Section 10 of Article 2 of the New Mexico Constitution, although that provision does not expressly mention arrest warrants. Cf. State v. Gibby, 78 N.M. 414, 432 P.2d 258 (1967). See also, commentary to Rule 5-209.

Paragraph D of this rule codified case law allowing the issuance of a warrant on probable cause based on hearsay evidence. This provision was taken from Rule 4(b) of the Federal Rules of Criminal Procedure. See 48 F.R.D. 553, 558-60 (1970) and 62 F.R.D. 271-72 (1974). Neither the proposed federal rule nor this rule attempts to establish what constitutes probable cause based on hearsay as that determination can only be made on a case by case basis, taking into account the unlimited variation and sources of information and the varying reliability of the information received by the affiant from others. 62 F.R.D. 271, 273-74 (1974). The fact that the information may involve double hearsay does not mean that the affidavit fails to provide probable cause. State v. Alderete, 88 N.M. 14, 536 P.2d 278 (Ct. App. 1975).

ANNOTATIONS

I. GENERAL CONSIDERATION.

Cross references. — For issuance of summons or warrant, see 31-1-4 NMSA 1978.

For forms on criminal summons, certificate of mailing, certificate of service and affidavit of service by other person making service, see Rule 9-208 NMRA.

For affidavit for arrest warrant form, see Rule 9-209 NMRA.

For inapplicability of Rules of Evidence to proceedings for issuance of arrest warrants and criminal summonses, see Rule 11-1101 NMRA.

Compiler's notes. — Paragraphs B and C are similar to Rules 4(c) and 9(b) of the Federal Rules of Criminal Procedure.

Paragraph D is similar to Rules 4(a) and (c) and 9(a) of the Federal Rules of Criminal Procedure.

Judge lacks authority to order production of handwriting exemplars. — Absent legislative, or judicial, authorization, a judge has no authority to order a defendant either to produce handwriting exemplars or be held in contempt, prior to arrest or charge. Sanchez v. Attorney Gen., 93 N.M. 210, 598 P.2d 1170 (Ct. App. 1979).

Law reviews. — For comment, "Criminal Procedure - Preventive Detention in New Mexico," see 4 N.M.L. Rev. 247 (1974).

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

Am. Jur. 2d, A.L.R. and C.J.S. references. — Private citizen's right to institute mandamus to compel a magistrate or other appropriate official to issue a warrant, or the like, for an arrest, 49 A.L.R.2d 1285.

22 C.J.S. Criminal Law § 334; 72 C.J.S. Process § 2.

II. FORM.

Generally. — A warrant is a writ or precept issued by a magistrate, justice or other competent authority, addressed to a sheriff, constable or other officer, requiring him to arrest the body of a person therein named, and bring him before the magistrate or court, to answer or be examined, touching some offense which he is charged with having committed. State v. Barreras, 64 N.M. 300, 328 P.2d 74 (1958) (decided under former law).

Purpose of warrant. — The purpose of a warrant is to acquire jurisdiction over the person of the accused, to bring him before the court. State v. Barreras, 64 N.M. 300, 328 P.2d 74 (1958) (decided under former law).

Unsigned warrant invalid. — Since the bench warrant upon which defendant was arrested was not properly signed by the court, the warrant was invalid and evidence seized thereunder must be suppressed. State v. Gurrola, 121 N.M. 34, 908 P.2d 264 (Ct. App. 1995).

Effect of invalid complaint. — Where the warrant was issued on an invalid complaint, the district court did not lose jurisdiction to try the defendant on the subject charges. State v. Baca, 81 N.M. 686, 472 P.2d 651 (Ct. App.), cert. denied, 81 N.M. 721, 472 P.2d 984 (1970) (decided under prior law).

III. BASIS FOR WARRANT.

Generally. — Before a warrant for arrest may be issued, the judicial officer issuing it must be supplied with sufficient information to support an independent judgment that probable cause exists for the warrant, so as to allow a relatively independent magistrate to be interposed between the arresting force and the citizen whose right not to be arrested without cause is guaranteed by U.S. Const., amend. IV. This probable cause standard must be at least as stringently applied in the case of warrantless arrests as in the instance of an arrest with a warrant. State v. Gorsuch, 87 N.M. 135, 529 P.2d 1256 (Ct. App. 1974).

Generally, as to test for probable cause. — Before an arrest warrant may be issued, the magistrate issuing it "must be supplied with sufficient information to support an independent judgment that probable cause exists for the warrant" and the test for probable cause is whether the police officer has reasonable grounds for belief of defendant's guilt. State v. Alderete, 88 N.M. 14, 536 P.2d 278 (Ct. App. 1975).

The substance of all the definitions of probable cause is a reasonable ground for belief of guilt. State v. Hilliard, 81 N.M. 407, 467 P.2d 733 (Ct. App. 1970).

Reasonable grounds for belief under this rule is a state of facts that would lead the police officer, as a man of reasonable caution, to believe the defendant committed the crime for which he is arrested. State v. Alderete, 88 N.M. 14, 536 P.2d 278 (Ct. App. 1975).

Examination of facts to be case by case. — The existence of "probable cause," whether for issuance of a search warrant or warrant of arrest, or for arrest without a warrant, or for search and seizure without a warrant, involves a case-by-case examination of the facts and no two cases are precisely alike. State v. Aull, 78 N.M. 607, 435 P.2d 437 (1967), cert. denied, 391 U.S. 927, 88 S. Ct. 1829, 20 L. Ed. 2d 668 (1968).

Sources of information. — In determining if probable cause exists, police officers may rely on information coming to them from official sources as well as other known reliable sources; therefore, a telephone call, followed by a letter, received by the police department from the federal bureau of investigation and connecting the defendant with the crime was held to be information coming from a responsible official source, and, therefore, it was sufficient to constitute probable cause and reasonable grounds for arrest. State v. Alderete, 88 N.M. 14, 536 P.2d 278 (Ct. App. 1975).

Double hearsay acceptable. — Where the victim identified defendant as one of two men who shot him and this identification would have provided probable cause if given directly to the affiant detective, then the fact that the affiant detective's information was double hearsay did not keep that information from providing probable cause. State v. Alderete, 88 N.M. 14, 536 P.2d 278 (Ct. App. 1975).

5-209. Service of summons; failure to appear.

A. **Service.** A summons shall be served in accordance with the rules governing service of process in civil actions unless the court directs service by mail. A copy of the complaint, indictment or information shall be attached to the summons. Service shall be made at least ten (10) days before the defendant is required to appear. Service by mail is complete upon mailing.

B. **Failure to appear.** If a defendant fails to appear in person, or by counsel when permitted by these rules, at the time and place specified in the summons, the court may issue a warrant for the defendant's arrest, and thereafter the action shall be treated as if the warrant had been the first process in the action.

Committee commentary. — Paragraph A of this rule incorporates Rule 1-004 as the procedure for service of summons on a defendant. This procedure is more often used in misdemeanor than felony cases. An identical rule is provided in the magistrate court rules. See Rule 6-205. Paragraph B of this rule, providing for arrest if the defendant fails to respond and appear to the summons, was derived from Rule 4(a) of the Federal Rules of Criminal Procedure. See generally, 1 Wright, Federal Practice and Procedure, § 51 (1969).

ANNOTATIONS

Cross references. — For computation of time, see Rule 5-104 NMRA.

For presence of defendant, appearance of counsel, see Rule 5-612 NMRA.

For service of process in civil actions, see Rule 1-004 NMRA.

For forms on criminal summons, certificate of mailing, certificate of service and affidavit of service by other person making service, see Rule 9-208 NMRA.

For affidavit for bench warrant form, see Rule 9-211 NMRA.

For forms on bench warrant and return, see Rule 9-212 NMRA.

Compiler's notes. — Paragraph B of this rule is similar to Rules 4(a), in part, and 9(a), in part, of the Federal Rules of Criminal Procedure.

Contempt proceedings. — Where plaintiff property owner brought suit against adjoining property owner to restrain him from certain actions, and court issued order restraining both parties, whereupon defendant had the court issue an order requiring plaintiff to show cause why he should not be held in contempt for violation of restraining order, plaintiff failed to appear within the meaning of this rule when he sent his counsel to respond to the show cause order for him, as appearance by counsel was not a permitted response under Rule 47 (see now Rule 5-612). Trial court was therefore

authorized to issue an arrest warrant under this rule, but was not authorized to try and sentence the plaintiff under Rule 47 (see now Rule 5-612) without his being present. Lindsey v. Martinez, 90 N.M. 737, 568 P.2d 263 (Ct. App. 1977).

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

Am. Jur. 2d, A.L.R. and C.J.S. references. — 62B Am. Jur. 2d Process § 59 et seq.

Foreign railway corporation as subject to service of process in state in which it merely solicits interstate business, 46 A.L.R. 570, 95 A.L.R. 1478.

Constitutionality, construction and applicability of statutes relating to service of process on unincorporated association, 79 A.L.R. 305.

Constitutionality, construction and effect of statute providing for service of process upon statutory agent in action against foreign corporation as regards communication to corporation of facts of service, 89 A.L.R. 658.

Power of state to provide for service, other than personal, of process upon nonresident individual doing business within the state so as to subject him to judgment in personam, 91 A.L.R. 1327.

Who, other than public official, may be served with process in action against foreign corporation doing business in state, 113 A.L.R. 9

Substituted service, service by publication or service out of the state, in action in personam against resident or domestic corporation, as contrary to due process of law, 126 A.L.R. 1474, 132 A.L.R. 1361.

Delay in issuance or service of summons as requiring or justifying order discontinuing suit, 167 A.L.R. 1058.

Leaving process or notice at residence as compliance with requirement that party be served "personally" or "in person," "personally served," etc., 172 A.L.R. 521.

Attorney representing foreign corporation in litigation as its agent for service of process in unconnected actions or proceedings, 9 A.L.R.3d 738.

Who is "general" or "managing" agent of foreign corporation under statute authorizing service of process on such agent, 17 A.L.R.3d 625.

Construction of phrase "usual place of abode," or similar terms referring to abode, residence or domicil, as used in statutes relating to service of process, 32 A.L.R.3d 112.

Stipulation extending time to answer or otherwise proceed as waiver of objection to jurisdiction for lack of personal service, 77 A.L.R.3d 841.

72 C.J.S. Process § 1 et seq.

5-210. Arrests without a warrant; arrest warrants.

A. **To whom directed.** Whenever a warrant is issued in a criminal action, it shall be directed to a full-time salaried state or county law enforcement officer, a municipal police officer, a campus security officer or an Indian tribal or pueblo law enforcement officer. Upon arrest the defendant shall be brought before the court without unnecessary delay.

B. **Arrest.** If the arresting officer has the warrant in his possession at the time of the arrest, a copy shall be served on the defendant upon arrest. If the officer does not have the warrant in his possession at the time of the arrest, the officer shall then inform the defendant of the offense and of the fact that a warrant has been issued and shall serve the warrant on the defendant as soon as practicable.

C. **Return.** The arresting officer shall make a return to the court which issued the warrant.

D. **Arrests without a warrant.** If the defendant is arrested without a warrant, a criminal complaint shall be prepared and a copy given to the defendant prior to transferring the defendant to the custody of the detention facility. If the defendant is in custody and the court is open, the criminal complaint shall be filed immediately with the court. If the court is not open and the defendant remains in custody, the complaint shall be filed the next business day of the court. If the defendant is not in custody, the complaint shall be filed with the court as soon as practicable.

[As amended, effective September 1, 1990; November 1, 1991.]

Committee commentary. — For the rule governing execution and return of arrest warrants issued by the magistrate, metropolitan and municipal courts, see Rules 6-206, 7-206 and 8-206 which are substantially identical to this rule. See also, commentary to Rule 5-301.

Paragraph B of this rule was derived from Rule 4(d)(3) of the Federal Rules of Criminal Procedure. See 62 F.R.D. 271-72 (1974). In a case decided without reference to Paragraph B of this rule, the court of appeals has upheld that physical possession of the warrant by the officer at the time of the arrest is not essential to the validity of the arrest, assuming that the warrant is otherwise valid. See State v. Grijalva, 85 N.M. 127, 509 P.2d 894 (Ct. App. 1974).

Paragraph D was added in 1990 to require in warrantless arrest cases that the defendant be given a copy of the criminal complaint prior to being transferred to the

custody of a detention facility. Similar language was added to Rules 6-201, 7-201 and 8-201. The right to a copy of the criminal charges is no greater than the right of a person accused of a motor vehicle violation to a copy of the citation. See Section 66-8-123 NMSA 1978 which provides that a copy of a traffic citation be given to the defendant. A traffic citation is a criminal complaint even though it is not verified. (See Sections 29-5-1.1 and 66-8-131 NMSA 1978). If the defendant remains in custody, the complaint must be filed with the court at the time it is given to the defendant or if the court is closed the next business day.

The right to a copy of the criminal complaint was added to this rule so that the defendant has notice of the criminal charges.

In 1991, the Supreme Court amended the criminal complaint form to delete the requirement that the complaint be sworn to before a notary or judicial officer before it is filed with the court. Law enforcement officers are required to swear or affirm under penalty of perjury that the facts set in the complaint are true to the best of their information and belief.

There is no absolute requirement that a copy of a criminal complaint be given to a defendant who, because of drugs, alcohol or rage is unable to read and understand the charges. Rather, it would be a better practice to place the complaint with other belongings of the defendant until such time as the defendant can understand the nature of the charges.

It is noted that under Section 43-2-22 NMSA 1978 of the Detoxification Act an intoxicated person may be detained in jail in protective custody for a 12 hour period without criminal charges. This time may be extended by a medical professional. Section 43-2-22 NMSA 1978. In this situation no criminal complaint need be served on the defendant who is being held for protective custody.

Rule 5-210 does not provide a precise definition as to the point in time at which a defendant is deemed to have been transferred to the custody of a detention facility. Nothing in these rules prevents the police from briefly detaining a defendant in a detention facility pending completion of preliminary police investigatory procedures so long as the police have not transferred jurisdiction to release the defendant to the detention facility. The police, however, must be free to release the defendant if, after such preliminary investigation and screening, charges are not filed.

The defendant has a number of rights prior to arraignment or first appearance. These preliminary rights include:

(a) The statutory right to 3 telephone calls within 20 minutes after detention; [Section 31-1-5 NMSA 1978]

(b) In warrantless arrest and detention cases, the right to be given a copy of the criminal complaint prior to transfer to custody of a detention facility; and

(c) In warrantless arrest and detention cases, the constitutional right to a prompt probable cause determination. See Commentary, Rule 5-301.

Unlike the 6-month trial rules, this rule does not contain a provision requiring dismissal of the complaint for failure to provide the defendant in a warrantless arrest case with a copy of the complaint prior to transfer to a detention facility. The court may dismiss criminal charges for denying an accused the right to 3 telephone calls, the right to a copy of the criminal complaint or the right to a prompt probable cause determination if the court finds that the denial of one of these rights resulted in prejudice to the defendant or if the court finds that the law enforcement officers acted in bad faith. See State v. Bearly, 112 N.M. 50, 811 P.2d 83 (Ct. App. 1991). See also State v. Gibby, 78 N.M. 414, 418, 432 P.2d 258 (1967). [As revised, effective November 1, 1991.]

ANNOTATIONS

Cross references. — For issuance of warrant for arrest and summons, see Rule 5-208 NMRA.

For forms on warrant for arrest and return where defendant is found, see Rule 9-210 NMRA.

The 1991 amendment, effective for cases filed in the district courts on or after November 1, 1991, in Paragraph D, rewrote the second and third sentences and added the last sentence.

Effect of unlawfully issued warrant and illegal arrest on conviction. — Where defendant was properly before the court under the information filed against him and pleads thereto, and there was no contention made that he did not receive a fair trial or that the verdict of guilty upon which his conviction was entered was not supported by the evidence, his conviction was not thereby rendered void even where the warrant was unlawfully issued and his arrest illegal. State v. Halsell, 81 N.M. 239, 465 P.2d 518 (Ct. App. 1970) (decided under former law).

Liability for arrest of person with same name. — A citizen who in good faith and upon probable cause swears out a criminal complaint identifying the accused by name is not liable for malicious prosecution where the officer arrests a person bearing that name but who is not in fact the person against whom the complaint was made. Barnett v. Cal M, Inc., 79 N.M. 553, 445 P.2d 974 (1968).

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

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

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 550 to 559, 562.

Necessity of showing warrant upon making arrest under warrant, 40 A.L.R. 62.

Liability for false imprisonment, of officer executing warrant for arrest as affected by its being returnable to wrong court, 40 A.L.R. 290.

Power of private person to whom warrant of arrest is directed to deputize another to make the arrest or to delegate his power in that respect, 47 A.L.R. 1089.

Territorial extent of power to arrest under a warrant, 61 A.L.R. 377.

Civil liability of officer making arrest under warrant as affected by his failure to exhibit warrant, or to state fact of, or substance of, warrant, 100 A.L.R. 188.

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

Search and seizure of telephone company records pertaining to subscriber as violation of subscriber's constitutional rights, 76 A.L.R.4th 536.

22 C.J.S. Criminal Law § 334 et seq.

5-211. Search warrants.

A. **Issuance.** A warrant may be issued by the court to search for and seize any:

(1) property which has been obtained or is possessed in a manner which constitutes a criminal offense;

(2) property designed or intended for use or which is or has been used as the means of committing a criminal offense;

(3) property which would be material evidence in a criminal prosecution; or

(4) person for whose arrest there is probable cause or who is unlawfully restrained. A warrant shall issue only on a sworn written statement of the facts showing probable cause for issuing the warrant.

B. **Contents.** A search warrant shall be executed by a full-time salaried state or county law enforcement officer, a municipal police officer, a campus security officer, an Indian tribal or pueblo law enforcement officer or a civil officer of the United States authorized to enforce or assist in enforcing any federal law. The warrant shall contain or have attached the sworn written statement of facts showing probable cause for its issuance and the name of any person whose sworn written statement has been taken in

support of the warrant. A search warrant shall direct that it be served between the hours of 6:00 a.m. and 10:00 p.m., according to local time, unless the issuing judge, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at any time.

C. **Execution.** A search warrant shall be executed within ten (10) days after the date of issuance. The officer seizing property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the affidavit for search warrant, and the search warrant and a copy of the inventory of the property taken or shall leave the copies of the affidavit for search warrant, the search warrant and inventory at the place from which the property was taken.

D. **Return.** The return shall be made promptly after execution of the warrant. The return shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be signed by the officer and the person in whose presence the inventory was taken. The court shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

E. **Probable cause.** As used in this rule, "probable cause" shall be based upon substantial evidence, which may be hearsay in whole or in part, provided there is a substantial basis for believing the source of the hearsay to be credible and for believing that there is a factual basis for the information furnished. Before ruling on a request for a warrant the court may require the affiant to appear personally and may examine under oath the affiant and any witnesses he may produce, provided that such additional evidence shall be reduced to writing, supported by oath or affirmation and served with the warrant.

Committee commentary. — This rule is patterned after Rule 41 of the Federal Rules of Criminal Procedure.

For other court rules governing issuance, etc., of search warrants by the magistrate court, see Rule 6-208, Rule 7-208, and Rule 8-208. These rules are substantially identical and are based upon the New Mexico constitutional requirements. See N.M. Const., Art. 2, § 10. The court rules replaced the former search warrant statute, repealed in 1972. See N.M. Laws 1967, ch. 245, §§ 1 and 2, formerly compiled as 41-18-1 and 41-18-2, 1953 Comp.

"Property" in Paragraph A of this rule is defined in Rule 41(h) of the Federal Rules of Criminal Procedure "to include documents, books, papers and any other tangible objects." The committee is of the opinion that this would include such things as blood, fingerprints, and handwriting samples. See Sanchez v. Attorney General, 93 N.M. 210, 598 P.2d 1170 (Ct. App. 1979).

As amended in 1979, this rule provides a procedure for the obtaining of a search warrant to conduct a search of premises for a person even when a warrant is not required. As stated in the advisory committee note to Rule 41 of the Federal Rules of Criminal Procedure:

That part of the amendment which authorizes issuance of a search warrant to search for a person unlawfully restrained is consistent with ALI Model Code of Pre-Arraignment Procedure § SS 210.3(1)(d) (Proposed Official Draft, 1975), which specifies that a search warrant may issue to search for "an individual * * * who is unlawfully held in confinement or other restraint." As noted in the Commentary thereto, id. at p. 507:

Ordinarily such persons will be held against their will and in that case the persons are, of course, not subject to "seizure." But they are, in a sense, "evidence" of crime, and the use of search warrants for these purposes presents no conceptual difficulties.

In United States v. Watson, 423 U.S. 411, 96 S. Ct. 820, 46 L. Ed. 2d 598 (1976), the Court . . . alluded to "the still unsettled question" of whether, absent exigent circumstances, officers acting without a warrant may enter private premises to make an arrest. Some courts have indicated that probable cause alone ordinarily is sufficient to support an arrest entry, United States v. Fernandez, 480 F.2d 726 (2d Cir. 1973); United States ex rel. Wright v. Woods, 432 F.2d 1143 (7th Cir. 1970). There exists some authority, however, that except under exigent circumstances a warrant is required to enter the defendant's own premises, United States v. Calhoun, 542 F.2d 1094 (9th Cir. 1976); United States v. Lindsay, 506 F.2d 166 (D.C. Cir. 1974); Dorman v. United States, 435 F.2d 385 (D.C. Cir. 1970), or, at least to enter the premises of a third party, Virgin Islands v. Gereau, 502 F.2d 914 (3d Cir. 1974); Fisher v. Volz, 486 F.2d 333 (3d Cir. 1974); Huotari v. Vanderport, 380 F. Supp. 645 (D. Minn. 1974).

A warrant must be served between the hours of 6:00 a.m. and 10:00 p.m. unless for reasonable cause shown the issuing judge authorizes the execution at any time. The time periods designated were taken from the definition of "day time" in Rule 41(h) of the Federal Rules of Criminal Procedure.

Paragraph E of this rule was derived in part from Rule 41(c) of the Federal Rules of Procedure. On the use of hearsay evidence to establish probable cause, see State v. Perea, 85 N.M. 505, 513 P.2d 1287 (Ct. App. 1973). See also, 48 F.R.D. 553, 630 (1970).

Uncorroborated information given by an unknown informant to support an affidavit for probable cause may be found to be reliable if the information is personal to the informant and other information given by the informant has been corroborated by information supplied by a reliable confidential informant. State v. Turkal, 93 N.M. 248, 599 P.2d 1045 (1979).

The tests for evaluating the supporting affidavit for probable cause were set forth in State v. Perea, supra: (1) technical requirements of elaborate specificity are not

required; (2) any inferences to be drawn from statements of the affiant must be drawn by the judge and not the police officer; (3) affidavits are tested by less rigorous standards than those governing the admissibility of evidence at trial; and (4) where affiant is relying on an informant, the affidavit must set forth some of the underlying circumstances supporting the affiant's conclusion that the information is credible or reliable. Only a probability of criminal conduct need be established and common sense should control the magistrate's determination of probable cause, which should be shown great deference by the reviewing court. State v. Bowers, 87 N.M. 74, 529 P.2d 300 (Ct. App. 1974). See also, State v. Alderete, 88 N.M. 14, 536 P.2d 278 (Ct. App. 1975).

As in the federal rule, any additional evidence received by the court when the affiant appears personally must be made a part of the facts showing probable cause. In addition, under this rule, the additional evidence must be reduced to writing and sworn to in order to comply with the constitutional requirement of a "written showing of probable cause."

For cases showing examples of the sufficiency of descriptions in warrants, see State v. Ferrari, 80 N.M. 714, 460 P.2d 244 (1969) (instrumentalities of the crime in a murder case); State v. Sero, 82 N.M. 17, 474 P.2d 503 (Ct. App. 1970) (sufficiency of the description of the place to be searched); State v. Quintana, 87 N.M. 414, 534 P.2d 1126 (Ct. App. 1975), cert. denied, 88 N.M. 29, 536 P.2d 1084, cert. denied, 423 U.S. 832, 96 S. Ct. 54, 46 L. Ed. 2d 50 (1975) (sufficiency of description of controlled substances).

Absent a showing of prejudice, defects in the return of service will not invalidate the warrant. See State v. Wise, 90 N.M. 659, 567 P.2d 970 (Ct. App.), cert. denied, 91 N.M. 4, 569 P.2d 414 (1977); State v. Baca, 87 N.M. 12, 528 P.2d 656 (Ct. App.), cert. denied, 87 N.M. 5, 528 P.2d 649 (1974).

ANNOTATIONS

I. GENERAL CONSIDERATION.

Cross references. — For requirement of probable cause in search and seizure cases, see N.M. Const., art. II, § 10.

For issuances of summonses or warrants, see 31-1-4 NMSA 1978.

For affidavit for search warrant form, see Rule 9-213 NMRA.

For forms on search warrant and return and inventory, see Rule 9-214 NMRA.

For application for inspectorial search order, see Rule 9-801 NMRA.

For forms on inspection order and return, see Rule 9-802 NMRA.

For inapplicability of Rules of Evidence to proceedings for issuance of arrest warrants and criminal summonses, see Rule 11-1101 NMRA.

Requirements of search warrant statutes are mandatory in every material respect. State v. Dalrymple, 80 N.M. 492, 458 P.2d 96 (Ct. App. 1969) (decided under former law).

Search and seizure is constitutionally lawful under either of three instances: if conducted pursuant to a legal search warrant, by consent or incident to a lawful arrest. State v. Sedillo, 79 N.M. 289, 442 P.2d 601 (Ct. App. 1968) (decided under former law).

Good faith exception to exclusionary rule. — There is no good faith exception to the exclusionary rule under N.M. Const., art. II, § 10. State v. Gutierrez, 112 N.M. 774, 819 P.2d 1332 (Ct. App. 1991), aff'd, 116 N.M. 431, 863 P.2d 1052 (1993).

Fact defendant was not present when the search occurred does not make the search unreasonable. State v. Everitt, 80 N.M. 41, 450 P.2d 927 (Ct. App. 1969) (decided under former law).

Where a search warrant authorizes the seizure of certain items, but the warrant gives the police officers no authority to seize other items, such authority does not extend beyond that conferred by the warrant. State v. Turkal, 93 N.M. 248, 599 P.2d 1045 (1979).

There is no provision under the New Mexico statutes for the securing of a telephone warrant. United States v. Chavez, 812 F.2d 1295 (10th Cir. 1987).

Attorney general's agents not precluded from seeking warrants. — Nothing in this rule precludes agents of the attorney general's office to seek out search warrants, so long as law enforcement officers actually execute the warrant. State v. Elam, 108 N.M. 268, 771 P.2d 597 (Ct. App.), cert. denied, 493 U.S. 832, 110 S. Ct. 105, 107 L. Ed. 2d 68 (1989).

Search without warrant. — Absent a search warrant or valid consent to enter, intrusion into a private residence by law officers must be supported by a showing that the entry was justified by exigent circumstances: Whether exigent circumstances exist is within the fact finding function of the trial court and must be proofed by the state by a preponderance of the evidence. State v. Burdex, 100 N.M. 197, 668 P.2d 313 (Ct. App. 1983).

Warrant requirement not applicable to contraband discovered during inventory search. — If, during an inventory search, evidence of a crime is discovered, a search warrant should normally be obtained prior to seizing the evidence, but where the evidence is contraband the case is removed from the warrant requirement which might normally otherwise apply. State v. Foreman, 97 N.M. 583, 642 P.2d 186 (Ct. App. 1982).

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

For note, "Search and Seizure - Search Warrants - Probable Cause - Reliability of Confidential and Anonymous Informants - State v. Brown," see 12 N.M.L. Rev. 517 (1982).

For note, "Refusing to 'Turn the Other Cheek' - New Mexico Rejects Federal 'Good Faith' Exception to the Exclusionary Rule: *State v. Gutierrez*," see 24 N.M.L. Rev. 545 (1994).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 68 Am. Jur. 2d Searches and Seizures §§ 108 to 233.

Preventing, obstructing or delaying service or execution of search warrant as contempt, 39 A.L.R. 1354.

Illustrations of distinction, as regards search and seizure, between papers or other articles which merely furnish evidence of crime, and the actual instrumentalities of crime, 129 A.L.R. 1296.

Previous illegal search for or seizure of property as affecting validity of subsequent search warrant or seizure thereunder, 143 A.L.R. 135.

Authority to consent for another to search and seizure, 31 A.L.R.2d 1078.

Requisites and sufficiency of affidavit upon which search warrant is issued as regards the time when information as to offense was received by officer or his informant, 100 A.L.R.2d 525.

Admissibility of evidence discovered in search of adult defendant's property or residence authorized by defendant's minor child - state cases, 99 A.L.R.3d 598.

Admissibility of evidence discovered in search of defendant's property or residence authorized by domestic employee or servant, 99 A.L.R.3d 1232.

Admissibility of evidence discovered in search of defendant's property or residence authorized by defendant's spouse (resident or nonresident) - state cases, 1 A.L.R.4th 673.

Odor of narcotics and providing probable cause for warrantless search, 5 A.L.R.4th 681.

Use of electronic sensing device to detect shoplifting as unconstitutional search and seizure, 10 A.L.R.4th 376.

Adequacy of defense counsel's representation of criminal client regarding search and seizure issues, 12 A.L.R.4th 318.

Sufficiency of showing of reasonable belief of danger to officers or others excusing compliance with "knock and announce" requirement - state criminal cases, 17 A.L.R.4th 301.

Disputation of truth of matters stated in affidavit in support of search warrant - modern cases, 24 A.L.R.4th 1266.

Search and seizure: necessity that police obtain warrant before taking possession of, examining or testing evidence discovered in search by private person, 47 A.L.R.4th 501.

Seizure of books, documents, or other papers under search warrant not describing such items, 54 A.L.R.4th 391.

Lawfulness of search of person or personal effects under medical emergency exception to warrant requirement, 11 A.L.R.5th 52.

State constitutional requirements as to exclusion of evidence unlawfully seized - post-Leon cases, 19 A.L.R.5th 470.

Propriety of execution of search warrant at nighttime, 41 A.L.R.5th 171.

Sufficiency of description in warrant of person to be searched, 43 A.L.R.5th 1.

Propriety of search of nonoccupant visitor's belongings pursuant to warrant issued for another's premises, 51 A.L.R.5th 375.

Admissibility of evidence discovered in search of adult defendant's property or residence authorized by defendant's minor child-state cases, 51 A.L.R.5th 425.

What constitutes compliance with knock-and-announce rule in search of private premises - state cases, 85 A.L.R.5th 1.

Sufficiency of description of business records under fourth amendment requirement of particularity in federal warrant authorizing search and seizure, 53 A.L.R. Fed. 679.

Admissibility of evidence obtained during nighttime search by federal officers where warrant does not contain "appropriate provision" authorizing execution at times other than daytime as required by Rule 41(c) of Federal Rules of Criminal Procedure, 41 A.L.R.5th 171.

When are facts offered in support of search warrant for evidence of sale or possession of cocaine so untimely as to be stale — state cases, 109 A.L.R.5th 99.

When are facts offered in support of search warrant for evidence of sexual offense so untimely as to be stale — state cases, 111 A.L.R.5th 239.

When are fact, relating to marijuana, provided by one other than police or other law enforcement officer, so untimely as to be stale when offered in support of search warrant for evidence of sale or possession of a controlled substance — state cases, 112 A.L.R.5th 429.

79 C.J.S. Searches and Seizures § 36 et seq.

II. ISSUANCE.

Facsimile applications for warrants. — Where a judge received applications for warrants by facsimile and returned the signed warrants by facsimile, the warrants were valid because Rule 5-211 NMRA does not mandate the physical presence of the affiant as a condition for the issuance of a warrant. State v. Balenquah, 2009-NMCA-055, 146 N.M. 267, 208 P.3d 912, cert. denied.

Where warrant issued by Zuni tribal court. — Because there is nothing in either the Zuni constitution or the Zuni tribal law and order code which authorizes the Zuni tribal court to issue a search warrant, the evidence seized from a house on the Zuni reservation pursuant to such a warrant is inadmissible at trial in a New Mexico court, and the motion to suppress the evidence obtained during the search should have been granted. State v. Railey, 87 N.M. 275, 532 P.2d 204 (Ct. App. 1975).

Search warrant sufficiency standards. — The standards for the sufficiency of search warrants are: (1) only a probability of criminal conduct need be shown; (2) there need be less vigorous proof than the rules of evidence require to determine guilt of an offense; (3) common sense should control; (4) great deference should be shown by courts to a magistrate's determination of probable cause. State v. Bowers, 87 N.M. 74, 529 P.2d 300 (Ct. App. 1974).

A fundamental principle of search and seizure law is that, before a neutral and detached judge can issue a search warrant, two conclusions must be supported by substantial evidence: (1) the items sought to be seized are evidence of a crime; and (2) the criminal evidence will be located at the place to be searched. State v. Baca, 97 N.M. 379, 640 P.2d 485 (1982).

When reviewing affidavits in support of search warrants, a magistrate and an appellate court must consider the affidavit as a whole. All direct and circumstantial evidence alleged, as well as all reasonable inferences to be drawn from those allegations should be considered. State v. Snedeker, 99 N.M. 286, 657 P.2d 613 (1982).

Judicial alteration acceptable. — Although after reading the officer's supporting affidavit the judge altered the warrant and that portion of the affidavit listing the items to

be searched and seized, these changes did not merit exclusion of the evidence seized by the warrant since defendant failed to introduce evidence showing that the judge relied on unrecorded or unsworn statements in making the probable cause determination. United States v. Ramirez, 63 F.3d 937 (10th Cir. 1995).

Affidavit held insufficient. — Affidavit did not establish a substantial basis for believing an informant's report was based on reliable information, where, although the informant reportedly stated that defendant had brought heroin into town and was selling it at the house in question, the affidavit was devoid of any indication of how the informant gathered this information. State v. Cordova, 109 N.M. 211, 784 P.2d 30 (1989).

Citizen-informer rule. — In order to apply the citizen-informer rule, the affidavit must affirmatively set forth circumstances which would allow a neutral magistrate to determine the informant's status as a citizen-informer. State v. Hernandez, 111 N.M. 226, 804 P.2d 417 (Ct. App. 1990).

Where warrant based upon informant insufficient. — Search warrant merely stating conclusions alleging distribution, possession and parcelling do not meet the test of providing a factual basis for the information furnished or the underlying circumstances from which the informant concluded that the controlled substances were where he claimed they were. Hudson v. State, 89 N.M. 759, 557 P.2d 1108 (1976), cert. denied, 431 U.S. 924, 97 S. Ct. 2198, 53 L. Ed. 2d 238 (1977).

Handwriting exemplars may be compelled if the requirements for a search warrant are met. Sanchez v. Attorney Gen., 93 N.M. 210, 598 P.2d 1170 (Ct. App. 1979).

District court lacks authority to compel handwriting exemplars from a person who has not been charged with a crime, has not been arrested and has not been directed to appear before an investigative agency pursuant to statutory authority. Sanchez v. Attorney Gen., 93 N.M. 210, 598 P.2d 1170 (Ct. App. 1979).

Nighttime search. — A search warrant authorizing a nighttime search may be issued without positive proof that the property to be seized is on the person or in the place to be searched or a showing in the affidavit of reasonable cause for conducting the search at nighttime. State v. Hausler, 101 N.M. 143, 679 P.2d 811 (1984).

Delay in issuance. — Despite the six week delay between the incident and the issuance of a search warrant, there was sufficient information that defendant would keep the gun at his home for future use to support the search warrant; thus, the district court's denial of the motion to suppress was upheld. State v. Gonzales, 2003-NMCA-008, 133 N.M. 158, 61 P.3d 867, cert. quashed, 134 N.M. 374, 77 P.3d 278 (2003).

III. CONTENTS.

Nighttime search. — Nothing in New Mexico jurisprudence precludes, in all cases, the after-the-fact testimony of a magistrate judge to support the reasonableness of a nighttime search by showing that the judge actually performed the required scrutiny and evaluation and authorized a nighttime search although the warrant itself failed to expressly show the authorization. State v. Katrina G., 2008-NMCA-069, 144 N.M. 205, 185 P.3d 376.

Sufficiency of description of place. — A description in a search warrant is sufficient if the officer can, with reasonable effort, ascertain and identify the place intended to be searched; the description, however, must be such that the officer is enabled to locate the place to be searched with certainty. It should identify the premises in such manner as to leave the officer no doubt and no discretion as to the premises to be searched. State v. Aragon, 89 N.M. 91, 547 P.2d 574 (Ct. App.), cert. denied, 89 N.M. 206, 549 P.2d 284 (1976), overruled on other grounds State v. Rickerson, 95 N.M. 666, 625 P.2d 1183 (1981).

Where heroin seized during a search pursuant to a warrant was physically located on property upon which there was an unoccupied house, and not within the curtilage as specified in the warrant, it was held that although the warrant did not authorize a search outside the curtilage, the can containing the heroin was viewed from a place the officer had a right to be under the warrant, and, consequently, it was not discovered as a result of an illegal search. State v. Aragon, 89 N.M. 91, 547 P.2d 574 (Ct. App.), cert. denied, 89 N.M. 206, 549 P.2d 284 (1976), overruled on other grounds State v. Rickerson, 95 N.M. 666, 625 P.2d 1183 (1981).

Despite the fact that the warrant contained two errors, in that the color of the residence was wrong, and the street number of the residence was wrong, where the warrant properly described the roof of the residence, located the house with specificity and stated that the residence was the only one in the immediate area which had a chicken coop containing pigeons (plainly visible from the road), it was held that the requirements of a sufficient description were met. State v. Aragon, 89 N.M. 91, 547 P.2d 574 (Ct. App.), cert. denied, 89 N.M. 206, 549 P.2d 284 (1976), overruled on other grounds State v. Rickerson, 95 N.M. 666, 625 P.2d 1183 (1981).

Sufficiency of description of items. — Where a search warrant specified the seizure of "controlled substances" kept contrary to law, the items to be searched for and seized were as precisely identified as the situation permitted considering the wide variety of drugs used by addicts. The words used in the warrant have a definite meaning in that they refer to certain and definite lists of drugs and their derivatives. Nothing was left to the discretion of the officers. Heroin is one of the drugs listed, and it was heroin that was seized. State v. Quintana, 87 N.M. 414, 534 P.2d 1126 (Ct. App.), cert. denied, 88 N.M. 29, 536 P.2d 1085, cert. denied, 423 U.S. 832, 96 S. Ct. 54, 46 L. Ed. 2d 50 (1975).

Effect of particularity requirement. — The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to

be taken, nothing is left to the discretion of the officer executing the warrant. State v. Paul, 80 N.M. 521, 458 P.2d 596 (Ct. App.), cert. denied, 80 N.M. 746, 461 P.2d 228, 397 U.S. 1044, 90 S. Ct. 1354, 25 L. Ed. 2d 654 (1970) (decided under former law).

Return of property not described. — A person aggrieved by an unlawful search and seizure may move for the return of the property and to suppress for the use of evidence anything so obtained on the ground that the property seized is not that described in the warrant. State v. Paul, 80 N.M. 521, 458 P.2d 596 (Ct. App.), cert. denied, 80 N.M. 746, 461 P.2d 228, 397 U.S. 1044, 90 S. Ct. 1354, 25 L. Ed. 2d 654 (1970) (decided under former law).

Contents of affidavit. — Where the search warrant affidavits issued to defendant contained redacted information the evidence seized was not to be suppressed, because the requirement, under Paragraph C was ministerial and did not arise out of U.S. Const. amend. IV. Additionally, defendant was not prejudiced as a result, and the State did not act in bad faith in obtaining and executing the search warrant. State v. Malloy, 2001-NMCA-067, 131 N.M. 222, 34 P.3d 611, cert denied, 130 N.M. 722, 31 P.3d 380 (2001).

IV. EXECUTION.

Generally, as to forcible entry. — The general standard for executing a search is that prior to forcible entry, an officer must give notice of authority and purpose and be denied admittance, but noncompliance with the standard may be justified by exigent circumstances known to the officer beforehand, as for example when the officer, in good faith, believes that a person is attempting to destroy evidence. State v. Anaya, 89 N.M. 302, 551 P.2d 992 (Ct. App. 1976).

Officer executing search warrant may enter by force. — An officer armed with a search warrant that authorizes the search of a house is well within his rights to enter by force if no one is present in the house of whom he may demand entrance. State v. Gutierrez, 91 N.M. 542, 577 P.2d 440 (Ct. App. 1978).

"No knock" search warrant. — There is nothing in this rule suggesting that a magistrate or judge may predetermine the existence of exigent circumstances and authorize execution of a warrant without knocking. The prevailing view appears to be that such warrants are invalid absent statutory authorization. State v. Gutierrez, 112 N.M. 774, 819 P.2d 1332 (Ct. App. 1991), aff'd, 116 N.M. 431, 863 P.2d 1052 (1993).

Owner or occupant need not be present. — At the time of execution of a warrant, the fourth amendment does not require the presence of the person from whose premises the property is taken. State v. Gutierrez, 91 N.M. 542, 577 P.2d 440 (Ct. App. 1978).

Exigent circumstance exists if, prior to entry, officers in good faith believe that the contraband, or other evidence, for which search is to be made is about to be destroyed, and the question of exigent circumstances is one of fact. State v. Anaya, 89 N.M. 302, 551 P.2d 992 (Ct. App. 1976).

Constitutionality of preparations prior to execution of warrant. — Entry under defendant's trailer and severing of a sewer pipe before executing a search warrant for narcotics did not amount to an unconstitutional search under the circumstances since testimony indicated that heroin is often disposed of by flushing and that upon a prior arrest, one of the defendants attempted to dispose of heroin in this fashion. State v. Anaya, 89 N.M. 302, 551 P.2d 992 (Ct. App. 1976).

Subdivision (d) (see now Paragraph C) differentiates between giving and leaving a warrant: if the occupant or owner is present during the search the officer shall personally hand the receipt to him, but if the occupant or owner is absent during the search, the officer shall leave the receipt at the location of the search and seizure. State v. Gutierrez, 91 N.M. 542, 577 P.2d 440 (Ct. App. 1978).

V. RETURN.

Effect of defects. — Absent a showing of prejudice an appellate court will not set aside an otherwise valid search warrant because of defects in the return of the warrant. Those matters of procedure relating to the return of a search warrant have consistently been held to be ministerial acts which, even if defective or erroneous, do not require a search warrant to be held invalid unless prejudice is shown; therefore, absent a showing of prejudice, that specific officers were not named as authorized to execute the warrant or that no copy of an inventory was delivered by the court to the defendant will not invalidate the warrant. State v. Perea, 85 N.M. 505, 513 P.2d 1287 (Ct. App. 1973); State v. Montoya, 86 N.M. 119, 520 P.2d 275 (Ct. App. 1974).

Absent a showing of prejudice, the appellate court will not set aside an otherwise valid search warrant because of defects in the return. Where the defendant did not allege nor did the record indicate that he was prejudiced in any way by a return with contradictory recitations that property had and had not been found was not error for the trial court to admit the evidence seized pursuant to this warrant. State v. Baca, 87 N.M. 12, 528 P.2d 656 (Ct. App.), cert. denied, 87 N.M. 5, 528 P.2d 649 (1974).

VI. PROBABLE CAUSE.

De novo review by appellate court. — An issuing court’s determination of probable cause to issue a search warrant should not be reviewed de novo, but, rather, must be upheld if the affidavit provides a substantial basis to support a finding of probable cause. State v. Williamson, 2009-NMSC-039, ____ N.M. ____, 212 P.3d 376, reversing State v. Williamson, 2008-NMCA-096, 144 N.M. 522, 188 P.3d 1273.

Probable cause found. — Where an affidavit for a search warrant alleged that the defendant brought a package into a UPS Store; the defendant appeared to be nervous; the defendant did not know what was inside the package; when the store manager told the defendant that the package would have to be opened to ascertain its contents, the defendant stated that the package contained a book; although the defendant had mailed packages before, this was the first time the defendant appeared nervous and did not

know what was in the package; after the defendant left, the store manager opened the package and discovered a clear plastic bag, which appeared to be vacuum sealed, containing a Crystal Light cylinder and a Ferrero candy box, both wrapped in duct tape; a narcotics detection dog sniffed the package but failed to indicate a positive response to narcotics; and a law enforcement officer with eleven years of law enforcement experience who was assigned to the narcotics task force division of the police department averred that often times narcotics are packaged in unusual containers, wrapped in duct tape and vacuum sealed to make the narcotics less detectable by narcotic detection dogs, the facts alleged in the affidavit were sufficient to explain the narcotic detection dog's failure to alert to the presence of narcotics and to support a reasonable inference that the package contained narcotics. State v. Williamson, 2009-NMSC-039, ____ N.M. ____, 212 P.3d 376, reversing State v. Williamson, 2008-NMCA-096, 144 N.M. 522, 188 P.3d 1273.

Generally. — Under Subdivision (f) (see now Paragraph E) the issue is whether there is a substantial basis for determining credibility and for determining that a factual basis exists. These tests are to be applied regardless of whether the affidavit identifies double hearsay, and the presence of double hearsay, in itself, does not render the affidavit legally insufficient as a magistrate is to evaluate this information as well as all other information in the affidavit in order to determine whether it can be reasonably inferred that the informant had gained his information in a reliable way. The magistrate must canvass the affidavit and the informer's tip as a whole to assess its probative value. State v. Perea, 85 N.M. 505, 513 P.2d 1287 (Ct. App. 1973).

Substance of all definitions of probable cause is a reasonable ground for belief of guilt. State v. Hilliard, 81 N.M. 407, 467 P.2d 733 (Ct. App. 1970)(decided under former law).

Probable cause determination to be made by judge, not police officer. — It is for a neutral and detached judge to determine from the affidavit whether probable cause exists. A police officer is not vested with that authority. State v. Baca, 97 N.M. 379, 640 P.2d 485 (1982).

Probable cause cannot be established or justified by what is revealed by the search. State v. Baca, 97 N.M. 379, 640 P.2d 485 (1982).

The warrant is not rendered invalid by the inclusion in the affidavit of some information that is not supported by probable cause. The warrant may nevertheless stand if the remaining allegations demonstrate probable cause. State v. Snedeker, 99 N.M. 286, 657 P.2d 613 (1982).

Mere suspicion or expectation that item may prove incriminating to a defendant is not sufficient justification for the seizure of the item. State v. Turkal, 93 N.M. 248, 599 P.2d 1045 (1979).

Use of hearsay. — Affidavits will be tested by much less rigorous standards than those governing admissibility of evidence at trial. Probable cause may be determined on the basis of evidence which at trial would not be legally competent. Thus, hearsay information, even from an undisclosed informant may form the basis for a probable cause determination so long as there is some reason for believing such information. State v. Perea, 85 N.M. 505, 513 P.2d 1287 (Ct. App. 1973).

Probable cause must be based on substantial evidence. The evidence used may be hearsay, provided: (1) there is a substantial basis for believing the source of the hearsay to be credible, and (2) there is a substantial basis for believing that there is a factual basis for the information furnished. State v. Snedeker, 99 N.M. 286, 657 P.2d 613 (1982).

Where the only allegations of criminality in an affidavit for a search warrant were hearsay from persons who were not law-enforcement officers, the affidavit did not establish probable cause because it did not establish either (1) that the informants were truthful persons, (2) that the informants had particular motives to be truthful about their specific allegations, or (3) that the allegations of criminality had been sufficiently corroborated. State v. Therrien, 110 N.M. 261, 794 P.2d 735 (Ct. App. 1990), overruled in part on other grounds, State v. Barker, 114 N.M. 589, 844 P.2d 839 (Ct. App. 1992).

Personal observation of informant satisfies probable cause. — Although, under the *Aguilar-Spinelli* test, an affidavit based on an informant's hearsay will constitute probable cause for a search warrant only if the affidavit establishes both the credibility and the basis of knowledge of the informant, a detective's personal observations of an unwitting informant buying cocaine constituted sufficient facts and circumstance to satisfy probable cause for the issuance of the warrant. The *Aguilar-Spinelli* analysis applies only to hearsay. The unwitting informant, who did not realize that he or she was buying cocaine for a law enforcement officer, did not intend his or her conduct as an "assertion"; consequently, that conduct was not hearsay. State v. Lovato, 117 N.M. 68, 868 P.2d 1293 (Ct. App. 1993).

An informant's first-hand knowledge of heroin trafficking as a result of his controlled purchase established the informant's "basis of knowledge" for purposes of establishing probable cause. State v. Lujan, 1998-NMCA-032, 124 N.M. 494, 953 P.2d 29, cert. denied, 124 N.M. 589, 953 P.2d 1087 (1998).

Use of evidence gathered from lengthy surveillance. — Where affidavit alleged police officer had defendant's premises under surveillance for months, had seen several known narcotics users come and go, had observed fresh needle marks on some whom he stopped, and that some of those whom he stopped had admitted purchasing narcotics from the defendant, there was probable cause for issuance of a search warrant. State v. Perea, 85 N.M. 505, 513 P.2d 1287 (Ct. App. 1973).

Where the affidavits presented to the magistrate indicated that the affiants personally inspected two cars rented previously by the defendants and found significant traces of

marijuana, that the defendants lived together, spent large amounts of cash for purchases, had no visible means of support, rented numerous automobiles for trips and flew on airplanes during the period of surveillance, the magistrate could assure himself that the affidavits were not based on rumors or merely on the defendants' reputation; there was sufficient information for him to be satisfied that the circumstances by which the affiants came by their information demonstrated probability for the issuance of a search warrant. State v. Bowers, 87 N.M. 74, 529 P.2d 300 (Ct. App. 1974).

Observations of fellow officers of the government engaged in a common investigation are plainly a reliable basis for a warrant applied for by one of their number. State v. Perea, 85 N.M. 505, 513 P.2d 1287 (Ct. App. 1973).

Use of evidence inculpating informant. — When an informant gives information that not only provides the basis for an accusation against a third party but also indicates that the informant himself is guilty of some misconduct, this admission carries its own indicia of credibility - sufficient at least to support a finding of probable cause to search. State v. Perea, 85 N.M. 505, 513 P.2d 1287 (Ct. App. 1973).

Substantiality of informant's information. — An unsupported statement by an affiant that he believed an informant to be truthful will not, in itself, provide a factual basis for believing the report of an unnamed informant. The affidavit must set forth some of the underlying circumstances supporting the affiants' conclusions and beliefs that the information is credible or that his information is reliable. State v. Perea, 85 N.M. 505, 513 P.2d 1287 (Ct. App. 1973).

Information from a reliable informant constitutes probable cause for search, particularly when the information is detailed and accurate. State v. McAdams, 83 N.M. 544, 494 P.2d 622 (Ct. App. 1972)(decided under former law).

In determining whether probable cause existed, it is of vital importance that a reliable confidential informant or affiant describe the criminal activity in sufficient detail so that the magistrate has something substantial to rely on and not a casual rumor circulating in the underworld. Affidavit containing nothing more than conclusionary statements without factual predicate was deficient. State v. Duran, 90 N.M. 741, 568 P.2d 267 (Ct. App. 1977).

In the absence of underlying circumstances establishing the basis of an informant's conclusion, the affidavit will sufficiently establish probable cause if the informant describes the criminal activity in such detail that a judge will know the informant relies on more than a casual rumor or reputation of the defendant. State v. Baca, 97 N.M. 379, 640 P.2d 485 (1982).

A conclusory statement that the informant has personal knowledge negates the validity of the affidavit and the facts advanced in support of a showing of probable cause. State v. Baca, 97 N.M. 379, 640 P.2d 485 (1982).

The fact that an informant states that the defendant was known by the informant to be involved in narcotic transactions is but a bald and unilluminating assertion of suspicion that is entitled to no weight in appraising the judge's decision. State v. Baca, 97 N.M. 379, 640 P.2d 485 (1982).

Magistrate not required to make independent investigation of informant's reliability. — There is no requirement that a magistrate make an independent investigation to determine whether an informant is reliable; rather, from the verified facts presented to him, the magistrate must believe that the source is credible and that a factual basis exists for the information furnished. State v. Gutierrez, 91 N.M. 542, 577 P.2d 440 (Ct. App. 1978).

Nor must past tips have resulted in conviction. — To establish a record of reliability of an informant sufficient for probable cause, it is unnecessary for the affidavit to state that the informer's past tips had resulted in a conviction. State v. Gutierrez, 91 N.M. 542, 577 P.2d 440 (Ct. App. 1978).

Veracity may be established by informant's reliability and corroboration. — Where, because of knowledge personal to a juvenile informant, and by reading of an affidavit as a whole, a juvenile informant's veracity is shown by the reliability of the information which she provided, which is partly corroborated by information supplied by a confidential informant, probable cause existed for issuing a search warrant. State v. Turkal, 93 N.M. 248, 599 P.2d 1045 (1979).

Corroboration or verification necessary to show informant's credibility. — Information furnished by an informant for the issuance of a search warrant must be sufficiently corroborated or verified to an extent sufficient to establish the informant's credibility. State v. Donaldson, 100 N.M. 111, 666 P.2d 1258 (Ct. App. 1983).

Where informant unreliable, and information not based on personal knowledge, no probable cause. — Where an informant supplies information not based on personal knowledge, and the affiant's reasons for believing the informant to be reliable do not meet the traditional test of the indicia of reliability, probable cause does not exist. State v. Brown, 96 N.M. 10, 626 P.2d 1312 (Ct. App.), remanded, 95 N.M. 454, 623 P.2d 574 (1981).

Affidavit based on statements of undisclosed informants. — Affidavit in support of search warrant, which was based primarily upon information provided by undisclosed informants but which failed to set out sufficient facts to determine the reliability of such informants, was insufficient to establish probable cause, and thus a search predicated on such warrant violated Article II of the New Mexico Constitution and the Fourth Amendment to the United States Constitution. In re Shon Daniel K., 1998-NMCA-069, 125 N.M. 219, 959 P.2d 553, cert. denied, 125 N.M. 147, 958 P.2d 105 (1998).

Reasonable inference from probable cause showing. — A showing of probable cause that a person has committed a crime will permit a reasonable inference that

evidence of the crime will be found in his house. State v. Baca, 97 N.M. 379, 640 P.2d 485 (1982).

If stolen property is not inherently incriminating and there is probable cause to believe a suspect has committed the theft, the magistrate can assume that the property will be found at the suspect's residence. State v. Snedeker, 99 N.M. 286, 657 P.2d 613 (1982).

Probable cause to search defendant and automobile for controlled substances found lacking. State v. Ven De Valde, 97 N.M. 680, 642 P.2d 1139 (Ct. App. 1982).

Defective affidavit based on unnamed police informant. — The trial court erred in refusing to suppress evidence because of a facially defective affidavit which merely reiterated the allegations of an unnamed police informant without providing specific, corroborating details regarding drug transaction times, frequency, amounts or kinds, sufficient to subject informant himself to a reasonable fear of prosecution. State v. Barker, 114 N.M. 589, 844 P.2d 839 (Ct. App. 1992).

5-212. Motion to suppress.

A. **Property.** A person aggrieved by a search and seizure may move for the return of the property and to suppress its use as evidence.

B. **Suppression of other evidence.** A person aggrieved by a confession, admission or other evidence may move to suppress such evidence.

C. **Time for filing.** A motion to suppress shall be made within twenty (20) days after the entry of a plea, unless, upon good cause shown, the trial court waives the time requirement of this rule.

D. **Hearing.** The court shall receive evidence on any issue of fact necessary to the decision of the motion. If a motion pursuant to Paragraph A of this rule is granted, the property shall be returned, unless otherwise subject to lawful detention.

Committee commentary. — For the general rule governing motions, see Rule 5-601 NMRA.

The aggrieved person under Paragraphs A and B of this rule is the person who has standing to raise the issue. See State v. Nemrod, 85 N.M. 118, 509 P.2d 885 (Ct. App. 1973), and State v. Torres, 81 N.M. 521, 469 P.2d 166 (Ct. App. 1970).

The motion under Paragraph B of this rule is used to suppress or exclude evidence obtained in violation of any constitutional rights, not only that obtained by an unlawful search and seizure. See e.g., State v. Harrison, 81 N.M. 324, 466 P.2d 890 (Ct. App. 1970) (motion to exclude lineup identification).

The New Mexico Rules of Criminal Procedure do not require motion objecting to illegally seized evidence prior to trial. Compare Rule 12(b)(3) of the Federal Rules of Criminal Procedure. 62 F.R.D. 271, 287 (1974). If a pretrial motion to suppress is made under this rule, it must be filed within twenty (20) days after the entry of a plea. Although this language differs from the general rule on motions, Paragraph D of Rule 5-601, the rule apparently means within twenty (20) days after the arraignment held in accordance with Rule 5-303. See State v. Rivera, 85 N.M. 723, 516 P.2d 694 (Ct. App. 1973), where the district court relied on Paragraph D of Rule 5-601 although the motion was clearly a motion to suppress.

At a hearing on a motion to suppress, the Rules of Evidence, except for the rules on privileges, do not apply. See Paragraph A of Rule 11-104 and Subparagraph (1) of Paragraph D of Rule 11-1101. For example, hearsay evidence is admissible. United States v. Matlock, 415 U.S. 164, 94 Sup. Ct. 988, 39 L. Ed. 2d 242 (1974).

ANNOTATIONS

I. GENERAL CONSIDERATION.

Cross references. — For pretrial motions, defenses and objections, see Rule 5-601 NMRA.

Compiler's notes. — Paragraph A of this rule is similar to Rule 41(e) of the Federal Rules of Criminal Procedure.

Deterrent purpose of exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right, and by refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused, but where the official action was pursued in complete good faith, the deterrence rationale loses much of its force. State v. Ramirez, 89 N.M. 635, 556 P.2d 43 (Ct. App. 1976), overruled on other grounds, City of Albuquerque v. Haywood, 1998-NMCA-029, 954 P.2d 93.

Role of trial court in admissibility hearing. — It is always open to an accused to subjectively deny that he understood the precautionary warning and advice with respect to assistance of counsel, and when the issue is raised in an admissibility hearing it is for the court to objectively determine whether in the circumstances of the case the words used were sufficient to convey the required warning. State v. Ramirez, 89 N.M. 635, 556 P.2d 43 (Ct. App. 1976), overruled on other grounds, City of Albuquerque v. Haywood, 1998-NMCA-029, 954 P.2d 93.

Role of appellate court. — Where the judge, on record, passed on the voluntariness and admissibility of defendant's statements at a suppression hearing, and submitted the statements to the jury with a charge which complied with UJI Crim. 40.40 (see now UJI

14-5040), regarding voluntariness of confessions, the defendant's argument that his statements were the product of promises and inducements was to be considered with all the conflicting evidence, and it was not for the appellate court to substitute its own judgment for that of the trier of fact and the trial judge. State v. Ramirez, 89 N.M. 635, 556 P.2d 43 (Ct. App. 1976), overruled on other grounds, City of Albuquerque v. Haywood, 1998-NMCA-029, 954 P.2d 93.

Effect of not objecting to voluntariness of confession. — Where confession is received in evidence without objection, no motion was made to strike nor to invoke the ruling of the court on this matter, it is not subject to consideration on appeal. State v. Soliz, 79 N.M. 263, 442 P.2d 575 (1968) (decided under former law).

II. PROPERTY.

A. IN GENERAL.

Purpose of prohibition against unreasonable searches and seizures. — The constitutional prohibition against unreasonable searches and seizures is so that people may be secure in their persons, houses, papers and effects, and does not apply to items viewed in an open field. State v. Aragon, 89 N.M. 91, 547 P.2d 574 (Ct. App.), cert. denied, 89 N.M. 206, 549 P.2d 284 (1976), overruled on other grounds State v. Rickerson, 95 N.M. 666, 625 P.2d 1183 (1981).

In the search and seizure context the prime purpose of an exclusionary rule is to deter future unlawful police conduct, and this rationale may be applicable to the right against compulsory self-incrimination. State v. Ramirez, 89 N.M. 635, 556 P.2d 43 (Ct. App. 1976), overruled on other grounds, City of Albuquerque v. Haywood, 1998-NMCA-029, 954 P.2d 93.

B. SEIZED FROM BUILDINGS OR GROUNDS.

Seizure of evidence from location not specified in warrant. — Where heroin seized during a search pursuant to a warrant was physically located on property upon which there was an unoccupied house, and not within the curtilage as specified in the warrant, it was held that although the warrant did not authorize a search outside the curtilage, the can containing the heroin was viewed from a place the officer had a right to be under the warrant, and, consequently, it was not discovered as a result of an illegal search. State v. Aragon, 89 N.M. 91, 547 P.2d 574 (Ct. App.), cert. denied, 89 N.M. 206, 549 P.2d 284 (1976), overruled on other grounds State v. Rickerson, 95 N.M. 666, 625 P.2d 1183 (1981).

Evidence seized on reservation. — Because there is nothing in either the Zuni constitution or the Zuni tribal law and order code which authorizes the Zuni tribal court to issue a search warrant, the evidence seized from a house on the Zuni reservation pursuant to such a warrant is inadmissible at trial in a New Mexico court, and the motion

to suppress the evidence obtained during the search should have been granted. State v. Railey, 87 N.M. 275, 532 P.2d 204 (Ct. App. 1975).

Search immediately after crime. — Where police followed robbery suspects to a house immediately after the crime, the fact that additional delay would have allowed time for disposing of clothing and contraband was an exigent circumstance and forcible entry by the police officers was a valid intrusion. State v. Hansen, 87 N.M. 16, 528 P.2d 660 (Ct. App. 1974).

Simultaneous announcement and entering. — Where police officers armed with a search warrant had probable cause to believe and in good faith did believe that defendant was selling heroin from his home and that there was heroin therein, they had received information from an informant who had assisted in the investigation leading to the issuance of the warrant, that defendant kept a weapon in the house and that the officers would have to move rapidly or defendant would flush the heroin down the toilet, the officers were all experienced and knew that normally there is an attempt to get rid of heroin before police officers get into a house, and after knocking on the door and announcing that they were police officers, they could see people moving and hear the sound of voices coming from inside the house, one of which was yelling or screaming as if someone was calling to another for the purpose of getting attention, the circumstances justified the officers in entering after knocking and announcing that they were police officers without waiting to be invited or denied entry. State v. Sanchez, 88 N.M. 402, 540 P.2d 1291 (1975), overruled on other grounds, State v. Attaway, 117 N.M. 141, 870 P.2d 103 (1994).

Other evidence observed in course of lawful search. — Where contraband was discovered when officers opened a cedar chest, a metal pill box in a purse and an overnight case while searching for heroin, the "plain view" doctrine did not justify its seizure of the contraband in this case. However, seizure of the contraband was permissible under the facts of this case because where permission has been given to search for a particular object, the ensuing search remains valid as long as its scope is consistent with an effort to locate that object and other evidence observed in the course of such a lawful search may also be seized. State v. Alderete, 88 N.M. 619, 544 P.2d 1184 (Ct. App. 1976).

Where the presence of possibly hazardous chemicals provided the exigent circumstances necessary for a warrantless entry of defendant's residence, seizure of glassware and handguns was lawful because they were in plain view, and the exigencies of the situation permitted the opening of a briefcase without a warrant to search for other weapons or explosives. State v. Calloway, 111 N.M. 47, 801 P.2d 117 (Ct. App. 1990).

Search of undercover agent's home. — The finding of the marijuana and LSD in the undercover agent's home after the officers were informed by the undercover agent was hardly a search, but if it was a search it was by permission of the owner of the house

and a search after permission is given by one who has authority is valid. State v. Mosier, 83 N.M. 213, 490 P.2d 471 (Ct. App. 1971) (decided under former law).

Effect of third-party consent. — Stolen items found in duffel bag in defendant's room were inadmissible where defendant occupied room in house rented by brother-in-law who gave police permission to search "my place of residence". A third party cannot consent to a search of a part of the premises within defendant's exclusive use and control. State v. Johnson, 85 N.M. 465, 513 P.2d 399 (Ct. App. 1973).

Standing of visitor to challenge search and seizure. – To establish his standing to challenge a search and seizure, a visitor must show subjectively, by his conduct, that he had an expectation of privacy, and objectively that his expectation was reasonable; defendant did not make any specific showing concerning his expectation of privacy where he was among a group of people in the living room in the presence of marijuana. State v. Fairres, 2003-NMCA-152, 134 N.M. 668, 81 P.3d 611, cert. denied, 2003-NMCERT-003.

C. SEIZED FROM MOTOR VEHICLE, ETC.

General license and registration check. — Where defendant's car was stopped during a general license and registration check, and after a police request defendant opened the trunk, at which point the officer smelled marijuana, and subsequently opened a suitcase (also at the officer's request), it was held that the seizure of the marijuana residue found in the suitcase was not unlawfully accomplished. State v. Bloom, 90 N.M. 192, 561 P.2d 465 (1977).

Suppression of evidence was not warranted where officers stopped motorist for routine registration and license check, found Arizona driver's license and Connecticut registration in another's name, and upon asking driver what was in trunk, had right to ask if they could look in the trunk, and upon being given consent by the driver who opened the trunk, and upon smelling marijuana, had the right to ask for keys to footlockers and open them. State v. Bidegain, 88 N.M. 466, 541 P.2d 971 (1975).

Where no plain view or exigent circumstances. — The plain view doctrine did not apply to marijuana found in defendant's car, which was enclosed in a burlap-like sack, since neither of the police officers involved could testify that he was able to see inside the bag nor did exigent circumstances justifying a warrantless search exist where defendant's car was parked outside the sheriff's office, and the defendant and the other two occupants were in the sheriff's office under arrest. State v. Coleman, 87 N.M. 153, 530 P.2d 947 (Ct. App. 1974).

Insufficient proof alcoholic beverages in possession of minors. — Where two officers who had stopped defendant's car for carelessly leaving the curb, saw alcoholic beverages therein (not a crime in and of itself) and neither officer ever explained why either of them believed any of the three occupants (all of whom had reached their majority) were under 21 (so as to, at that time, make possession of the alcohol illegal),

the officers had no probable cause to search the car and defendant's motion to suppress should have been granted. State v. Ledbetter, 88 N.M. 344, 540 P.2d 824 (Ct. App. 1975).

Inventory search. — An inventory search of an automobile does not violate U.S. Const., amend. IV when that automobile is in the lawful custody of the police in a reasonable exercise of its caretaking function; however, an inventory search is not constitutionally permissible absent a search warrant after police have relinquished possession, custody and control to a third party who has the legal right to possession, custody and control, and the trial court should have granted defendant's motion to suppress. State v. Clark, 89 N.M. 695, 556 P.2d 851 (Ct. App. 1976).

Marijuana found in closed paper bag in locked trunk was admissible as police are not limited to plain view items when doing inventory of personal items left in arrested and jailed person's car. State v. Vigil, 86 N.M. 388, 524 P.2d 1004 (Ct. App.), cert. denied, 86 N.M. 372, 524 P.2d 988, 420 U.S. 955, 95 S. Ct. 1339, 43 L. Ed. 2d 432 (1975).

Search of overdue rental vehicle. — When police stopped car which appeared reluctant to pass police vehicle and which turned out to be an overdue rental vehicle, there was no justification in making a warrantless search of the car, and seizure of the marijuana seeds and marijuana was unlawful because consent was not given, the search was not pursuant to an arrest, and there was no probable cause to warrant a search; therefore, the trial court correctly granted defendant's motion to suppress. State v. Brubaker, 85 N.M. 773, 517 P.2d 908 (Ct. App. 1973).

Search two hours after arrest. — A search that occurred around two hours after the arrest when the evidence is sufficient to show that the police officers had reasonable or probable cause to search the automobile at the place of arrest was valid, as this right continued to a search at the police station shortly thereafter. The search was not remote; therefore, the evidence seized from the car was properly admitted. State v. Courtright, 83 N.M. 474, 493 P.2d 959 (Ct. App. 1972) (decided under former law).

Airplane alert bulletin not probable cause. — Where superior officer was notified that there was an alert bulletin out on a certain airplane, radioed to another officer to arrest pilot and search airplane, resulting in statements being made and the discovery of marijuana, there was no probable cause, and the statements and marijuana were an exploitation of an illegal arrest and inadmissible. State v. Gorsuch, 87 N.M. 135, 529 P.2d 1256 (Ct. App. 1974).

D. SEIZED FROM PERSON.

Reasonable suspicion that the defendant was armed and dangerous. — Where police officers asked the defendant to step outside his residence; the defendant kept his hand in his pocket as he opened the door; the defendant twice refused to comply with the officers' orders to take his hand out of his pocket; one officer grabbed the wrist of the defendant's hand that was in the pocket; the defendant removed his hand from his

pocket while the officer continued to hold on to the defendant's wrist; the defendant had past interactions with the officers; the officers were aware that the defendant was known to carry a pocketknife; and the officers were nervous about their safety because the defendant had complied with their requests in the past, but was not compliant in this instance, the officers had a reasonable suspicion that the defendant was armed and dangerous which justified the officer's seizure of the defendant's hand. State v. Talley, 2008-NMCA-148, 145 N.M. 127, 194 P.3d 742.

Observations by experienced officer. — A police officer who testified he had been working in narcotics for approximately four years, had made numerous arrests in the area, for the year prior to defendant's arrest had spent almost every day in the area, was acquainted with many addicts and had discussed methods of carrying and hiding small quantities of narcotics, had reasonable grounds for belief that defendant, based on the officer's observance of his conduct, was in possession of heroin and, therefore, had probable cause for the detention and search and seizure which disclosed the heroin. State v. Blea, 88 N.M. 538, 543 P.2d 831 (Ct. App.), cert. denied, 89 N.M. 5, 546 P.2d 70 (1975).

Search and seizure incident to lawful arrest. — Where there is probable cause for the arrest, the search and seizure, contemporaneous with the arrest, was valid as an incident of the arrest; therefore, the trial court did not err in denying the motion to suppress or in admitting the heroin at trial. State v. Garcia, 83 N.M. 490, 493 P.2d 975 (Ct. App. 1971), cert. denied, 83 N.M. 473, 493 P.2d 958 (1972) (decided under former law).

The trial court properly denied defendant's motion to suppress evidence seized from his person, where defendant was arrested for public drunkenness (prior to repeal of the offense of drunkenness), and the police officer searched defendant finding a marijuana cigarette and a glasses case which contained heroin, since the full search of the person of the suspect made incident to a lawful custodial arrest does not violate the U.S. Const., amends. IV and XIV, and having authority to search the glasses case, the right to open it naturally followed. State v. Barela, 88 N.M. 446, 541 P.2d 435 (Ct. App. 1975).

Officer who could see cigarette with rolled up end in see-through shirt pocket of child, and who had previously seen traces of tobacco and marijuana nearby, had probable cause to grab cigarette out of pocket, and subsequent emptying of pockets, producing more marijuana, and arrest, were contemporaneous events and suppression of evidence was not warranted. In re Doe, 89 N.M. 83, 547 P.2d 566 (Ct. App.), cert. denied, 89 N.M. 206, 549 P.2d 284 (1976).

III. SUPPRESSION OF OTHER EVIDENCE.

Requirements for valid statement. — For defendant to make a valid statement the defendant must have had sufficient mental capacity at the time he made the statement, to be conscious of the physical acts performed by him, to retain them in his memory,

and to state them with reasonable accuracy, and where there was evidence which met this standard, the trial court did not err in refusing to suppress the consent to search. State v. Chavez, 88 N.M. 451, 541 P.2d 631 (Ct. App. 1975).

Constitutionality of confession taken in violation of statutory provision. — The supreme court, although not reaching the question of suppression of confession, indicated that, in case where confession was given by indigent during forcible detention after twice being given and waiving the Miranda warnings, before public defender was notified of detention, in violation of 31-15-12 NMSA 1978 of the Public Defender Act, the U.S. Const., amends. V and VI rights were not violated, entirely apart from whether they were waived, that prejudice was not shown, that for suppression to be warranted both would be required, and reversed the trial court and court of appeals who had suppressed evidence on basis that confessions violated U.S. Const., amends. V and VI. State v. Rascon, 89 N.M. 254, 550 P.2d 266 (1976).

Coercion necessary. — The right against self-incrimination must involve an element of coercion since the clause provides that a person shall not be compelled to give evidence against himself; where defendant twice insisted on making a confession, twice was given Miranda warnings and still insisted on making statements, defendant's statements were obtained in a manner indicating that they were given voluntarily within the meaning of fundamental fairness, and the deterrence of overzealous and unlawful police activity would not be served by their exclusion. State v. Ramirez, 89 N.M. 635, 556 P.2d 43 (Ct. App. 1976), overruled on other grounds, City of Albuquerque v. Haywood, 1998-NMCA-029, 954 P.2d 93.

Effect of noncompliance with Miranda procedures. — Any statement given without compliance with the Miranda procedures cannot be admitted in evidence against the accused over his objection, even if it is wholly voluntary. State v. Ramirez, 89 N.M. 635, 556 P.2d 43 (Ct. App. 1976), overruled on other grounds, City of Albuquerque v. Haywood, 1998-NMCA-029, 954 P.2d 93.

Where defendant made confession before being advised of his rights, motion to suppress was properly denied where defendant testified at trial that he shot decedent in self-defense and jury was instructed on issue of voluntariness. State v. Romero, 86 N.M. 674, 526 P.2d 816 (Ct. App.), cert. denied, 86 N.M. 656, 526 P.2d 798 (1974).

Where petitioner had no attorney when the statement was given and claims that he had not been advised that he did not have to make any statement at all, and that if he did make a statement it could be used against him on a trial, no prejudice is shown where it was typed on the form that he did not have to make any statement. Pece v. Cox, 74 N.M. 591, 396 P.2d 422 (1964) (decided under former law).

Exploitation of prior illegal statement. — The fact that defendant may have understood his rights at the time of a later statement did not discharge state's burden of showing that later statement was not exploitation of prior illegal statement, and it was

improper to admit the later incriminating statement at trial for armed robbery. State v. Dickson, 82 N.M. 408, 482 P.2d 916 (Ct. App. 1971) (decided under former law).

Effect of photograph on in-court identification of defendant. — Where victim was robbed by two men, went to police headquarters and looked at more than 10 mug shots with no officer in the room, made no identification, returned the next day, was shown five mug shots, identified one robber, not defendant, returned a few days later, was shown five more mug shots, identifying defendant, the record was void of any indication that in-court identification of defendant was tainted. State v. Beal, 86 N.M. 335, 524 P.2d 198 (Ct. App. 1974).

Suppression of in-court identification of defendant was denied where identification was independent and unhesitating. Here, prosecutrix was shown, during the course of the investigation, a group of photographs, including one of defendant, which were not introduced at trial nor alluded to in the presence of the jury; the in-court identification of defendant was permissible where the individuals in the photographs were similar in appearance and were not so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. State v. Armstrong, 85 N.M. 234, 511 P.2d 560 (Ct. App.), cert. denied, 85 N.M. 228, 511 P.2d 554 (1973), overruled on other grounds State v. Elliott, 88 N.M. 187, 539 P.2d 210 (1975).

Where victim's testimony was to the effect that intruder was in her presence for approximately an hour and 40 minutes, and at the police station she described the intruder by height, style of haircut and "big lips", showing the victim the driver's license photograph when victim knew the driver's license came from the wallet she had taken from the rapist's pocket, it was not error to admit evidence of the out-of-court identification of defendant from the photographs, and the in-court identification was not inadmissible because of taint by an illegal pretrial identification. State v. Baldonado, 82 N.M. 581, 484 P.2d 1291 (Ct. App. 1971) (decided under former law).

Improper inducement. — Where 18-year-old defendant had been advised by his mother to go to a former district attorney if he ever needed help, went, made confession and produced evidence believing the charges would be dropped, the confession and evidence were entitled to be suppressed. State v. Benavidez, 87 N.M. 223, 531 P.2d 957 (Ct. App. 1975).

Suggestive elements not invalidating on-the-scene confrontation. — During a showup, the facts that defendant was either the sole occupant of the police car or was standing alongside the police car and was in the presence of police officers during the confrontation with the witness were simply the usual elements in any police conducted on-the-scene confrontation, and while these elements are suggestive, they were not unnecessarily so and were to be considered by the trial court in evaluating the totality of the circumstances; in themselves they do not require exclusion of the evidence. State v. Torres, 88 N.M. 574, 544 P.2d 289 (Ct. App. 1975).

Effect of arrest and confession in another state. — The Philadelphia police were entitled to act on the Phoenix police department's telephone request and to assume that Phoenix had probable cause for making it, and since defendant did not contend that the Phoenix police lacked probable cause to arrest him for crimes committed in Arizona, defendant's arrest by the Philadelphia police was lawful, and the confession thereafter obtained from him was admissible. State v. Carter, 88 N.M. 435, 540 P.2d 1324 (Ct. App. 1975).

Admission of blood test. — Absent a valid warrant or consent by the defendant, an arrest prior to the taking of a blood alcohol test is an essential element in order to constitute a reasonable search and seizure. Admission into evidence of the results of a blood test which does not meet this standard is reversible error. State v. Richerson, 87 N.M. 437, 535 P.2d 644 (Ct. App.), cert. denied, 87 N.M. 450, 535 P.2d 657 (1975).

IV. TIME FOR FILING.

As a general rule, a motion to suppress evidence is not required to be made before trial and may be made at trial. State v. Katrina G., 2008-NMCA-069, 144 N.M. 205, 185 P.3d 376.

Time limitation of Subdivision (c) (see now Paragraph C) does not violate defendant's constitutional right to be heard on the voluntariness of a confession. State v. Gallegos, 92 N.M. 336, 587 P.2d 1347 (Ct. App. 1978).

Because issue not thereby foreclosed. — Defendant's right to be heard on whether the prosecutor had laid a sufficient foundation for the admission of inculpatory statements was not barred by the fact that he had not sought to suppress the statements under Subdivision (c) (see now Paragraph C). State v. Gallegos, 92 N.M. 336, 587 P.2d 1347 (Ct. App. 1978).

Defendant's duty to move for suppression of evidence before trial is discretionary. State v. Doe, 93 N.M. 143, 597 P.2d 1183 (Ct. App. 1979) (motion for rehearing).

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

Where defendant waited until trial to object to admission of confession, the failure of defendant to file a timely motion to suppress statement, made directly after seizure of

heroin, on grounds rights not given, resulted in prejudice to the state, and since in such circumstances it would be contrary to the ends of public justice to carry the first trial to a final verdict, the trial court did not abuse its discretion in declaring a mistrial; there was no double jeopardy. State v. Aragon, 89 N.M. 91, 547 P.2d 574 (Ct. App.), cert. denied, 89 N.M. 206, 549 P.2d 284 (1976), overruled on other grounds State v. Rickerson, 95 N.M. 666, 625 P.2d 1183 (1981).

Objection waived. — In the absence of an objection from the state to consideration of a motion to suppress evidence, and its affirmatively arguing its merits to the district court, the state waived its objection to the motion. State v. Gutierrez, 2005-NMCA-015, 136 N.M. 779, 105 P.3d 332, cert. denied, 2005-NMCERT-001.

V. HEARING.

Challenge to veracity of statements made in affidavit underlying warrant. — At a hearing under this rule, the person aggrieved has the right to challenge the veracity of statements made in an affidavit underlying a search warrant. The defendant is entitled to a hearing which delves below the surface of a facially sufficient affidavit if he has made an initial showing of either (1) any misrepresentation by the government agent of a material fact or (2) an intentional misrepresentation by the government agent, whether or not material. Once a hearing is granted, however, more must be shown to suppress the evidence, i.e., the trial court must find that the government agent was either recklessly or intentionally untruthful. State v. Gutierrez, 91 N.M. 542, 577 P.2d 440 (Ct. App. 1978).

Effect of failure to request hearing. — Where no request was made at the trial for a hearing on the voluntariness of a confession, and the explanation of rights form and the confession were admitted in evidence without objection, no foundation was laid by the defense which required the trial court to give UJI Crim. 40.40 (now see UJI 14-5040). State v. McCarter, 93 N.M. 708, 604 P.2d 1242 (1980).

Admission of confession without hearing. — An evidentiary hearing on the issue of involuntariness to confess due to insanity is constitutionally required when a defendant requests it or when the defendant attempts to offer proof that he was not mentally competent to make the confession. However, a confession is presumed to be given by a mentally competent person and the burden is on the defendant to show some evidence to the contrary. Where defendant failed to demand an evidentiary hearing and did not show that he had evidence to submit on his incompetence to confess, nor was there evidence in the record of coercion, prolonged interrogation or anything which might make the confession involuntary, it was proper for the court to admit the evidence of the confession, along with evidence of the defendant's state of mind at the time of the confession, to allow the jury to decide the weight to be accorded the confession. State v. Lujan, 87 N.M. 400, 534 P.2d 1112, cert. denied, 423 U.S. 1025, 96 S. Ct. 469, 46 L. Ed. 2d 400 (1975).

Where failure to conduct hearing not error. — The trial court did not err in failing to conduct a hearing on a pretrial motion to suppress statements made by defendants when the motion was never brought to its attention. State v. Dosier, 88 N.M. 32, 536 P.2d 1088 (Ct. App.), cert. denied, 88 N.M. 28, 536 P.2d 1084 (1975).

Effect of failure to rule on pretrial motion to suppress. — Defendant has a constitutional right to have a fair hearing and a reliable determination as to the voluntariness of his confession. The failure of the trial court to rule on pretrial motion to suppress confession was error and necessitated vacation of conviction and sentence pending trial court determination on issue of voluntariness of confession. State v. Gurule, 84 N.M. 142, 500 P.2d 427 (Ct. App. 1972).

Use of evidence adduced at hearing. — Evidence adduced at a hearing on a motion to suppress could not be used to augment an otherwise defective affidavit. State v. Baca, 84 N.M. 513, 505 P.2d 856 (Ct. App. 1973).

Defendants were prejudiced by the unconstitutional denial of their motion to suppress testimony used at hearing to suppress confession, when the trial court refused to guarantee that none of the testimony elicited from them therein would be admitted at their subsequent trial; a defendant cannot be required to elect between a valid fourth amendment claim or, in legal effect, a waiver of his fifth amendment privilege against self-incrimination. State v. Volkman, 86 N.M. 529, 525 P.2d 889 (Ct. App. 1974).

Acceptance of evidence rights given and waived in Spanish. — Where the defendant spoke Spanish and the record reflected defendant's waiver in Spanish of his constitutional rights which were written in Spanish, the court of appeals took judicial notice of its English interpretation, and agreed with the trial court that the language of the waiver satisfied the requirements of due process. State v. Ramirez, 89 N.M. 635, 556 P.2d 43 (Ct. App. 1976), overruled on other grounds, City of Albuquerque v. Haywood, 1998-NMCA-029, 954 P.2d 93.

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

Am. Jur. 2d, A.L.R. and C.J.S. references. — Admissibility of evidence discovered in search of adult defendant's property or residence authorized by defendant's minor child - state cases, 99 A.L.R.3d 598.

Admissibility of evidence discovered in search of defendant's property or residence authorized by domestic employee or servant, 99 A.L.R.3d 1232.

Admissibility of evidence discovered in search of defendant's property or residence authorized by defendant's spouse (resident or nonresident) - state cases, 1 A.L.R.4th 673.

Admissibility of evidence discovered in search of defendant's property or residence authorized by defendant's adult relative other than spouse - state cases, 4 A.L.R.4th 196.

Admissibility of evidence discovered in search of defendant's property or residence authorized by one, other than relative, who is cotenant or common resident with defendant - state cases, 4 A.L.R.4th 1050.

Adequacy of defense counsel's representation of criminal client regarding confessions and related matters, 7 A.L.R.4th 180.

Adequacy of defense counsel's representation of criminal client regarding search and seizure issues, 12 A.L.R.4th 318.

Sufficiency of showing that voluntariness of confession or admission was affected by alcohol or other drugs, 25 A.L.R.4th 419.

Admissibility of confession or other statement made by defendant as affected by delay in arraignment - modern state cases, 28 A.L.R.4th 1121.

Propriety in state prosecution of severance of partially valid search warrant and limitation of suppression to items seized under invalid portions of warrant, 32 A.L.R.4th 378.

Voluntariness of confession as affected by police statements that suspect's relatives will benefit by the confession, 51 A.L.R.4th 495.

Coercive conduct by private person as affecting admissibility of confession under state statutes or constitutional provisions-post-connelly cases, 48 A.L.R.5th 555.

Propriety of search of nonoccupant visitor's belongings pursuant to warrant issued for another's premises, 51 A.L.R.5th 375.

Admissibility of evidence discovered in search of adult defendant's property or residence authorized by defendant's minor child-state cases, 51 A.L.R.5th 425.

Admissibility of evidence discovered in search of defendant's property or residence authorized by defendant's adult relative other than spouse-state cases, 55 A.L.R. 5th 125.

What is "oral statement" of accused subject to disclosure by government under Rule 16(a)(1)(A), Federal Rules of Criminal Procedure, 39 A.L.R. Fed. 432.

Admissibility of evidence discovered in search of defendant's property or residence authorized by defendant's relative, 48 A.L.R. Fed. 131.

Admissibility of evidence discovered in warrantless search of property or premises authorized by one having ownership interest in property or premises other than relative, 49 A.L.R. Fed. 511.

Propriety in federal prosecution of severance of partially valid search warrant and limitation of suppression to items seized under invalid portions of warrant, 69 A.L.R. Fed. 522.

Admissibility of evidence not related to air travel security, disclosed by airport security procedures, 108 A.L.R. Fed. 658.

23A C.J.S. Criminal Law § 1224 et seq.

ARTICLE 3
Pretrial Proceedings

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

A. **General rule.** A probable cause determination shall be made in all cases in which the arrest has been made without a warrant and the person has not been released upon some conditions of release. The probable cause determination shall be made by a magistrate, metropolitan or district court judge promptly, but in any event within forty-eight (48) hours after custody commences and no later than the first appearance of the defendant whichever occurs earlier.

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

C. **Probable cause determination; conclusion.** If the court finds that there is no probable cause to believe that the defendant has committed an offense, the court shall dismiss the complaint without prejudice and order the immediate release of the defendant. If the court finds probable cause that the defendant committed an offense, the court shall review the conditions of release. If no conditions of release have been set and the offense is a bailable offense, the court shall set conditions of release in accordance with Rule 5-401. If the court finds that there is probable cause the court shall make such finding in writing.

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

(1) the offense charged;

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

(3) the right to bail;

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

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

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

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

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

[As amended, effective September 1, 1990; November 1, 1991.]

Committee commentary. — This rule will govern those cases in which all of the magistrate or metropolitan court judges are unavailable for probable cause determinations or for first appearance proceedings. If a magistrate or metropolitan judge is not available, a district court judge will make probable cause determinations for all persons arrested for felonies or misdemeanors. Since most persons accused of a crime will be taken before a magistrate, or metropolitan court for the initial appearance, Rules 6-201, 6-203, 6-501, 7-201, 7-203 and 7-501 govern probable cause determinations in the courts of limited jurisdiction.

Under the Fourth Amendment to the United States constitution, an accused who is detained and unable to meet conditions of release has a right to a probable cause determination. Gerstein v. Pugh, 420 U.S. 103, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975); Riverside v. McLaughlin, 111 S. Ct. 1661, 114 L. Ed. 2d 49, 59 U.S.L.W. 4413 (1991). See also, Rule 5-210 and commentary.

In Gerstein, the Supreme Court explained that when a suspect is arrested and detained without a warrant, there must be a judicial determination of probable cause by a neutral and detached magistrate "promptly after arrest." In Riverside, the court held:

Taking into account the competing interests articulated in Gerstein, we believe that a jurisdiction that provides judicial determinations of probable cause within 48 hours of

arrest will, as a general matter, comply with the promptness requirement of Gerstein. For this reason, such jurisdictions will be immune from systemic challenges.

This is not to say that the probable cause determination in a particular case passes constitutional muster simply because it is provided within 48 hours. Such a hearing may nonetheless violate Gerstein if the arrested individual can prove that his or her probable cause determination was delayed unreasonably. Examples of unreasonable delay are delays for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual, or delay for delay's sake. In evaluating whether the delay in a particular case is unreasonable, however, courts must allow a substantial degree of flexibility. Courts cannot ignore the often unavoidable delays in transporting arrested persons from one facility to another, handling late-night bookings where no magistrate is readily available, obtaining the presence of an arresting officer who may be busy processing other suspects or securing the premises of an arrest, and other practical realities. Where an arrested individual does not receive a probable cause determination within 48 hours, the calculus changes. In such a case, the arrested individual does not bear the burden of proving an unreasonable delay. Rather, the burden shifts to the government to demonstrate the existence of a bona fide emergency or other extraordinary circumstance. The fact that in a particular case it may take longer than 48 hours to consolidate pretrial proceedings does not qualify as an extraordinary circumstance. Nor, for that matter, do intervening weekends. A jurisdiction that chooses to offer combined proceedings must do so as soon as is reasonably feasible, but in no event later than 48 hours after arrest.

* * *

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

There is every reason to believe that the standard set forth in the Riverside decision will be strictly construed by the federal courts. All federal circuit courts except one held that Gerstein required that the probable cause determination must ordinarily be made within twenty-four hours of arrest. For a discussion of these cases, see the dissenting opinion of Justice Scalia in County of Riverside v. McLaughlin, supra, 111 S. Ct. 1665 at 1676.

A probable cause determination proceeding is not to be confused with a first appearance hearing or a preliminary hearing. The determination of probable cause is a nonadversarial proceeding and may be held in the absence of the defendant and of counsel. Although a magistrate or metropolitan court judge could hold a first appearance hearing at the same time as a probable cause determination, the committee does not anticipate that this will be the norm. The probable cause

determination is required only to assure in warrantless arrest cases that there is probable cause to detain the defendant.

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

The committee did not set forth a test for probable cause determinations as this is a matter of developing case law. The test for probable cause determinations under the New Mexico Constitution for arrest and search warrants based upon information from informants is a higher standard than the United States Supreme Court "totality of circumstances" test under the Fourth Amendment of the United States Constitution. See Massachusetts v. Upton, 466 U.S. 727, 104 S. Ct. 2085, 80 L. Ed. 2d 721 (1984) and Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). New Mexico has continued to follow the United States Supreme Court decisions of Aguilar v. Texas, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964) and Spinelli v. United States, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 673 (1969) out of which was derived a two-pronged test of:

(1) revealing the informant's basis of knowledge; and

(2) providing facts sufficient enough to establish the reliability or veracity of the informant.

See State v. Cordova, 109 N.M. 211, 784 P.2d 30 (1989).

Delay in holding a probable cause determination is generally not grounds for dismissal of the criminal proceedings. See for example, State v. Lattin, 78 N.M. 49, 51, 428 P.2d 23 (1967); State v. Sedillo, 79 N.M. 9, 10, 439 P.2d 226 (1968); State v. Hicks, 105 N.M. 286, 731 P.2d 982 (Ct.App. 1986); and State v. Nolan, 93 N.M. 472, 475, 601 P.2d 442 (1979) (cert. denied 93 N.M. 683, 604 P.2d 821) relying on Gerstein v. Pugh, 420 U.S. 103, 119, 95 S. Ct. 854, 865, 43 L. Ed. 2d 54 (1975). Similarly in the absence of bad faith on the part of the law enforcement officers or prejudice to the defendant, failure to provide the defendant with access to a telephone within 20 minutes is generally not grounds for dismissal of the charges. See State v. Bearly, 112 N.M. 50 811 P.2d 83 (Ct. App. 1991). For this reason Rule 5-301 does not include a dismissal for failure to make a timely probable cause determination.

This rule does not attempt to spell out what rights the accused may have in every situation; hence, for example, the rule provides that the accused is told of his right "if any", to a trial by jury. On the right to a jury trial for criminal contempt, see Bloom v. Illinois, 391 U.S. 194, 88 S. Ct. 1477, 20 L. Ed. 2d 522 (1968) and Taylor v. Hayes, 418 U.S. 488, 94 S. Ct. 2697, 41 L. Ed. 2d 897 (1974).

The right to assistance of counsel at every critical stage of the proceeding is fairly clear under New Mexico practice and procedure. § 31-15-10 B NMSA 1978. The only question remaining for the judge handling the first appearance is whether the accused is entitled to representation at state expense. The court must inform a person who is charged with any crime that carries a possible sentence of imprisonment and who appears in court without counsel of the right to confer with an attorney, and, if the person is financially unable to obtain counsel, of the right to be represented by counsel at all stages of the proceedings at public expense. § 31-15-12 NMSA 1978. See also, Argersinger v. Hamlin, 407 U.S. 25, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972) and Smith v. Maldonado, 103 N.M. 558, 573, 711 P.2d 3 (1985).

Assuming that the accused is appearing before the court on a felony complaint, the defendant is entitled to be advised of the right to a preliminary hearing. [As revised, effective November 1, 1991.]

ANNOTATIONS

Cross references. — For explanation of rights at first appearance in the magistrate court, see Rule 6-501 NMRA.

For waiver of counsel form, see Rule 9-401 NMRA.

For forma pauperis affidavit form, see Rule 9-701 NMRA.

The 1991 amendment, effective for cases filed in the district courts on or after November 1, 1991, in Paragraph A, substituted "promptly but in any event within forty-eight (48) hours" for "within a reasonable time but in any event within twenty-four (24) hours" in the second sentence and deleted the former last sentence, relating to expiration of the prescribed period on a Saturday, Sunday, or legal holiday.

Arrest and release on same day. — Where a defendant is arrested without a warrant and released from custody on the same day as the arrest, the Rules of Criminal Procedure do not contemplate a probable cause determination by either the district court under Paragraph A of this rule or the magistrate court under Rule 6-203(A) NMRA 2003. State v. Gomez, 2003-NMSC-012, 133 N.M. 763, 70 P.3d 753.

Setting of bail before counsel appointed. — Where, at defendant's first appearance in court, the court set bond "at the present time", before counsel was appointed, but with the condition that if counsel wanted to bring bail to the court's attention, a hearing would be held, and no request was subsequently made, the defendant, who was out on bail, was in no position to complain of trial court setting bond at first appearance rather than waiting until counsel appeared. State v. Quintana, 86 N.M. 666, 526 P.2d 808 (Ct. App.), cert. denied, 86 N.M. 656, 526 P.2d 798 (1974).

Rights of assistance and representation by counsel required. — Rights which are required to be explained to a defendant at his first appearance include the right to the

assistance of counsel, and the possible right to representation by an attorney at state expense. State v. Warner, 86 N.M. 219, 521 P.2d 1168 (Ct. App. 1974).

Scope of duty to advise. — The statutes do not make it a duty to advise of the charges on which an arrest is based, prior to his being brought before a magistrate. State v. Gibby, 78 N.M. 414, 432 P.2d 258 (1967) (decided under former law).

The rules promulgated by the supreme court do not require that waiver of the right to a jury in a trial de novo in district court on appeal from a metropolitan court conviction must be accompanied by advice to the defendant on the record in district court of his right to a jury trial. State v. Ciarlotta, 110 N.M. 197, 793 P.2d 1350 (Ct. App. 1990).

Repeated warnings of Miranda rights are not necessary as a matter of law. State v. Carlton, 83 N.M. 644, 495 P.2d 1091 (Ct. App.), cert. denied, 83 N.M. 631, 495 P.2d 1078 (1972) (decided under former law).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 589 to 599.

Delay in taking before magistrate or denial of opportunity to give bail as supporting action for false imprisonment, 98 A.L.R.2d 966, 3 A.L.R.4th 1057.

Accused's right to assistance of counsel at or prior to arraignment, 5 A.L.R.3d 1269.

Admissibility of confession or other statement made by defendant as affected by delay in arraignment - modern state cases, 28 A.L.R.4th 1121.

22 C.J.S. Criminal Law § 357 et seq.

5-302. Preliminary examination.

A. **Subpoena of witnesses.** If the court determines that a preliminary examination must be conducted, subpoenas shall be issued for any witnesses required by the district attorney or the defendant. The witnesses shall be examined in the defendant's presence and may be cross-examined.

B. **Record of hearing.** Upon request, a record shall be made of the preliminary examination. If requested, the record shall be filed with the clerk of the district court within ten (10) days after it is requested.

C. **Findings of court.** If, upon completion of the examination, it appears to the court that there is no probable cause to believe that the defendant has committed an offense, the court shall discharge the defendant. If the court finds that there is probable cause to believe that the defendant committed an offense, it shall bind the defendant over for trial.

D. **Time.** A preliminary hearing shall be held within a reasonable time but in any event not later than ten (10) days following the initial appearance if the defendant is in custody and no later than sixty (60) days if he is not in custody.

E. **Remand for preliminary examination.** Upon motion and for cause shown, the court may remand the case to the magistrate or metropolitan court judge for a preliminary examination.

[As amended, effective June 1, 1999.]

Committee commentary. — This rule governs preliminary examinations held in the district court. Most preliminary examinations will be held by the magistrate and will be governed by Rule 6-202 or Rule 7-202. The magistrate rule is substantially identical with this rule.

Where the state has not proceeded by indictment, the New Mexico Constitution requires that the defendant be given a preliminary hearing before requiring him to answer or be tried for any capital, felonious or infamous crime. See commentary to Rule 5-301. Because the matter has not been submitted to a grand jury, the purpose of the preliminary hearing is to inquire concerning the commission of a crime and the connection of the accused with it, in order that he may be informed of the nature and character of the crime charged against him, and, if there be probable cause for believing him guilty, that the state may take the necessary steps to bring him to trial. State v. Melendrez, 49 N.M. 181, 191, 159 P.2d 768 (1945). The magistrate or district judge must determine whether there is that degree of evidence to bring within reasonable probabilities the fact that a crime was committed by the accused. State v. Garcia, 79 N.M. 367, 443 P.2d 860 (1968). A preliminary hearing under New Mexico law is a critical stage of the proceeding. Williams v. Sanders, 80 N.M. 619, 459 P.2d 145 (1969).

It should be noted that State v. Melendrez, supra, also indicated that the purpose of a preliminary hearing was to perpetuate testimony and to determine the amount of bail. Depositions under Rule 5-503 are now used for perpetuation of testimony and bail is set at the first appearance of the defendant under Rule 5-301, Rule 6-501 or Rule 7-401.

Under the fourth amendment to the United States Constitution, a person being detained pending trial on an information has a right to a preliminary hearing to determine probable cause as a prerequisite to further detention. Gerstein v. Pugh, 420 U.S. 103, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975). The supreme court in Gerstein indicated that the preliminary hearing required by the fourth amendment was not necessarily the full preliminary hearing found in some states, but was more like a hearing held to determine if there was probable cause to issue an arrest warrant. The court specifically noted that the hearing was not a critical stage in the prosecution and would not require appointment of counsel. Gerstein arose under a Florida procedure which did not require a preliminary hearing of any type when the prosecution was proceeding by information.

Because New Mexico provides a complete preliminary hearing, it would appear that the defendant is also obtaining his fourth amendment rights as required by Gerstein v. Pugh, supra. The only question is when must the preliminary hearing be held. Paragraph D of this rule requires a hearing for a person still in custody no later than ten (10) days following the first appearance under Rule 5-301. This time limitation was derived from Rule 5(c) of the Federal Rules of Criminal Procedure. See also, 48 F.R.D. 547, 567 (1970). Assuming that the preliminary hearing is held within that time period, the state appears to have complied with all requirements. The supreme court in Gerstein, recognizing the desirability of flexibility in experimentation by the states, did not attempt to set specific outside limits for when the fourth amendment probable cause determination must be made. The supreme court noted, with approval, the Uniform Rules of Criminal Procedure which require a full preliminary examination within five (5) days after the first appearance. See Uniform Rules of Criminal Procedure (U.L.A.) Rule 344 (1974).

Under Paragraph B of Rule 6-104 for the Magistrate Courts, Rule 3-104 or Paragraph B of Rule 5-104, the state may move for an extension of time for holding the preliminary hearing. However, in granting an extension of time when the defendant remains in custody, the court must consider the requirements of the fourth amendment as interpreted by Gerstein v. Pugh, supra. Where the state proceeds by an information and the defendant has been denied a timely preliminary examination, the district court apparently has discretion to fashion some relief, however "neither dismissal of the charge nor reversal of conviction is an appropriate remedy if there is no showing of prejudice." State v. Warner, 86 N.M. 219, 521 P.2d 1168 (Ct. App. 1974). In addition, a failure to follow the time limitations does not affect the validity of an indictment. Paragraph D of Rule 6-202 and Paragraph D of Rule 7-202. State v. Peavler, 88 N.M. 125, 537 P.2d 1387 (1975).

Paragraph E of Rule 6-202 and Paragraph E of Rule 7-202 contain an additional provision not found in this rule. The magistrate and metropolitan rules specifically provide that if an indictment is returned prior to the preliminary examination the magistrate shall take no further action. The rule, therefore, incorporates prior decisions to the effect that the defendant is not entitled to the preliminary examination once the state has obtained the indictment. See State v. Ergenbright, 84 N.M. 662, 506 P.2d 1209 (1973); State v. Burk, 82 N.M. 466, 483 P.2d 940 (Ct. App.), cert. denied, 404 U.S. 955, 92 S. Ct. 309, 30 L. Ed. 2d 271 (1971). See also, State v. Peavler, supra.

Paragraph E of this rule was added in 1980. The contents of this paragraph were formerly found in Paragraph C of Rule 5-601.

ANNOTATIONS

I. GENERAL CONSIDERATION.

Cross references. — For constitutional rights to preliminary examination and to confrontation of witnesses, see N.M. Const., art. II, § 14.

For magistrate court rule relating to preliminary examination, see Rule 6-202 NMRA.

For bindover order form, see Rule 9-207 NMRA.

The 1999 amendment, effective on and after June 1, 1999, substituted "sixty (60)" for "twenty (20)" in Paragraph D.

Compiler's notes. — Paragraph C is similar to Rule 5.1(b) of the Federal Rules of Criminal Procedure.

Preliminary examination waived by plea. — Under former law, defendant's plea in district court constituted a waiver of his right to a preliminary examination. State v. Sexton, 78 N.M. 694, 437 P.2d 155 (Ct. App. 1968). See also 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. Darrah, 76 N.M. 671, 417 P.2d 805 (1966); State v. Deltenre, 77 N.M. 497, 424 P.2d 782 (1966), cert. denied, 386 U.S. 976, 87 S. Ct. 1171, 18 L. Ed. 2d 136 (1967); State v. Gibby, 78 N.M. 414, 432 P.2d 258 (1967); State v. Tanner, 78 N.M. 519, 433 P.2d 498 (1967); State v. Henry, 78 N.M. 573, 434 P.2d 692 (1967); State v. Olguin, 78 N.M. 661, 437 P.2d 122 (1968); State v. Sisk, 79 N.M. 167, 441 P.2d 207 (1968); State v. Sanders, 79 N.M. 587, 446 P.2d 639 (1968); State v. Leyba, 80 N.M. 190, 453 P.2d 211 (Ct. App.), cert. denied, 80 N.M. 198, 453 P.2d 219 (1969); State v. Maimona, 80 N.M. 562, 458 P.2d 814 (Ct. App. 1969).

Plea of nolo contendere waives right to preliminary examination. State v. Raburn, 76 N.M. 681, 417 P.2d 813 (1966) (decided under former law).

Exception to waiver by plea. — Where defendant waived right to preliminary hearing without benefit of counsel, and later self-employed counsel requested remand for hearing on grounds it was essential to preparation of case, the entry of a plea upon arraignment in the district court did not operate as a waiver of defendant's right to a preliminary examination. State ex rel. Hanagan v. Armijo, 72 N.M. 50, 380 P.2d 196 (1963); State v. Vega, 78 N.M. 525, 433 P.2d 504 (1967).

Losing of jurisdiction. — Under former law, even though the district court acquires jurisdiction of a criminal case upon the filing of the information, that jurisdiction originally acquired "may be lost 'in the course of the proceeding' by failure of the court to remand for a preliminary examination when its absence is timely brought to the attention of the district court". Mascarenas v. State, 80 N.M. 537, 458 P.2d 789 (1969); State v. Vasquez, 80 N.M. 586, 458 P.2d 838 (Ct. App. 1969).

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

Right to preliminary hearing not absolute. — There exists no absolute right to a preliminary hearing and N.M. Const., art. II, § 14, leaves it in the discretion of the

prosecutor to proceed by indictment and thus to obviate the requirement of preliminary examination. The constitutional alternatives protect an accused from being charged except upon probable cause. State v. Peavler, 88 N.M. 125, 537 P.2d 1387 (1975).

And does not exist where grand jury indictment. — When charged by criminal information, a defendant has a right to a preliminary examination. No such right exists if the defendant is indicted by a grand jury. State v. Burk, 82 N.M. 466, 483 P.2d 940 (Ct. App.), cert. denied, 404 U.S. 955, 92 S. Ct. 309, 30 L. Ed. 2d 271 (1971) (decided under former law).

Discovery not object of hearing. — Because there was a grand jury indictment, defendant's claim that he was deprived of the discovery he could have obtained at a preliminary hearing is no ground for error as discovery is not the object of a preliminary hearing. State v. Burk, 82 N.M. 466, 483 P.2d 940 (Ct. App.), cert. denied, 404 U.S. 955, 92 S. Ct. 309, 30 L. Ed. 2d 271 (1971) (decided under former law).

Effect of postarrest irregularities on hearing. — If the manner of arrest of an accused will not affect the jurisdiction of the court where the charge of which he is accused is pending, the irregularities which occur subsequent to the arrest but prior to preliminary hearing should likewise have no effect on the jurisdiction of the court. State v. Barreras, 64 N.M. 300, 328 P.2d 74 (1958) (decided under former law).

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

The preliminary examination is a critical stage in criminal proceedings, because a defendant needs the advice and assistance of counsel at the time of his arraignment, at the entry of plea and his announcement as to whether he desires or waives a preliminary examination, and because he needs the assistance of counsel in cross-examining the state's witnesses at the preliminary examination. Pearce v. Cox, 354 F.2d 884 (10th Cir. 1965), cert. denied, 384 U.S. 976, 86 S. Ct. 1869, 16 L. Ed. 2d 685 (1966) (decided under former law).

Generally, as to right to counsel. — Under state law the preliminary hearing is a critical stage of a criminal proceeding. It has been held that counsel must be made available at all critical stages of a criminal proceeding. Nevertheless, if represented by counsel when arraigned in district court, if no objection is made to a lack of counsel at the preliminary hearing stage, or even of the total absence of a preliminary, without a showing of prejudice, there is a waiver of the right to counsel at the earlier stages. Neller v. State, 79 N.M. 528, 445 P.2d 949 (1968) (decided under former law).

Claim that defendant was entitled to counsel when he appeared before the magistrate states no basis for post-conviction relief where defendant was represented by counsel

at preliminary hearing. State v. Apodaca, 78 N.M. 412, 432 P.2d 256 (1967) (decided under former law).

The determination of the question of indigency must often be made before the otherwise normal appearance of the accused before the district court. To hold a preliminary hearing without counsel present, unless the right to counsel has been competently, intelligently and voluntarily waived, vitiates the hearing. State ex rel. Peters v. McIntosh, 80 N.M. 496, 458 P.2d 222 (1969) (decided under former law).

Necessity for prejudice resulting from absence of counsel. — Failure to assign counsel prior to preliminary examination of an indigent defendant in a noncapital case is not ground for vacating a conviction or sentence based upon a plea of guilty, at least without a showing that prejudice resulted therefrom. Sanders v. Cox, 74 N.M. 524, 395 P.2d 353 (1964), cert. denied, 379 U.S. 978, 85 S. Ct. 680, 13 L. Ed. 2d 569 (1965) (decided under former law).

Failure to assign counsel to represent defendant before the magistrate or at his arraignment did not abridge defendant's constitutional rights where no prejudice was shown. Gantar v. Cox, 74 N.M. 526, 395 P.2d 354 (1964) (decided under former law).

Where the failure to assign counsel prior to preliminary examination did not prejudice petitioner's position in any manner in the district court, such failure does not require vacating the plea of guilty. French v. Cox, 74 N.M. 593, 396 P.2d 423 (1964) (decided under former law).

Failure to appeal forecloses question of error in preliminary hearing. — Under former Rule 93, R. Civ. P. (Dist. Cts.) (now former Rule 1-093), the question of error in a preliminary hearing is foreclosed by failure to take an appeal from original conviction. State v. Anderson, 84 N.M. 786, 508 P.2d 1019 (Ct. App. 1973) (decided prior to Rule 5-802).

Second hearing not afforded by amended information. — Having been afforded a preliminary hearing on the original information, the defendant was not entitled to another on the amended information. State v. Wesson, 83 N.M. 480, 493 P.2d 965 (Ct. App. 1972) (decided under former law).

Preliminary hearing is no essential prerequisite to guilt-determining process which comports with fundamental fairness and due process and state may proceed by indictment rather than information. State v. Burk, 82 N.M. 466, 483 P.2d 940 (Ct. App.), cert. denied, 404 U.S. 955, 92 S. Ct. 309, 30 L. Ed. 2d 271 (1971) (decided under former law).

Probable cause the only issue. — The preliminary hearing is not a trial on the merits with a view of determining the defendant's guilt or innocence of the crime "failure to appear"; at a preliminary hearing the only issue is whether there exists probable cause

to believe defendant committed the offense. State v. Masters, 99 N.M. 58, 653 P.2d 889 (Ct. App. 1982).

Magistrate court jurisdiction over aggravated battery. — Magistrate courts have no trial jurisdiction over aggravated battery, which is a third-degree felony, but do have authority to conduct preliminary examinations upon charges therefor. State ex rel. Moreno v. Floyd, 85 N.M. 699, 516 P.2d 670 (1973).

Purpose of procedures prescribing preliminary hearing conduct. — Statutory procedures prescribing the conduct of a preliminary hearing are designed to protect the rights of the accused, and it is only upon a full examination that probable cause may be found to exist and a defendant be bound over to the district court for trial. State ex rel. Hanagan v. Armijo, 72 N.M. 50, 380 P.2d 196 (1963) (decided under former law).

No provision for reopening of preliminary hearing. — There is no provision under the statutes allowing for the reopening of a preliminary hearing. State ex rel. Hanagan v. Armijo, 72 N.M. 50, 380 P.2d 196 (1963) (decided under former law).

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

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

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 575 to 588.

Right of indigent defendant under Rule 17(b) of the Federal Rules of Criminal Procedure to appearance of witnesses necessary to adequate defense, 42 A.L.R. Fed. 233.

Civil liability of witness in action under 42 USCS § 1983 for deprivation of civil rights, based on testimony given at pretrial criminal proceeding, 94 A.L.R. Fed. 892.

22 C.J.S. Criminal Law § 357 et seq.

II. SUBPOENA OF WITNESSES.

Scope of right to confront witnesses. — When the constitution grants to an accused the right to be confronted by the witness against him, it grants that right at all of the criminal proceedings, including the preliminary examination. Mascarenas v. State, 80 N.M. 537, 458 P.2d 789 (1969) (decided under former law).

Effect of denial of right to confront witnesses. — As the preliminary examination is a part of the criminal prosecution, denial of that right to be confronted with the witnesses against defendant amounts to the denial of a preliminary examination and the court was

without jurisdiction to proceed with the trial based upon an information. Mascarenas v. State, 80 N.M. 537, 458 P.2d 789 (1969) (decided under former law).

Production of prior statements or records. — When it is made to appear that when a witness called to testify by the state in a preliminary examination has made a prior written statement concerning the matter about which he is called to testify, the accused is entitled to an order directing the prosecution to produce for inspection all statements or reports of such witness in its possession touching the events about which the witness will testify. Any other result would be to deny the accused his constitutional right to confront the witnesses against him and would have the same effect as though he were denied a preliminary examination. Mascarenas v. State, 80 N.M. 537, 458 P.2d 789 (1969) (decided under former law).

Defendant may call witnesses in his defense at a preliminary hearing, and the magistrate must, if necessary, issue subpoenas to compel their appearance. State ex rel. Hanagan v. Armijo, 72 N.M. 50, 380 P.2d 196 (1963) (decided under former law).

Denial of defendant's right to call witnesses in his behalf, at a preliminary examination, was error which required the trial judge to sustain a plea in abatement for a full and complete preliminary examination. Mascarenas v. State, 80 N.M. 537, 458 P.2d 789 (1969) (decided under former law).

III. RECORD OF HEARING.

Scope of rule defining "record". — Rule 55 (see now Rule 5-111 NMRA) is merely a definition of a "record" and pertains equally to proceedings in district court and to preliminary examinations pursuant to this rule in magistrate courts. State ex rel. Moreno v. Floyd, 85 N.M. 699, 516 P.2d 670 (1973).

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

Two alternatives where witness' testimony at hearing lost. — Where the loss of the testimony of a witness at the preliminary hearing because of equipment failure is known prior to trial, there are two alternatives: (1) exclusion of all evidence which the lost evidence might have impeached; or (2) admission, with full disclosure of the loss and its relevance and import, and the choice between these alternatives must be made by the trial court, depending on its assessment of materiality and prejudice. State v. Pedroncelli, 97 N.M. 190, 637 P.2d 1245 (Ct. App. 1981).

IV. FINDINGS OF COURT.

District judge in preliminary hearing has authority to decide probable cause. State v. Chavez, 93 N.M. 270, 599 P.2d 1067 (Ct. App.), cert. denied, 93 N.M. 172, 598 P.2d 215 (1979).

Effect of magistrate court findings on subsequent indictment. — Subsequent indictment is not barred when the magistrate conducts a preliminary hearing and decides that insufficient probable cause exists for binding the accused over for trial in district court. State v. Peavler, 88 N.M. 125, 537 P.2d 1387 (1975).

Effect where punishment not within magistrate court jurisdiction. — If it appears that an offense has been committed, the punishment of which is not within the jurisdiction of the magistrate as a trial judge, and there is probable cause to believe the prisoner guilty thereof, the magistrate, without the necessity of further complaint, or further preliminary examination, shall commit or bail the accused to appear at the next term of the district court. State v. Vasquez, 80 N.M. 586, 458 P.2d 838 (Ct. App. 1969) (decided under former law).

V. TIME.

Due process not denied by delay where no prejudice. — Where there is nothing in the record indicating that appellant was prejudiced in the delay in arraignment, then absent a showing of prejudice, the delay in holding a preliminary hearing is not a denial of due process. State v. Olguin, 78 N.M. 661, 437 P.2d 122 (1968) (decided under former law).

When defendant has been denied timely preliminary examination, the court is to proceed in its discretion in fashioning relief to an aggrieved defendant; however, neither dismissal of the charge nor reversal of a conviction is an appropriate remedy if there is no showing of prejudice. State v. Warner, 86 N.M. 219, 521 P.2d 1168 (Ct. App. 1974).

VI. REMAND FOR PRELIMINARY EXAMINATION.

Subdivision (e) (see now Paragraph E) of this rule is not limited only to cases which originate in district court. State v. Tollardo, 99 N.M. 115, 654 P.2d 568 (Ct. App. 1982).

Jurisdiction of magistrate court expanded beyond usual time limit. — Nothing in either the district court rules or the magistrate court rules limits the jurisdiction of the magistrate court to the time limits specified in Rule 15, N.M.R. Crim. P. (Magis. Ct.) (see now Rule 6-202 NMRA); rather, they specifically grant limited jurisdiction to the magistrate court, by Rule 3, N.M.R. Crim. P. (Magis. Ct.) (see now Rule 6-104 NMRA) and Subdivision (e) (see now Paragraph E) of this rule, beyond the time limits prescribed in Magistrate Court Rule 15 (see now Rule 6-202 NMRA). State v. Tollardo, 99 N.M. 115, 654 P.2d 568 (Ct. App. 1982).

5-303. Arraignment.

A. **Arraignment.** The defendant may appear at arraignment:

(1) through a two way audio-visual communication in accordance with Paragraph H of this rule; or

(2) in open court.

If the defendant appears without counsel, the court shall advise the defendant of the defendant's right to counsel.

B. **Reading of indictment or information.** The district attorney shall deliver to the defendant a copy of the indictment or information and shall then read the complaint, indictment or information to the defendant unless the defendant waives such reading. Thereupon the court shall ask the defendant to plead.

C. **Bail review.** At arraignment, upon request of the defendant, the court shall evaluate conditions of release considering the factors stated in Rule 5-401 NMRA. If conditions of release have not been set, the court shall set conditions of release.

D. **Pleas.** A defendant charged with a criminal offense may plead as follows:

(1) guilty;

(2) not guilty;

(3) no contest, subject to the approval of the court; or

(4) guilty but mentally ill, subject to the approval of the court.

E. **Refusal to plead.** If a defendant refuses to plead or stands mute, the court shall direct the entry of a plea of not guilty on the defendant's behalf.

F. **Advice to defendant.** The court shall not accept a plea of guilty, no contest or guilty but mentally ill without first, by addressing the defendant personally in open court, informing the defendant of and determining that the defendant understands the following:

(1) the nature of the charge to which the plea is offered;

(2) the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law for the offense to which the plea is offered;

(3) that the defendant has the right to plead not guilty, or to persist in that plea if it has already been made;

(4) that if the defendant pleads guilty, no contest or guilty but mentally ill there will not be a further trial of any kind, so that by pleading guilty, no contest or guilty but mentally ill the defendant waives the right to a trial;

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

(6) that, if the defendant is charged with a crime of domestic violence or a felony, a plea of guilty or no contest will affect the defendant's constitutional right to bear arms, including shipping, receiving, possessing or owning any firearm or ammunition, all of which are crimes punishable under federal law for a person convicted of domestic violence or a felony; and

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

G. **Ensuring that the plea is voluntary.** The court shall not accept a plea of guilty, no contest or guilty but mentally ill without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire of the defendant, defense counsel and the attorney for the government as to whether the defendant's willingness to plead guilty, no contest or guilty but mentally ill results from prior discussions between the attorney for the government and the defendant or the defendant's attorney.

H. **Record of proceedings.** A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty, no contest or guilty but mentally ill, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of a guilty plea.

I. **Audio-visual appearance.** The arraignment or first appearance of the defendant before the court may be through the use of a two-way audio-video communication if the following conditions are met:

(1) the defendant and the defendant's counsel are together in one room at the time of the first appearance before the court;

(2) the judge, legal counsel and defendant are able to communicate and see each other through a two-way audio-video system which may also be heard and viewed in the courtroom by members of the public; and

(3) no plea is entered by the court except a plea of not guilty.

J. **Waiver of arraignment.** With the consent of the court, a defendant may waive arraignment by filing a written waiver of arraignment and plea of not guilty with the court and serving a copy on the state in time to give notice to interested persons. A waiver of arraignment shall not be filed and is not effective unless signed by the district court judge. A waiver of arraignment and entry of a plea of not guilty shall be substantially in the form approved by the Supreme Court.

[As amended, effective October 1, 1974; October 1, 1976; July 1, 1980; May 19, 1982; October 1, 1983; March 1, 1987; September 1, 1990; August 1, 1992; as amended by Supreme Court Order 06-8300-010, effective April 15, 2006; by Supreme Court Order 07-8300-29, effective December 10, 2007.]

Committee commentary. — Paragraphs A through D of this rule were included in this rule as originally adopted in 1972. Paragraphs A, B and D of this rule conformed to the then existing practice for New Mexico arraignments. By referring only to indictments and informations in Paragraph B of this rule the rule tacitly acknowledges that misdemeanors will rarely be prosecuted on a complaint in the district court. However, the same procedure would be used for arraignment on a complaint.

Paragraph C of this rule, by eliminating the plea of not guilty by reason of insanity, introduced a change in New Mexico procedure. See, e.g., State v. Wilson, 85 N.M. 552, 514 P.2d 603 (1973). The elimination of this plea brought the New Mexico practice into line with the federal practice. See generally, 1 Wright, Federal Practice and Procedure, § 176 (1969). However, under Rule 5-602, the defendant must give notice of the defense of insanity at the arraignment or within twenty (20) days thereafter. See also, Rule 12.2 of the Federal Rules of Criminal Procedure. 62 F.R.D. 271, 295-98 (1974).

Section 31-9-3 NMSA 1978 enacted by the 1982 legislature provides that a plea of guilty but mentally ill may be accepted by the court if the defendant has undergone examination by a clinical psychologist or psychiatrist and the court has examined the reports and after a hearing is satisfied that there is a factual basis for the plea. Paragraph G of Rule 5-304 provides for an inquiry to determine the factual basis of any guilty plea.

Paragraph C of this rule also specifically allows the plea of no contest with the approval of the court. The provision was taken from Rule 11 of the Federal Rules of Criminal Procedure. See generally, 1 Wright, Federal Practice and Procedure, § 177 (1969). Rule 11(b) of the Federal Rules of Criminal Procedure would add a provision that the court consider the views of the parties and the interests of the public before accepting a plea of no contest. See 62 F.R.D. 271, 275 (1974).

A plea of no contest is, for the purposes of punishment, the same as a plea of guilty. North Carolina v. Alford, 400 U.S. 25, 35-36 (1970); cf. State v. Raburn, 76 N.M. 681, 417 P.2d 813 (1966). See generally, 62 F.R.D. 271, 277-78 (1974). Consequently,

Paragraphs E and F of this rule require the court to give the defendant the same advice given when a plea of guilty is entered and also insure that the plea is voluntary. However, unlike the case in which the defendant pleads guilty, a court need not inquire into whether or not there is a factual basis for the no contest plea. See Paragraph G of Rule 5-304.

Elimination of the inquiry into the factual basis for the no contest plea is consistent with the use of the plea where the defendant does not want to admit any wrongdoing. A defendant may want to avoid pleading guilty because a guilty plea can be introduced in subsequent litigation. Under Rule 11-410, a plea of no contest is not admissible. (The Rules of Evidence contain an inconsistency, however, in that the no contest plea, declared inadmissible under Rule 11-410, is declared to be not excluded by the hearsay rule under Paragraph V of Rule 11-803.) The fact that the plea of no contest will not be admissible in subsequent litigation should be considered in the court's decision to approve the plea. See generally, 63 F.R.D. 271, 277-78, 286 (1974).

Paragraphs E, F and I, governing plea procedures, were added in 1974. They were taken from Rules 11(c), (d) and (g) of the Federal Rules of Criminal Procedure. See 62 F.R.D. 271, 275-86 (1974).

Paragraph E of this rule prescribes the advice the court must give to the defendant as a prerequisite to the acceptance of a plea of guilty. Except for Subparagraph (5), added in 1990, the rule codifies the constitutional requirements set forth in Boykin v. Alabama, 395 U.S. 238 (1969). See also Henderson v. Morgan, 426 U.S. 637 (1976), holding that the trial judge must explain the nature of the charge of murder, i.e., the court must explain intent to kill to the defendant if intent to kill is an element of the offense, prior to acceptance of a plea of guilty. The trial judge may want to refer to essential elements in UJI Criminal, particularly when they have not been set forth in the accusatory pleading. Although it has been a common practice in New Mexico to also advise the defendant that he is giving up a right to appeal, that advice is not included in either the rule or in the approved form for a guilty plea proceeding. A guilty plea does not prevent an appeal in New Mexico. Cf. State v. Vigil, 85 N.M. 328, 512 P.2d 88 (Ct. App. 1973). Subparagraph (5), requiring the court to "warn" the defendant that a conviction could affect the defendant's immigration or naturalization status, was added in 1990.

Paragraph F of this rule requires the court to determine that a plea of guilty or no contest is voluntary before accepting either plea. As noted above, Paragraph G of Rule 5-304 also requires that the court satisfy itself that there is a factual basis for a plea of guilty. Both of these requirements have been in the federal rules since 1966, and also have a basis in constitutional law. See Santobello v. New York, 404 U.S. 257 (1971). The court must not only inquire of the defendant, but must, "make a separate and distinct inquiry" of defense counsel and counsel for the government as to the existence of any agreement or discussions relative to the plea. State v. Lucero, 97 N.M. 346, 639 P.2d 1200 (Ct. App. 1981).

Finally, it should be noted that Paragraph G of this rule makes it clear that plea proceedings before the court must be on the record. See Santobello v. New York, supra.

AUDIO-VISUAL ARRAIGNMENTS.

Paragraph H provides that a defendant may be arraigned by way of a two-way closed circuit audio-video communication between the defendant, his legal counsel and the court and the prosecutor. The committee assumes that proper equipment will be installed prior to conducting an audio-video arraignment pursuant to Paragraph H. Proper equipment includes a direct cable connection to the court's audio recording system to assure that a "record" is made of the arraignment.

Right of Confrontation.

Both the United States Constitution and the New Mexico Constitution guarantee a defendant the right to be present in the courtroom to confront his accusers. See Illinois v. Allen, 397 U.S. 337, 90 S. Ct. 1057, 25 L.Ed 2d 353 (1970).

Actual presence in the courtroom, however, is not always necessary. The right can be waived in misdemeanor cases by the accused's counsel. The defendant's presence is not required during a pretrial detention hearing. See United States v. Zuccaro, 645 F.2d 104, 106 (2d Cir.) (cert. denied, 454 U.S. 823, 102 S. Ct. 110, 70 L.Ed2d 96 (1981)). The continued presence of an accused is not required if the accused voluntarily absents himself after the trial has commenced or if the accused engages in conduct which justifies his being excluded from the courtroom. See Rule 5-112.

Although the general rule is that the accused has a right to a face to face confrontation, this rule is subject to policy or necessity considerations. See State v. Tafoya, N.M. Ct. App. No. 9004, decided October 7, 1986, finding that the right to face to face confrontation must give way when necessary to protect a child who is a victim of a sex offense from further mental or emotional harm. In Tafoya, the New Mexico Court of Appeals held that a defendant is "present" during a deposition when the defendant is in a control booth in constant contact with his attorney and can view all of the proceedings.

Use of Audio-Video System during Arraignment Proceedings.

The use of a two-way audio-video system to arraign a defendant while in jail is apparently becoming fairly common in many areas. Although the use of an audio-video system in which the defendant would participate in the trial from a hospital by use of a single television and a telephone by which he could communicate with counsel may be insufficient, People v. Piazza, 92 Misc.2d 813, 401 NYS2d 371 (1977), the conducting of an arraignment on felony charges via a closed circuit two-way audio-video system has been upheld. Commonwealth of Pennsylvania v. Terebieniec, 408 A.2d 1120 (1979).

Guilty Plea.

It is clear that a guilty plea cannot be accepted without a record showing that the defendant intelligently and voluntarily entered the plea. Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 170, 23 L. Ed. 2d 274 (1969). Paragraph H limits audio-video arraignments to those proceedings in which the defendant will have his rights explained and enter a plea of not guilty.

ANNOTATIONS

I. GENERAL CONSIDERATION.

Cross references. — For form on waiver of arraignment entry of plea of not guilty, see Rule 9-405 NMRA.

For forms on guilty plea proceeding and certificate by defendant, see Rule 9-406 NMRA.

See Criminal Form 9-405 NMRA for the Supreme Court approved waiver of arraignment form.

For a discussion of the consequences of a conviction under the Family Violence Protection Act, 40-13-1 NMSA 1978, and the so-called "Brady Bill", 18 U.S.C. Section 922, *see* Civil Form 4-970 NMRA.

The 1992 amendment, effective for cases filed in the district courts on or after August 1, 1992, substituted "defendant" or "defendant's" for "he" or "his" throughout the rule and added Paragraph I.

The 2006 amendment, effective April 15, 2006, added Paragraph C relating to bail review, relettered the succeeding paragraphs and revised relettered Paragraph J to permit a waiver of arraignment without consent of the court.

The 2007 amendment, effective December 10, 2007, revised Subparagraph (5) and added Subparagraphs (6) and (7) of Paragraph F to require that a defendant who pleads guilty or no contest be advised of the consequences of a plea on immigration status, under the domestic violence laws and under the Sex Offender Registration Notification Act, 29-11A-1 NMSA 1978 and to require in Paragraph J that a waiver of arraignment be approved by the district court judge.

Compiler's notes. — This rule is similar to Rule 10 of the Federal Rules of Criminal Procedure.

Paragraph D is deemed to supersede 41-6-52, 1953 Comp., which was substantially the same.

Right to counsel. — Resolution of an accused's claim of indigency is an integral aspect of a defendant's right to counsel. State v. Watchman, 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.

Purposes of arraignment. — The purposes of an arraignment are to establish the identity of defendant, to inform him of the charge against him, and to give him an opportunity to plead to the charge and where, as here, there is no question that defendant is the person charged in the information and he was served with a copy of the information, engaged two competent attorneys to represent him, and the court, in the presence of defendant and his counsel, at the very outset of the trial explained to the entire jury panel the nature of the charge. Defendant was personally present with his attorneys when the case was called for trial, and he announced, through one of his attorneys, that he was ready to proceed with the trial. Defendant was resisting the charge against him as this was further confirmed by his attorney when the court inquired as to his plea; therefore defendant was not prejudiced by his failure to plead "not guilty" at an arraignment proceeding. State v. Parker, 80 N.M. 551, 458 P.2d 803 (Ct. App.), cert. denied, 80 N.M. 607, 458 P.2d 859 (1969) (decided under former law).

Validity of prearraignment findings at later competency hearings. — Where the witnesses at a later hearing were the psychiatrists who examined petitioner prior to his plea of guilty, the court could not say that mere lapse of time before a competency hearing invalidated the findings made as a result of that hearing, where the mere lapse was three and one-half years. Barefield v. New Mexico, 434 F.2d 307 (10th Cir. 1970), cert. denied, 401 U.S. 959, 91 S. Ct. 969, 28 L. Ed. 2d 244 (1971) (decided under former law).

Effect of failing to object at arraignment of prior defects. — Failure to be represented by counsel during juvenile court investigation may be waived by not objecting upon arraignment with counsel in district court. State v. Gallegos, 82 N.M. 618, 485 P.2d 374 (Ct. App.), cert. denied, 82 N.M. 601, 485 P.2d 357 (1971) (decided under former law).

Effect of plea on prior defects. — Any irregularities or defects which may have occurred prior to his plea of guilty were waived when he entered his plea of guilty. Christie v. Ninth Judicial Dist., 78 N.M. 469, 432 P.2d 825 (1967) (decided under former law).

Absent a showing of prejudice, the plea at arraignment waived prior defects in the proceedings. State v. Robinson, 78 N.M. 420, 432 P.2d 264 (1967), aff'd, 82 N.M. 660, 486 P.2d 69 (1971) (decided under former law).

Such as motion to quash indictment. — A motion to quash an indictment must be made before arraignment and plea. State v. Paul, 82 N.M. 619, 485 P.2d 375 (Ct. App.), cert. denied, 82 N.M. 601, 485 P.2d 357 (1971) (decided under former law).

Illegality of arrest. — The submission of the appellant to jurisdiction of his person by entry of a plea of not guilty and proceeding to trial in municipal court was an effective waiver of any claim of illegality as to the arrest. An appearance limited solely to a challenge to jurisdiction of the person is necessary to preserve this question. Similarly, the submission of appellant to jurisdiction of his person, both in the city court and in the district court by proceeding to trial, was an effective waiver of any challenge to the original complaint. City of Roswell v. Leonard, 73 N.M. 186, 386 P.2d 707 (1963) (decided under former law).

Where defendant pleaded not guilty and proceeded to trial, claim of illegal arrest was waived. State v. Ramirez, 78 N.M. 418, 432 P.2d 262 (1967), aff'd, 81 N.M. 150, 464 P.2d 569 (1971) (decided under former law).

Absence of counsel. — Absent a showing of prejudice, complaint of absence of counsel during interrogation by authorities and at preliminary hearing is waived by guilty plea. State v. Archie, 78 N.M. 443, 432 P.2d 408 (1967) (decided under former law).

Right to preliminary examination. — Former statutes concerning preliminary examinations did not provide for a plea in justice (now magistrate) court when the justice of the peace (magistrate) was sitting as an examining magistrate. Although no plea was provided for, if the accused voluntarily pleads guilty before the magistrate, this voluntary action constituted a waiver of the right to a preliminary examination. State v. Sexton, 78 N.M. 694, 437 P.2d 155 (Ct. App. 1968) (decided under former law).

An entry of a plea in the district court, after consulting with and being advised by counsel, in itself accomplishes a waiver to a preliminary hearing. State v. Olguin, 78 N.M. 661, 437 P.2d 122 (1968) (decided under former law).

Entry of a plea of guilty in the district court after consulting with and being advised by counsel, in itself, accomplished a waiver of right to a preliminary hearing. State v. Gibby, 78 N.M. 414, 432 P.2d 258 (1967) (decided under former law).

And right to be furnished copy of information. — Appellant's contention that his constitutional rights were violated in that he was not furnished a copy of the information more than 24 hours prior to pleading to the charges of which he was convicted contrary to 41-6-46, 1953 Comp. (now repealed), was waived by the plea of guilty which he entered. State v. McCain, 79 N.M. 197, 441 P.2d 237 (Ct. App. 1968) (decided under former law).

Effect of prior absence of attorney on plea. — Since guilty plea was voluntary, defendant was not prejudiced by the absence of counsel at the preliminary hearing though the result of the preliminary hearing may have influenced his guilty plea. State v. Archie, 78 N.M. 443, 432 P.2d 408 (1967) (decided under former law).

Allegation plea unjust and unfair insufficient to raise involuntariness question. — Allegation that the plea was unjust and unfair is too general to raise a question as to

involuntariness. State v. Archie, 78 N.M. 443, 432 P.2d 408 (1967) (decided under former law).

Law reviews. — For article, "Defending the Criminal Alien in New Mexico: Tactics and Strategy to Avoid Deportation," see 9 N.M.L. Rev. 45 (1978-79).

For note, "Eller v. State: Plea Bargaining in New Mexico," see 9 N.M.L. Rev. 167 (1978-79).

For comment, "Definitive Sentencing in New Mexico: The 1977 Criminal Sentencing Act," see 9 N.M.L. Rev. 131 (1978-79).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 589 to 599.

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

Delay in taking before magistrate or denial of opportunity to give bail as supporting action for false imprisonment, 98 A.L.R.2d 966, 3 A.L.R.4th 1057.

Accused's right to assistance of counsel at or prior to arraignment, 5 A.L.R.3d 1269.

Intoxication as ground for police postponing arrestee's appearance before magistrate, 3 A.L.R.4th 1057.

Adequacy of defense counsel's representation of criminal client regarding post-plea remedies, 13 A.L.R.4th 533.

Retrial on greater offense following reversal of plea-based conviction of lesser offense, 14 A.L.R.4th 970.

Guilty plea safeguards as applicable to stipulation allegedly amounting to guilty plea in state criminal trial, 17 A.L.R.4th 61.

Admissibility of confession or other statement made by defendant as affected by delay in arraignment - modern state cases, 28 A.L.R.4th 1121.

Compliance with federal constitutional requirement that guilty pleas be made voluntarily and with understanding, in federal cases involving allegedly mentally incompetent state convicts, 38 A.L.R. Fed. 238.

Construction and application of Rule 11(c) of Federal Rules of Criminal Procedure, as amended in 1975, requiring court to give certain advice to defendant before accepting plea of guilty or nolo contendere, 41 A.L.R. Fed. 874.

22 C.J.S. Criminal Law § 357 et seq.

II. ARRAIGNMENT.

Generally. — Where defendant appeared before the district court and admitted that he was the defendant in the case and was informed as to the nature of the charge and given an opportunity to plead, this was an arraignment. State v. Sexton, 78 N.M. 694, 437 P.2d 155 (Ct. App. 1968) (decided under former law).

Where waiver of counsel effective. — Where at arraignment appellant signed a written waiver of his right to be represented by court-appointed counsel and elected to proceed without counsel, appellant had knowledge of and understood his right to be represented by counsel and he voluntarily waived such right. Waiver of counsel was knowledgeably and understandingly made. State v. Baughman, 79 N.M. 442, 444 P.2d 769 (Ct. App. 1968) (decided under former law).

Effect of failure to assign counsel. — Failure to assign counsel to represent defendant before the magistrate or at his arraignment did not abridge defendant's constitutional rights where no prejudice was shown. Gantar v. Cox, 74 N.M. 526, 395 P.2d 354 (1964) (decided under former law).

Where failure to inform waived by not guilty plea. — Any defect which may have occurred in the manner in which defendant was informed of the charge against her, or any failure by the justice of the peace to inform her of her right to counsel, is waived by plea of not guilty. State v. Knight, 78 N.M. 482, 432 P.2d 838 (1967) (decided under former law).

III. READING OF INDICTMENT OR INFORMATION.

Collateral attack on failure to timely provide copy prohibited. — Failure to timely provide defendant with a copy of the information cannot be collaterally attacked. State v. Knight, 78 N.M. 482, 432 P.2d 838 (1967) (decided under former law).

IV. PLEAS.

Advice about possible sentence enhancements. — The district court is obligated to explain the mandatory minimum and maximum possible penalties to the defendant, including advice about sentence enhancements that could result if the defendant has prior convictions. If the court is aware of the defendant’s prior convictions that would require a sentence enhancement if subsequently requested by the state, the court should inform the defendant of the maximum potential sentence, including enhancements. If the defendant enters a guilty or no contest plea without being advised of possible sentence enhancements and then the possible existence of prior convictions comes to light when the state files a subsequent supplemental information seeking to enhance the defendant’s sentence based on those prior convictions, the court should conduct a supplemental plea proceeding to advise the defendant of the likely

sentencing enhancements that will result, and determine whether the defendant wants to withdraw the plea in light of the new sentencing enhancement information. Marquez v. Hatch, 2009-NMSC-040, 146 N.M. 556, 212 P.3d 1110.

Where the defendant entered a no contest plea to trafficking cocaine; the district court informed the defendant that the trafficking charge would be a second degree felony with a maximum basic sentence of nine years and that the basic sentence could be enhanced under the habitual offender statute if the defendant had any undisclosed prior felony convictions; the state filed a supplemental criminal information alleging that the defendant had three prior felony convictions, two of which were trafficking offenses; there was no indication in the record that before the defendant entered a plea of no contest to the three prior convictions that the defendant was advised about a potential enhancement under the trafficking statute or that the trafficking charge could be treated as a first-degree felony with a basic sentence of eighteen years, the court did not adequately and accurately advise the defendant of the possible sentencing enhancements the defendant faced by pleading no contest. Marquez v. Hatch, 2009-NMSC-040, 146 N.M. 556, 212 P.3d 1110.

Change of plea. — There is no constitutional barrier to a pro se defendant changing his plea when he recognizes he made a bad decision to represent himself. State v. Vincent, 2005-NMCA-064, 137 N.M. 462, 112 P.3d 1119, cert. granted, 2005-NMCERT-005.

Generally, as to guilty plea. — A guilty plea must be voluntarily made. If it is not voluntarily made, but is, in fact, induced by promises or threats, then it is void and subject to collateral attack. State v. Robbins, 77 N.M. 644, 427 P.2d 10, cert. denied, 389 U.S. 865, 88 S. Ct. 130, 19 L. Ed. 2d 137 (1967) (decided under former law).

Effect of plea. — An involuntary plea is inconsistent with the constitutional guarantee of due process. But when a plea of guilty is made voluntarily after proper advice of counsel and with a full understanding of the consequences, the plea is binding. State v. Robbins, 77 N.M. 644, 427 P.2d 10, cert. denied, 389 U.S. 865, 88 S. Ct. 130, 19 L. Ed. 2d 137 (1967) (decided under former law).

A plea of guilty voluntarily made, and after opportunity to consult with counsel and with full understanding of the consequences, is binding. State v. Vigil, 79 N.M. 287, 442 P.2d 599 (Ct. App. 1968) (decided under former law).

Burden of proof on defendant. — Upon appeal, the burden of proof is on defendant to show that the plea is involuntary. State v. Ortiz, 77 N.M. 751, 427 P.2d 264 (1967) (decided under former law).

Silent trial record shifts burden to government to prove that a trial waiver was knowingly, voluntarily and intelligently made. Sena v. Romero, 617 F.2d 579 (10th Cir. 1980).

But voluntariness may still be shown. — Even if the trial record is silent, reversal is not required if the voluntariness and intelligence of a guilty plea is proved at a post-conviction evidentiary hearing. Sena v. Romero, 617 F.2d 579 (10th Cir. 1980).

Competency to plead. — The trial court did not err in applying the same standard to a defendant's competency to enter into a plea agreement as would have been appropriate in determining his competency to stand trial. State v. Lucas, 110 N.M. 272, 794 P.2d 1201 (Ct. App. 1990).

Metropolitan court may not use a conviction based on nolo contendere plea as sole basis of probation revocation. State v. Baca, 101 N.M. 415, 683 P.2d 970 (Ct. App. 1984).

V. REFUSAL TO PLEAD.

Effect of remaining mute. — Objections to form of verification were waived by defendant who remained mute and had a plea of not guilty entered for him by the trial court. State ex rel. Hanagan v. Armijo, 72 N.M. 50, 380 P.2d 196 (1963).

VI. ADVICE TO DEFENDANT.

Generally. — Before accepting a plea of guilty a trial court has a duty to ascertain that a defendant knows the consequences of his plea and to advise him of those consequences if he is not otherwise advised. That a defendant is represented by counsel does not alter this rule. Neller v. State, 79 N.M. 528, 445 P.2d 949 (1968) (decided under former law).

Knowledge of consequences of guilty plea, a requirement recognized by supreme court, means that in some manner the accused should be informed of the nature of the charges, acts sufficient to constitute the offense, the right to plead "not guilty," the right to a jury trial, the right to counsel and the permissible range of sentences. State v. Montler, 85 N.M. 60, 509 P.2d 252 (1973) (decided under former law).

Admonition of immigration consequences of defendant's guilty plea, that it "could" affect his immigration status, was sufficient advice to satisfy federal due process and Rule 5 303(E)(5) but distinct possibility that defense attorney failed to provide specific advice regarding impact of guilty plea on his immigration status established prima facie case of ineffective assistance of counsel. State v. Paredez, 2004-NMSC-036, 136 N.M. 533, 101 P.3d 799.

Substantial compliance. — Absent a showing of prejudice to the defendant's right to understand his guilty plea and its consequences, substantial compliance with Paragraph E is sufficient. State v. Garcia, 1996-NMSC-013, 121 N.M. 544, 915 P.2d 300.

Substantial compliance with Paragraph E was not shown since the court did not ascertain if the defendant understood the nature of the charge and the possible range of

penalties provided by law. State v. Garcia, 1996-NMSC-013, 121 N.M. 544, 915 P.2d 300.

Source of information. — Provided the record shows the defendant had the requisite information, the court need not be the only source of information. State v. Garcia, 1996-NMSC-013, 121 N.M. 544, 915 P.2d 300.

Lack of compliance with paragraph not constitutional claim. — The claim that defendant's guilty pleas were invalid because the trial court did not comply with Subdivision (e) (see now Paragraph E) in accepting the pleas is not a claim that the pleas were constitutionally invalid. State v. Gallegos, 91 N.M. 107, 570 P.2d 938 (Ct. App. 1977).

Plea not rendered involuntary by later statements. — Having concluded that the plea of guilty was voluntarily and understandingly made, nothing which was later said by the court renders this plea involuntary. State v. Vigil, 79 N.M. 287, 442 P.2d 599 (Ct. App. 1968) (decided under former law).

Waiver of lesser included offense instructions. — It is not necessary to subject the defendant's decision to waive lesser included offense instructions to the formulaic inquiry required under Paragraph E for all pleas of guilty. State v. Boeglin, 105 N.M. 247, 731 P.2d 943 (1987).

VII. ENSURING VOLUNTARY PLEA.

Due process requires that a guilty plea be made voluntarily and intelligently. State v. Lucero, 97 N.M. 346, 639 P.2d 1200 (Ct. App. 1981).

Where plea not voluntary. — Defendant's plea of guilty could not have been freely, intelligently or knowingly given if court-appointed counsel did not and would not discuss any of such possible issues as police reports, potential defenses or relevant statutory requirements, with defendant. The items, considered together and in relation to the "facts" related in the police report, show manifest error was committed by the trial court in not permitting defendant to withdraw his plea of guilty. The issue is whether under the foregoing undisputed facts, defendant had effective assistance of counsel. State v. Kincheloe, 87 N.M. 34, 528 P.2d 893 (Ct. App. 1974).

Trial counsel's relation to the defendant of an agreement later found by the court to be nonexistent, which information induces defendant's guilty plea, clearly removed that plea from the category of pleas "freely, intelligently or knowingly given". State v. Lucero, 97 N.M. 346, 639 P.2d 1200 (Ct. App. 1981).

Where plea of guilty held voluntary. — The court, in a habeas corpus proceeding under former law, held that plea of guilty was voluntary even though sheriff and district attorney told him he would be prosecuted under the habitual criminal statute and that his wife would be prosecuted as an accessory if he did not plead guilty. The comments

by the district attorney were said to be just a statement of his potential criminal responsibility which he already knew. The important thing is that the plea be genuine and that he not be deceived or coerced. Allen v. Rodriguez, 372 F.2d 116 (10th Cir. 1967) (decided under former law).

Validity where counsel, not defendant, responds to court's inquiries. — Prior to the adoption of this rule, it was held that a guilty plea would not be voided because the response to the court's inquiries was made by counsel rather than defendant. Further, it was held that the fact that the trial court failed to question defendant as to his understanding of the guilty plea, and its consequences, did not in itself provide a basis for post-conviction relief. State v. Murray, 81 N.M. 445, 468 P.2d 416 (Ct. App. 1970) (decided under former law).

Trial court determines whether guilty plea is voluntary. State v. Gallegos, 91 N.M. 107, 570 P.2d 938 (Ct. App. 1977) (decided under former law).

It is the trial court that determines whether a guilty plea is voluntary, whether a plea of guilty may be withdrawn and whether a guilty plea is invalid. State v. Martinez, 92 N.M. 256, 586 P.2d 1085 (1978).

Although a trial judge need not specifically enumerate the trial rights a defendant waives by pleading guilty, the judge must be satisfied that the plea is being given voluntarily and with knowledge of its consequences. Sena v. Romero, 617 F.2d 579 (10th Cir. 1980).

The trial court must make the separate and distinct inquiry required by the second sentence of Subdivision (f) (see now Paragraph F). State v. Lucero, 97 N.M. 346, 639 P.2d 1200 (Ct. App. 1981).

Rejection of plea agreement draws into question voluntariness of plea. — When a trial judge rejects a plea agreement he removes the basis upon which the defendant entered his plea and draws into question the voluntariness of the plea; even where the only "promise" was a prosecutorial recommendation for a lighter sentence, there nevertheless remains at least the taint of false inducement. Eller v. State, 92 N.M. 52, 582 P.2d 824 (1978).

Plea not invalidated by reliance on counsel's advice. — The fact that defendant did rely on his counsel's advice does not establish that his plea was involuntary and does not set forth a basis for post-conviction relief. Goodwin v. State, 79 N.M. 438, 444 P.2d 765 (Ct. App. 1968) (decided under former law).

Effect of time before arrest and arraignment. — The length of time between arrest and arraignment may be one of the factors which creates a coercive atmosphere in violation of the due process clause of U.S. Const., amend. XIV. State v. Ortiz, 77 N.M. 316, 422 P.2d 355 (1967) (decided under former law).

Raising of certain issues for first time on appeal prohibited. — The issue of voluntariness of a guilty plea cannot be raised for the first time on appeal nor may issues directed to the trial court's procedure in accepting a guilty plea, such as claimed violations of this rule, be raised for the first time on appeal. State v. Brakeman, 88 N.M. 153, 538 P.2d 795 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

VIII. RECORD OF PROCEEDINGS.

Use of record and trial order on appeal. — Order of trial which stated that the court interrogated the defendant and was satisfied that he voluntarily and intelligently entered a plea of guilty, having been advised of the constitutional rights which he was waiving and the sentence which could be imposed, and which was not attacked in the trial court or on appeal, together with the record of the hearing, was sufficient to show that defendant's plea of guilty to charge of unlawful possession of amphetamines was voluntarily and understandingly made. State v. Bachicha, 84 N.M. 395, 503 P.2d 1173 (Ct. App.), cert. denied, 84 N.M. 390, 503 P.2d 1168 (1972) (decided under former law).

IX. WAIVER OF ARRAIGNMENT.

Waiver of arraignment by stipulation and going to trial. — Where, in pretrial stipulation, defendant waived the time limitations for arraignment and agreed arraignment could be held on or before trial date, when no arraignment was held, case was called for trial, and defendant announced ready for trial and proceeded thereto, right to be arraigned was effectively waived. State v. Dosier, 88 N.M. 32, 536 P.2d 1088 (Ct. App.), cert. denied, 88 N.M. 28, 536 P.2d 1084 (1975).

5-304. Pleas.

A. **Alternatives**

(1) In general. The attorney for the state and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty, no contest or guilty but mentally ill to a charged offense or to a lesser or related offense, the attorney for the state will move for dismissal of other charges, or will recommend or not oppose the imposition of a particular sentence, or will do both. The court shall not participate in any such discussions.

(2) With the approval of the court and the consent of the state, a defendant may enter a conditional plea of guilty, no contest or guilty but mentally ill, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified pre-trial motion. A defendant who prevails on appeal shall be allowed to withdraw the plea.

B. **Notice.** If a plea agreement has been reached by the parties which contemplates entry of a plea of guilty, no contest or guilty but mentally ill in the expectation that a

specific sentence will be imposed or that other charges before the court will be dismissed it shall be reduced to writing substantially in the form approved by the Supreme Court, and the court shall require the disclosure of the agreement in open court at the time the plea is offered. Thereupon the court may accept or reject the agreement, or may defer its decision as to acceptance or rejection until there has been an opportunity to consider the presentence report.

C. **Acceptance of plea.** If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

D. **Rejection of plea.** If the court rejects the plea agreement, the court shall inform the parties of this fact, advise the defendant personally in open court that the court is not bound by the plea agreement, afford either party the opportunity to withdraw the agreement and advise the defendant that if the defendant persists in a guilty plea, plea of no contest or guilty but mentally ill the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

E. **Time of plea agreement procedure.** Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at such time, as may be fixed by the court.

F. **Inadmissibility of plea discussions.** Evidence of a plea of guilty, later withdrawn, a plea of no contest or guilty but mentally ill, or of an offer to plead guilty, no contest or guilty but mentally ill to the crime charged or any other crime, or of statements made in connection with any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer.

G. **Determining accuracy of plea.** Notwithstanding the acceptance of a plea of guilty or guilty but mentally ill, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

H. **Form of written pleas.** A plea and disposition agreement or a conditional plea shall be submitted substantially in the form approved by the Supreme Court.

[As amended, effective August 1, 1989; January 15, 1998.]

Committee commentary. — Paragraphs A through F of this rule provide for a "plea bargaining" procedure. They were taken verbatim from proposed Rule 11(e) of the Federal Rules of Criminal Procedure. See 62 F.R.D. 271, 276, 280-86 (1974). Prior to the adoption of Paragraph A of this rule, judicial involvement in plea bargaining in New Mexico varied with the interest of the individual district court judges. The propriety of judicial involvement had been questioned by the supreme court. See State v. Scarborough, 75 N.M. 702, 708, 410 P.2d 732 (1966). By the adoption of this rule, the court has specifically eliminated all judicial involvement in the plea bargaining

discussions. The judge's role is explicitly limited to acceptance or rejection of the bargain agreed to by counsel for the state, defense counsel, and defendant. See generally, 62 F.R.D. 271, 283-84 (1974).

Paragraph B of this rule requires the parties to reduce the agreement to writing if it is contemplated that a specific sentence should be imposed or that other charges will be dropped. Following the adoption of the rule, the court administrator approved a form titled "Plea and Disposition Agreement" for use with this rule. Use of the form also obviates the necessity of filing new pleading since by its terms it amends the pleadings containing the pending charges. On July 26, 1979, the supreme court issued an order requiring plea and disposition orders to be filed in the original case. It may be held that the defendant was denied effective assistance of counsel if he is advised to plead guilty without a written plea agreement. State v. Lucero, supra, at 351.

With the exception of Paragraph D of this rule, providing for withdrawal of the plea when the court rejects the plea bargain, these rules do not govern the withdrawal of a plea. Withdrawal of a voluntary plea is within the discretion of the court. State v. Brown, 33 N.M. 98, 263 P. 502 (1927). Santobello v. New York, supra. The American Bar Association Standards Relating to Pleas of Guilty, Section 2.1 (Approved Draft 1968) recommends the following considerations in dealing with a request to withdraw a plea of guilty:

"(a) the court should allow the defendant to withdraw his plea of guilty or no contest whenever the defendant, upon a timely motion for withdrawal, proves that withdrawal is necessary to correct a manifest injustice.

(i) a motion for withdrawal is timely if made with due diligence, considering the nature of the allegations therein and is not necessarily barred because made subsequent to judgment or sentence.

(ii) withdrawal is necessary to correct a manifest injustice whenever the defendant proves that:

(1) he was denied the effective assistance of counsel guaranteed to him by constitution, statute, or rule;

(2) the plea was not entered or ratified by the defendant or a person authorized to so act in his behalf;

(3) the plea was involuntary, or was entered without knowledge of the charge or that the sentence actually imposed could be imposed";

(the ABA Standards here include a provision for a plea bargain situation which would not apply since the adoption of Rule 21(g)(4) (see Paragraph D of this rule))

(iii) the defendant may move for withdrawal of his plea without alleging that he is innocent of the charge to which the plea has been entered.

"(b) in the absence of a showing that withdrawal is necessary to correct a manifest injustice, the defendant may not withdraw his plea of guilty or no contest as a matter of right once the plea has been accepted by the court. Before sentence, the court in its discretion may allow the defendant to withdraw his plea for any fair and just reason unless the prosecution has been substantially prejudiced by reliance upon the defendant's plea."

In Eller v. State, 92 N.M. 52, 582 P.2d 824 (1978), the New Mexico Supreme Court held that when the trial judge rejects the recommendation of the district attorney for a suspended sentence this is tantamount to the rejection of the plea and disposition agreement.

ANNOTATIONS

Cross references. — For plea and disposition agreement form, see Rule 9-408 NMRA.

The 1997 amendment, effective January 15, 1998, substituted "Pleas" for "Plea agreements" in the Rule heading, in Paragraph A, substituted "Alternatives" for "In general" as the Paragraph heading, deleted the last sentence of former Paragraph A, redesignated the remainder of Paragraph A as A (1) and added Subparagraph A (2), in Paragraph B, substituted "substantially in the form" for "on a form" in the first sentence and added Paragraph H.

Compiler's notes. — This rule is similar to Rule 11(e) of the Federal Rules of Criminal Procedure.

Rejection of sentencing recommendation in a plea agreement. — A court is not required to afford a defendant the opportunity to withdraw his or her plea when it rejects a sentencing recommendation or a defendant’s unopposed sentencing request, so long as the defendant has been informed that the sentencing recommendation or request is not binding on the court. However, if the defendant and the state have bargained for a specific sentence and the court rejects the specific sentence, the court must give the defendant an opportunity to withdraw his or her plea agreement. State v. Pieri, 2009-NMSC-019, 146 N.M. 155, 207 P.3d 1132, overruling Eller v. State, 92 N.M. 52, 582 P.2d 824 (1978).

Breach of plea agreement. — Where the state agreed not to oppose the defendant’s request for a suspended sentence on the condition that the defendant testify truthfully in a pending case against the defendant’s spouse; the district court held the defendant’s sentencing hearing before the defendant had an opportunity to testify in the case against the defendant’s spouse; and the state opposed a suspended sentence because the defendant had not satisfied the conditions of the agreement, the state breached its agreement and the defendant should have either been afforded specific performance of

the agreement or have been allowed to withdraw the defendant's plea. State v. Pieri, 2009-NMSC-019, 146 N.M. 155, 207 P.3d 1132, overruling Eller v. State, 92 N.M. 52, 582 P.2d 824 (1978).

Defendant has the burden to show that the defendant was not advised about the immigration consequences of plea. — Where the defendant, who entered guilty pleas and no contest pleas, seeks relief from the defendant's convictions on the ground that the defendant's attorney failed to advise the defendant of the specific immigration consequences of the defendant's pleas; the defendant is seeking relief on the basis that the defendant's counsel was constitutionally ineffective; the defendant has the burden to show that the defendant's attorney failed to advise the defendant about the specific immigration consequences of the defendant's pleas and the defendant must show that if it were not for the attorney's failure to properly advise defendant, the defendant would not have made the pleas. State v. Tran, 2009-NMCA-010, 145 N.M. 487, 200 P.3d 537.

Failure to plead or make prima facie case that defendant was not advised of the immigration consequences of a guilty plea or no contest plea. — Where the defendant asserted that there was no concrete and certain evidence that the defendant had been advised of the specific immigration consequences of the defendant's guilty pleas and no contest pleas; asserted that the court cannot assume that the defendant's attorney advised the defendant about the immigration consequences of the pleas; and asserted that the record contained no evidence that the defendant's attorney advised the defendant about the immigration consequences of the pleas; the defendant failed to plead or make a prima facie case that he was denied the effective assistance of counsel. State v. Tran, 2009-NMCA-010, 145 N.M. 487, 200 P.3d 537.

No contest plea. — A court is not required to inquire into whether there is a factual basis for a no contest plea. State v. Vincent, 2005-NMCA-064, 137 N.M. 462, 112 P.3d 1119, cert. granted, 2005-NMCERT-005.

State case law fails to make distinction between pre-sentence plea withdrawals and requests for withdrawal after sentencing. State v. Hunter, 2005-NMCA-089, 138 N.M. 96, 117 P.3d 254, cert. granted, 2005-NMCERT-007.

Effect of committee commentary. — Although this rule does not expressly address withdrawal of pleas, the committee commentary to this rule, citing the recommendations of the American Bar Association Standards relating to Pleas of Guilty, provides guidance. State v. Hunter, 2005-NMCA-089, 138 N.M. 96, 117 P.3d 254, cert. granted, 2005-NMCERT-007.

The commentary to this rule draws a rather sharp distinction in Subparagraphs (a) and (b) between pre-sentence and other motions to withdraw. State v. Hunter, 2005-NMCA-089, 138 N.M. 96, 117 P.3d 254, cert. granted, 2005-NMCERT-007.

Defendant has burden of proving fair and just reason exists for the withdrawal of a pre-sentence plea. State v. Hunter, 2005-NMCA-089, 138 N.M. 96, 117 P.3d 254, cert. granted, 2005-NMCERT-007.

And factors used by federal courts adopted. — In evaluating whether a fair and just reason exists for the withdrawal of a pre-sentence plea, the factors used by the federal courts are adopted. State v. Hunter, 2005-NMCA-089, 138 N.M. 96, 117 P.3d 254, cert. granted, 2005-NMCERT-007.

In reviewing pre-sentence plea withdrawal request, the district court in its discretion may allow the defendant to withdraw a plea of guilty or no contest for any fair and just reason unless the prosecution has been substantially prejudiced by reliance upon the defendant's plea. State v. Hunter, 2005-NMCA-089, 138 N.M. 96, 117 P.3d 254, cert. granted, 2005-NMCERT-007.

Standard for post-sentencing plea withdrawals is manifest injustice. State v. Hunter, 2005-NMCA-089, 138 N.M. 96, 117 P.3d 254, cert. granted, 2005-NMCERT-007.

Subdivision (g) (see now Paragraphs A to F) is similar to Rule 11(e) of the Federal Rules of Criminal Procedure. Eller v. State, 92 N.M. 52, 582 P.2d 824 (1978).

Rule was designed to obtain disclosure. State v. Lord, 91 N.M. 353, 573 P.2d 1208 (Ct. App. 1977), cert. denied, 91 N.M. 491, 576 P.2d 297 (1978).

Reliance on rule by defendant. — The determinative factor in excluding statements pursuant to Rule 11-410 NMRA (similar to this rule) is whether it may be naturally inferred that the defendant relied on the rule in deciding to break silence, because the rule encourages cooperation only if the defendant relied on it. State v. Anderson, 116 N.M. 599, 866 P.2d 327 (1993).

Presumption of reliance. — To assure "fairness", when a suspect is induced by the state to engage in plea negotiations, as in formal plea negotiations with a state attorney or an agent of the attorney, there will be an irrebuttable presumption that such person has relied on the rule in breaking his silence, and all statements made during the course of "making a deal" are inadmissible in future proceedings, whether the statements are offers to confess or offers to plead guilty, and regardless of whether the declarant has been formally charged with a crime. The court may be guided by the established standards of voluntariness in finding inducement by the state. State v. Anderson, 116 N.M. 599, 866 P.2d 327 (1993).

Absent a finding by the court that statements were made with the belief they could not be "held against" the declarant, if a defendant or suspect makes uninduced statements after receiving *Miranda* warnings (i.e., being told that any statement made may be used against such person in court), there is no reason to presume that such person was motivated to make inculpatory statements in reliance on some rule of inadmissibility. State v. Anderson, 116 N.M. 599, 866 P.2d 327 (1993).

Agreement not to prosecute is not plea bargain unless defendant pleads guilty or is granted immunity. State v. Doe, 103 N.M. 178, 704 P.2d 432 (Ct. App. 1984).

Sentence recommendation permitted. — The state, by offering the defendant a mandatory minimum sentence, did not propose an illegal plea bargain by allegedly invading the court's sentencing province. Even if the defendant had accepted the plea offer, the prosecutor did no more than recommend the imposition of a particular sentence, as permitted by this rule. The court still would have retained the right to accept or reject the plea bargain and make an independent decision regarding the appropriate sentence. State v. Taylor, 107 N.M. 66, 752 P.2d 781 (1988).

Defendant's understanding of plea controls. — Since plea agreements should be interpreted in accordance with what the defendant reasonably understood when he entered his plea, the issue of whether the trial court breached the plea agreement after accepting it is a question of law that is reviewable de novo by an appellate court, and any ambiguity in the plea agreement should be construed against the State. Since the defendant understood the plea agreement provided for nine years incarceration and that at least seven years was to be suspended on condition that he be placed on probation, the subsequent imposition of nine years incarceration following probation revocation violated his plea assignment. State v. Mares, 118 N.M. 217, 880 P.2d 314 (Ct. App.), rev'd on other grounds, 119 N.M. 48, 888 P.2d 930 (1994).

Guilty plea not set aside where alleged promise not disclosed. — Defendant's claim of an unkept promise by the state, when based on his own failure to disclose the alleged promise, does not require his guilty plea to be set aside. He cannot take advantage of his own nondisclosure. State v. Lord, 91 N.M. 353, 573 P.2d 1208 (Ct. App. 1977), cert. denied, 91 N.M. 491, 576 P.2d 297 (1978).

Secret plea agreements are impermissible under these rules. State v. Lucero, 97 N.M. 346, 639 P.2d 1200 (Ct. App. 1981).

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).

Failure to utilize the form set out in Rule 9-408 NMRA did not invalidate a guilty plea where there were adequate indicia that the plea was knowing and voluntary. State v. Jonathan B., 1998-NMSC-003, 124 N.M. 620, 954 P.2d 52, cert. denied, 525 U.S. 865, 119 S. Ct. 155, 142 L. Ed. 2d 127 (1998).

Effect of accepting plea bargain. — Having obtained the advantage of the dismissal of other charges, defendant should not be permitted to welch on his part of the bargain. By his guilty pleas pursuant to a plea bargain that has not been questioned, defendant

waived any right to attack the validity of those guilty pleas. State v. Gallegos, 91 N.M. 107, 570 P.2d 938 (Ct. App. 1977).

Generally, where change of plea to guilty valid. — Where the motion, affidavit and record in the cause clearly show or imply: (1) that the defendant was represented by a competent attorney; (2) that the plea discussion was between the assistant district attorney and defendant's attorney; (3) that defendant's attorney informed and discussed with defendant the proposal made by the assistant district attorney; (4) that defendant's attorney informed the court that defendant wished to change his plea to guilty, and this was done in the hearing and presence of defendant; (5) that defendant himself advised the court he wished to change his plea to guilty, and this was done in the hearing and presence of his attorney; (6) that defendant advised the court that he was voluntarily changing his plea to guilty, and this was done in the hearing and presence of his attorney; (7) that defendant and his attorney fully understood the consequences of the plea of guilty; and (8) that defendant and his attorney waived a presentence report, requested that the sentence be pronounced and acquiesced in and agreed to the sentence, and defendant thanked the court, nothing further was required to conclusively show that defendant did voluntarily change his plea from not guilty to guilty after proper advice from competent counsel, that he did understand the consequences of his act in changing his plea, and that he is not entitled to relief. State v. Robbins, 77 N.M. 644, 427 P.2d 10, cert. denied, 389 U.S. 865, 88 S. Ct. 130, 19 L. Ed. 2d 137 (1967) (decided under former law).

Plea negotiation involves exchange of concessions and advantages between the state and the accused. State v. Gallegos, 91 N.M. 107, 570 P.2d 938 (Ct. App. 1977).

Action of court upon discovering plea involuntary. — It is a fundamental rule of criminal procedure that a judgment and sentence cannot stand if based upon an involuntary plea of guilty induced by an unkept promise of leniency. A guilty plea induced by either promises or threats which deprive it of the character of a voluntary act is void and subject to collateral attack. To withhold the privilege of withdrawing a guilty plea in order to reassume the position occupied prior to its entry would constitute a denial of due process of law. State v. Ortiz, 77 N.M. 751, 427 P.2d 264 (1967) (decided under former law).

No constitutional right to have court accept guilty plea. — A trial judge need not accept every constitutionally valid guilty plea merely because a defendant wishes so to plead; a criminal defendant does not have an absolute right under the federal constitution to have his guilty plea accepted by the court although the states may by statute or otherwise confer such a right. State v. Jiminez, 89 N.M. 652, 556 P.2d 60 (Ct. App. 1976).

Court has discretionary power to refuse to accept guilty plea, and the trial court did not err in refusing to accept a guilty plea proffered by defendant immediately prior to trial and after the close of the state's case to two of four counts in the indictment (aggravated assault and assault with intent to commit a violent felony) when he was also charged

with first-degree criminal sexual penetration and aggravated battery. State v. Jiminez, 89 N.M. 652, 556 P.2d 60 (Ct. App. 1976).

The trial judge has discretion to accept or reject a guilty plea, which will not be disturbed on appeal unless he abuses his discretion. State v. Holtry, 97 N.M. 221, 638 P.2d 433 (Ct. App. 1981).

"Abuse of discretion" test applicable. — The "abuse of discretion" test applies when a trial judge accepts or rejects a plea and disposition agreement. State v. Holtry, 97 N.M. 221, 638 P.2d 433 (Ct. App. 1981).

Unduly light sentence sound reason for rejecting agreement. — A decision that a plea bargain will result in the defendant's receiving too light a sentence under the circumstances of the case is a sound reason for a judge's refusing to accept the agreement. State v. Holtry, 97 N.M. 221, 638 P.2d 433 (Ct. App. 1981).

Refusal to accept agreement did not demonstrate judicial bias. — Judge's refusal to accept a tendered plea agreement did not demonstrate judicial bias or prejudice, where, when the plea and disposition agreement was tendered, the judge reserved ruling on it until he could consider a presentence report, information on treatment programs, and written statements from the victim of the crime and her brother regarding their feelings and views on the proposed disposition. State v. Swafford, 109 N.M. 132, 782 P.2d 385 (Ct. App. 1989).

Plea agreements, absent constitutional invalidity, are binding upon both parties. State v. Bazan, 97 N.M. 531, 641 P.2d 1078 (Ct. App. 1982), overruled on other grounds State v. Ball, 104 N.M. 176, 718 P.2d 686 (1986).

And defendant waives right to appeal by entering into plea and disposition agreement. State v. Bazan, 97 N.M. 531, 641 P.2d 1078 (Ct. App. 1982), overruled on other grounds State v. Ball, 104 N.M. 176, 718 P.2d 686 (1986).

Once a plea is accepted, the court is bound by the dictates of due process to honor the plea agreement and is barred from imposing a sentence which is outside the parameters of the plea agreement. State v. Sisneros, 98 N.M. 279, 648 P.2d 318 (Ct. App. 1981), aff'd in part, rev'd on other grounds, 98 N.M. 201, 647 P.2d 403 (1982), aff'd, 101 N.M. 679, 687 P.2d 736 (1984).

Refusal by the trial court to follow a plea agreement worked out by the parties affords the defendant the opportunity to withdraw his plea. State v. Sisneros, 98 N.M. 279, 648 P.2d 318 (Ct. App. 1981), aff'd in part, rev'd on other grounds, 98 N.M. 201, 647 P.2d 403 (1982), aff'd, 101 N.M. 679, 687 P.2d 736 (1984).

District court's failure to offer defendant the opportunity to withdraw his plea after the court refused to accept the prosecutor's sentencing recommendation pursuant to a plea agreement between the state and defendant was fundamental error, requiring a remand

to the court with instructions either (1) to resentence defendant in conformity with the plea agreement or (2) to permit defendant to withdraw his plea. State v. Bencomo, 109 N.M. 724, 790 P.2d 521 (Ct. App. 1990).

Acceptance of plea by other than assigned judge. — Nothing in Paragraphs C or D prevents another judge vested with the same jurisdiction and with equal standing as the assigned judge, to accept a plea in the stead of the assigned judge when the assigned judge was unavailable. State v. Martinez, 2002-NMSC-008, 132 N.M. 32, 43 P.3d 1042.

Hearing on plea-withdrawal motion. — Trial court's refusal to hold an evidentiary hearing on defendant's plea-withdrawal motion was well within his discretion because the same judge presided over the trial, the plea change, and the sentencing; denial of the motion was reasonably based on personal observation. State v. Guerro, 1999-NMCA-026, 126 N.M. 699, 974 P.2d 669, cert. denied, 126 N.M. 533, 972 P.2d 352 (1999).

Refusal to reinstate plea. — The trial court properly refused to reinstate the defendant's earlier guilty plea since the plea had been withdrawn because the defendant's profession of innocence was supported by a factual basis inconsistent with guilt. State v. Willis, 1997-NMSC-014, 123 N.M. 55, 933 P.2d 854.

Paragraph F applicable to metropolitan court probation revocation proceedings. — Since Subdivision (g)(6) (see now Paragraph F) is applicable to district court proceedings on probation revocation, there is no reason why it should not apply to such metropolitan court proceedings. State v. Baca, 101 N.M. 415, 683 P.2d 970 (Ct. App. 1984).

Prosecution could use plea-related statements first introduced by defendant. — Having interjected taped conversations of statements made in connection with offers to plead into the trial for his own purposes, defendant could not properly complain of the prosecutor's use of the tapes on cross-examination to attack the credibility of defendant's trial testimony. State v. Watkins, 92 N.M. 470, 590 P.2d 169 (Ct. App. 1979).

Defendant, whose conduct fell within charge, not entitled to relief. — Where at arraignment inquiries made of defendant by the prosecuting attorney and defendant's answers furnished information sufficient to satisfy the court that defendant's conduct actually fell within the charges, defendant is not entitled to relief because of any shortcomings in the information given by the court, such as to severity of sentence, before accepting the plea. The court also said that recent federal cases holding that similar situations would be a basis for relief under federal rules, applied only to the federal courts. State v. Guy, 81 N.M. 641, 471 P.2d 675 (Ct. App. 1970) (decided under former law).

Statements volunteered are not protected. — Letter voluntarily written by defendant initiating contact with the authorities is not within the protection of Rule 11-410 NMRA,

even if the letter is viewed as an offer to plea bargain. State v. Fernandez, 117 N.M. 673, 875 P.2d 1104 (Ct. App. 1994).

Plea agreement admissible in habitual offender proceeding. — An unrelated plea agreement containing an admission of the defendant's identity in prior convictions was admissible for purposes of a habitual offender proceeding. State v. Roybal, 120 N.M. 507, 903 P.2d 249 (Ct. App. 1995).

Law reviews. — For article, "Defending the Criminal Alien in New Mexico: Tactics and Strategy to Avoid Deportation," see 9 N.M.L. Rev. 45 (1978-79).

For note, "Eller v. State: Plea Bargaining in New Mexico," see 9 N.M.L. Rev. 167 (1978-79).

For comment, "Definitive Sentencing in New Mexico: The 1977 Criminal Sentencing Act," see 9 N.M.L. Rev. 131 (1978-79).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law § 78 et seq.

Propriety of sentencing justice's consideration of defendant's failure or refusal to accept plea bargain, 100 A.L.R.3d 834.

Accused's right to sentencing by same judge who accepted guilty plea entered pursuant to plea bargain, 3 A.L.R.4th 1181.

Adequacy of defense counsel's representation of criminal client regarding plea bargaining, 8 A.L.R.4th 660.

Judge's participation in plea bargaining negotiations as rendering accused's guilty plea involuntary, 10 A.L.R.4th 689.

Right of prosecutor to withdraw from plea bargain prior to entry of plea, 16 A.L.R.4th 1089.

Sufficiency of court's statement, before accepting plea of guilty, as to waiver of right to jury trial being a consequence of such plea, 23 A.L.R.4th 251.

Power or duty of state court, which has accepted guilty plea, to set aside such plea on its own initiative prior to sentencing or entry of judgment, 31 A.L.R.4th 504.

Use of plea bargain or grant of immunity as improper vouching for credibility of witness - state cases, 58 A.L.R.4th 1229.

Guilty plea as affected by fact that sentence contemplated by plea bargain is subsequently determined to be illegal or unauthorized, 87 A.L.R.4th 384.

Effect, under Rule 11(e) of Federal Rules of Criminal Procedure, of plea bargain based on offer of leniency toward person other than accused, 50 A.L.R. Fed. 829.

Standards of Rule 11 of Federal Rules of Criminal Procedure, requiring personal advice to accused from court before acceptance of guilty plea, as applicable where accused's stipulation or testimony allegedly amounts to guilty plea, 53 A.L.R. Fed. 919.

What constitutes "rejection" of plea agreement under Rule 11(e)(4) of the Federal Rules of Criminal Procedure, allowing withdrawal of plea if court rejects agreements, 60 A.L.R. Fed. 621.

When is statement of accused made in connection with plea bargain negotiations so as to render statement inadmissible under Rule 11(e)(6) of the Federal Rules of Criminal Procedure, 60 A.L.R. Fed. 854.

Use of plea bargain or grant of immunity as improper vouching for credibility of witness in federal cases, 76 A.L.R. Fed. 409.

Right of access to Federal District Court guilty plea proceeding or records pertaining to entry or acceptance of guilty plea in criminal prosecution, 118 A.L.R. Fed. 621.

Choice of remedies where federal prosecutor has breached plea bargain - post-Santobello v. New York (1971) 404 U.S. 257, 30 L. Ed. 2d 427, 92 S. Ct. 495 cases, 120 A.L.R. Fed. 501.

Prohibition of federal judge's participation in plea bargaining negotiations under Rule 11(e) of Federal Rules of Criminal Procedure, 161 A.L.R. Fed. 537.

22 C.J.S. Criminal Law § 365 et seq.

ARTICLE 4
Release Provisions

5-401. Bail.

A. **Right to bail; recognizance or unsecured appearance bond.** Pending trial, any person bailable under Article 2, Section 13 of the New Mexico Constitution, shall be ordered released pending trial on the person's personal recognizance or upon the execution of an unsecured appearance bond in an amount set by the court, subject to any release conditions imposed pursuant to Paragraph C of this rule, unless the court makes a written finding that such release will not reasonably assure the appearance of the person as required.

B. **Secured bonds.** If the court makes a written finding that release on personal recognizance or upon execution of an unsecured appearance bond will not reasonably

assure the appearance of the person as required or will endanger the safety of any other person or the community, in addition to any release conditions imposed pursuant to Paragraph D of this rule, the court shall order the pretrial release of such person subject to the first of the following types of secured bonds which will reasonably assure the appearance of the person as required and the safety of any person and the community:

(1) the execution of a bail bond in a specified amount executed by the person and secured by a deposit of cash of ten percent (10%) of the amount set for bail or secured by such greater or lesser amount as is reasonably necessary to assure the appearance of the person as required. The cash deposit may be made by or assigned to a paid surety licensed under the Bail Bondsmen Licensing Law provided such paid surety also executes a bail bond for the full amount of the bail set;

(2) the execution of a bail bond by the defendant or by unpaid sureties in the full amount of the bond and the pledging of real property as required by Rule 5-401A NMRA; or

(3) the execution of a bail bond with licensed sureties as provided in Rule 5-401B NMRA or execution by the person of an appearance bond and deposit with the clerk of the court, in cash, of one-hundred percent (100%) of the amount of the bail set, such deposit to be returned as provided in this rule.

Any bail, property or appearance bond shall be substantially in the form approved by the Supreme Court.

C. **Factors to be considered in determining conditions of release.** The court shall, in determining the type of bail and which conditions of release will reasonably assure appearance of the person as required and the safety of any other person and the community, take into account the available information concerning:

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

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

(3) the history and characteristics of the person, including:

(a) the person's character and physical and mental condition;

(b) the person's family ties;

(c) the person's employment status, employment history and financial resources;

(d) the person's past and present residences;

(e) the length of residence in the community;

(f) any facts tending to indicate that the person has strong ties to the community;

(g) any facts indicating the possibility that the person will commit new crimes if released;

(h) the person's past conduct, history relating to drug or alcohol abuse, criminal history and record concerning appearance at court proceedings; and

(i) whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal or completion of an offense under federal, state or local law;

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

(5) any other facts tending to indicate the person is likely to appear.

D. **Additional conditions; conditions to assure orderly administration of justice.** The court, upon release of the defendant or any time thereafter, may enter an order, that such person's release be subject to:

(1) the condition that the person not commit a federal, state or local crime during the period of release; and

(2) the least restrictive of, or combination of, the following conditions the court finds will reasonably assure the appearance of the person as required, the safety of any other person and the community and the orderly administration of justice:

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

(b) a condition that the person maintain employment, or, if unemployed, actively seek employment;

(c) a condition that the person maintain or commence an educational program;

(d) a condition that the person abide by specified restrictions on personal associations, place of abode or travel;

(e) a condition that the person avoid all contact with an alleged victim of the crime and with a potential witness who may testify concerning the offense;

(f) a condition that the person report on a regular basis to a designated pretrial services agency or other agency agreeing to supervise the defendant;

(g) a condition that the person comply with a specified curfew;

(h) a condition that the person refrain from possessing a firearm, destructive device or other dangerous weapon;

(i) a condition that the person refrain from excessive or any use of alcohol and any use of a narcotic drug or other controlled substance without a prescription by a licensed medical practitioner;

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

(k) a condition that the person submit to a urine analysis or alcohol test upon request of a person designated by the court;

(l) a condition that the person return to custody for specified hours following release for employment, schooling, or other limited purposes;

(m)a condition that the person satisfy any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community.

E. **Explanation of conditions by court.** The release order of the court shall:

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

(2) advise the person of:

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

(b) the consequences for violating a condition of release, including the immediate issuance of a warrant for the person's arrest; and

(c) the consequences of intimidating a witness, victim or informant or otherwise obstructing justice; and

(3) unless the defendant is released on personal recognizance, set forth the circumstances which require that conditions of release be imposed.

F. **Detention.** Upon motion by the state to detain a person without bail pending trial, the court shall hold a hearing to determine whether bail may be denied pursuant to Article 2, § 1 of the New Mexico Constitution.

G. **Review of conditions of release.** A person for whom bail is set by the district court and who after twenty-four (24) hours from the time of transfer to a detention facility continues to be detained as a result of the person's inability to meet the bail set, shall, upon motion, be entitled to have a hearing to review the amount of bail set. Unless the release order is amended and the person is thereupon released, the court shall state in the record the reasons for continuing the amount of bail set. A person who is ordered released on a condition which requires that the person return to custody after specified hours, upon application, shall be entitled to have a hearing to review the conditions imposed. Unless the requirement is removed and the person is thereupon released on another condition, the court shall state in the record the reason for the continuation of the requirement. A hearing to review conditions of release pursuant to this paragraph shall be held by the district court.

H. **Amendment of conditions.** The court ordering the release of a person on any condition specified in this rule may amend its order at any time to increase the amount of bail set or impose additional or different conditions of release. If such amendment of the release order results in the detention of the person as a result of the person's inability to meet such conditions or in the release of the person on a condition requiring the person to return to custody after specified hours, the provisions of Paragraph G of this rule shall apply.

I. **Record of hearing.** A record shall be made of any hearing held by the district court pursuant to this rule.

J. **Return of cash deposit.** If a person has been released by executing an appearance bond and depositing a cash deposit set pursuant to Subparagraph (1) or (3) of Paragraph B of this rule, when the conditions of the appearance bond have been performed and the defendant's guilt for whom bail was required has been adjudicated by the Court, the clerk shall return the sum which has been deposited to the person who deposited the sum, or that person's personal representatives or assigns.

K. **Cases pending in magistrate or metropolitan court.** A person charged with an offense which is not within magistrate or metropolitan court trial jurisdiction and who has not been bound over to the district court may file a petition any time after the person's arrest with the clerk of the district court for release pursuant to this rule. Jurisdiction of the magistrate or metropolitan court to release the accused shall be terminated upon the filing of a petition for release in the district court. Upon the filing of the petition, the district court may:

(1) continue the bail set and any condition of release imposed by the magistrate or metropolitan court;

(2) impose any bail or condition of release authorized by Paragraph A, B or D of this rule;

(3) continue any revocation of release imposed pursuant to Rule 5-403 NMRA; or

(4) after a hearing, revoke the release of a defendant pursuant to Subparagraph (2) of Paragraph A of Rule 5-403 NMRA.

L. **Release from custody by designee.** Any or all of the provisions of this rule, except the provisions of Paragraphs F, G and K of this rule, may be carried out by responsible persons designated in writing by the chief judge of the district court. No person shall be qualified to serve as a designee if such person or such person's spouse is:

(1) related within the second degree of blood or marriage to a paid surety who is licensed to sell property or corporate bonds within this state; or

(2) employed by a jail or detention facility unless designated in writing by the chief judge of the judicial district in which the jail or detention facility is located.

M. **Bind over in district court.** The bond shall remain in the magistrate or metropolitan court, except that it shall be transferred to the district court upon indictment or bind over to that court.

N. **Evidence.** Information stated in, or offered in connection with, any order entered pursuant to this rule need not conform to the Rules of Evidence.

O. **Forms.** Instruments required by this rule shall be substantially in the form approved by the Supreme Court.

[As amended, effective January 1, 1987; October 1, 1987; September 1, 1990; December 1, 1990; September 1, 2005; as amended by Supreme Court Order 07-8300-29, effective December 10, 2007.]

Committee commentary. — Under Section 13 of Article 2 of the New Mexico Constitution, every accused, except a person accused of first degree murder where the proof is evident or the presumption great, is entitled to bail. Paragraph E was added in 1990 to recognize the amendment of Article 2, Section 13 of the New Mexico Constitution which permits the denial of bail for 60 days by an order entered within 7 days after incarceration if:

(1) the defendant is accused of a felony and has been previously been convicted of two or more felonies within the state; or

(2) the defendant is accused of a felony involving the use of a deadly weapon and has a prior felony conviction within this state.

This rule was derived from the Federal Bail Reform Act of 1966, as amended. Under the federal bail law, the right to bail is restated as the right to have conditions of release set by the court. *See* 18 U.S.C. §§ 3142 et seq. The 1990 amendments to Paragraphs B and C of this rule were taken from Subsections (g) and (c), respectively, of 18 USCA § 1342.

In 1990 this rule was amended to encourage more releases on personal recognizance. Release conditions may now be imposed in addition to the execution of a unsecured personal appearance bond or a secured bond.

Because bail and additional conditions of release will usually be set initially by a magistrate or metropolitan court judge Rules 6-401 and 7-401 NMRA govern the procedure in those courts. The magistrate, municipal and metropolitan court bail rules were derived from and are substantially identical to this rule.

Under this rule, the types of bonds authorized to be posted are set forth in the order of priority they are to be considered by the judge or designee. The first priority is release upon the execution of a personal recognizance or unsecured appearance bond. If the court determines that release on personal recognizance or upon the execution of an unsecured bond will not reasonably assure the appearance of the defendant as required, the court may require a secured bond.

If a secured bond is required to assure the appearance of the defendant, the judge or designee must first consider requiring an appearance bond with a cash deposit of 10% or such other percentage of the amount of the bond. If this is inadequate, the court then must consider a property bond where the property belongs to the defendant or other unpaid surety. If the court has not authorized a cash deposit of less than 100% of the amount of bond set, the defendant may execute an appearance bond and deposit one hundred percent (100%) of the amount of the bond with the court. Last of all the defendant may purchase a bond from a paid surety. A paid surety may execute a corporate surety bond or a property bond.

A real or personal property bond may only be executed by a paid surety if the conditions of Rule 5-401B NMRA are met. Under the 1990 amendments to Rule 5-401B NMRA, a bond which has as collateral real or personal property is authorized only in those districts in which an order has been entered finding that the pledging of an irrevocable letter of credit will result in the detention of persons otherwise eligible for release.

Although bail hearings are not required to be a matter of record in the magistrate, metropolitan or municipal courts, Form 9-302A requires the judge or designee to set

forth the reasons why a secured bond was required rather than release on personal recognizance.

Normally the court can exercise its discretion as to the adequacy of the sureties and not as to the type of sureties. *State v. Lucero*, 81 N.M. 578, 469 P.2d 727 (Ct. App. 1970). Cash, property or licensed surety will each provide sufficient security for any of the secured bonds described in Subparagraphs (2) or (3) of Paragraph B of this rule. *See* Rule 5-401A NMRA for the requirements of unpaid surety property bonds. If the court sets a secured bond pursuant to Subparagraph (3) of Paragraph B, the bond may be secured by cash, property or licensed surety. The court may not require a particular type of security. *See State v. Lucero, supra*.

The provision allowing the court to set additional conditions of release "in order to assure the orderly administration of justice" was derived from American Bar Association Standards Relating to Pretrial Release, Section 5.5 (Approved Draft 1968) and 18 USCA §3142 and Rule 46(b) of the Federal Rules of Criminal Procedure.

Pursuant to 31-3-1 NMSA 1978, the court may appoint a designee to carry out the provisions of this rule. Designees must be named in writing. A person may not be appointed as a designee if such person is related within the second degree of blood or marriage to a paid surety licensed in this state to execute bail bonds. A jailer may not be appointed as a designee.

Paragraph M of this rule dovetails with Subparagraph (2) of Paragraph D of Rule 11-1101 NMRA. Both provide that the Rules of Evidence are not applicable to proceedings in either the magistrate or district court with respect to matters of release or bail.

ANNOTATIONS

Cross references. — For procedural statutes relating to bail, see 31-3-1 to 31-3-9 NMSA 1978.

For habeas corpus to obtain release or bail, see 44-1-23, 44-1-24 NMSA 1978.

For Magistrate Court Rules relating to bail, see Rule 6-401 NMRA.

For form on record of responses to questions at release hearing, see Rule 9-301 NMRA.

For release order form, see Rule 9-302 NMRA.

For appearance bond form, see Rule 9-303 NMRA.

For forms on bail bond and justification of sureties, see Rule 9-304 NMRA.

For Rules of Evidence inapplicable to bail proceedings, see Rule 11-1101 NMRA.

Compiler's notes. — Paragraphs A to F and H of this rule are similar to 18 U.S.C. § 3142, referred to in Rule 46(a) of the Federal Rules of Criminal Procedure.

The 2005 amendment, effective September 1, 2005, revised former Paragraph A to require a written finding of the determination that release of the defendant on personal recognizance or upon execution of an unsecured appearance bond will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community, to designate all, but the first sentence of Paragraph A as a new Paragraph B, to redesignate former Paragraphs B through N as Paragraphs C through O and to make other non-substantive revisions.

The 2007 amendment, effective December 10, 2007, revised Paragraph J to provide for return of the bond upon adjudication of the defendant's guilt. *See State v. Gutierrez*, 2006-NMCA-090, 140 N.M. 157, 140 P.3d 1106.

Cash-only bond. — The court has the discretion to determine, under the particular facts and circumstances of each case, the type of secured bond needed to secure the defendant's appearance at trial, including cash-only bonds. State v. Gutierrez, 2006-NMCA-090, 140 N.M. 157, 140 P.3d 1106, cert. denied, 2006-NMCERT-008.

Imposition of conditions of release. — Where a trial court did not allow defendant bail, the trial judge did not have an obligation to set specific "conditions of release"; it would not only be inconsistent but absurd to impose "conditions of release" on a defendant remanded to custody when it is not intended that he be released. State v. Flores, 99 N.M. 44, 653 P.2d 875 (1982).

Security for restitution disallowed. — There is no statutory authorization 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).

Effect of delay in fixing bond. — Delay in fixing of bond is no grounds for holding invalid the judgment and sentence thereafter imposed following a plea of guilty. State v. Gibby, 78 N.M. 414, 432 P.2d 258 (1967)(decided under former law).

Interlocutory bail determination is not final judgment and bail decisions may be reviewed at any time and for a variety of reasons under this rule. State v. David, 102 N.M. 138, 692 P.2d 524 (Ct. App. 1984).

Review hearing required by Subdivision (e) (see now Paragraph E) of this rule is not required in order to appeal a denial or revocation of bail. State v. David, 102 N.M. 138, 692 P.2d 524 (Ct. App. 1984).

Law reviews. — For comment, "Criminal Procedure - Preventive Detention in New Mexico," see 4 N.M.L. Rev. 247 (1974).

For article, "The Constitutionality of Pretrial Detention Without Bail in New Mexico," see 12 N.M.L. Rev. 685 (1982).

For comment, "The Constitution Is Constitutional - A Reply to the Constitutionality of Pretrial Detention Without Bail in New Mexico," see 13 N.M.L. Rev. 145 (1983).

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

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

When is a person in custody of governmental authorities for purpose of exercise of state remedy of habeas corpus - modern cases, 26 A.L.R.4th 455.

Bail: duration of surety's liability on pretrial bond, 32 A.L.R.4th 504.

Bail: duration of surety's liability on posttrial bail bond, 32 A.L.R.4th 575.

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

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

Propriety of applying cash bail to payment of fine, 42 A.L.R.5th 547.

Propriety, after obligors on appearance bond have been exonerated pursuant to Rule 46(f) of the Federal Rules of Criminal Procedure, of applying cash or other security to fine imposed on accused, 58 A.L.R. Fed. 676.

8 C.J.S. Bail § 1 et seq.

5-401A. Bail; unpaid surety.

Any bond authorized by Subparagraph (2) of Paragraph A of Rule 5-401 shall be signed by the owner(s) of the real property as surety for the bond. The affidavit must contain a description of the property by which the surety proposes to justify the bond and the encumbrances thereon, the number and amount of other bonds and undertakings for bail entered into by the surety remaining undischarged and a statement that the surety is a resident of New Mexico and owns real property in this state having an unpledged and unencumbered net value equal to the amount of the bond. Proof may be required of the matters set forth in the affidavit. The provisions of this rule shall not apply to a paid surety.

[Adopted, effective October 1, 1987; as amended, effective September 1, 1990.]

5-401B. Bail bonds; justification of compensated sureties.

A. **Justification of sureties.** Any bond submitted to the court by a paid surety pursuant to Paragraph A of Rule 5-401 shall be signed by a bail bondsman, as surety, who is licensed under the Bail Bondsmen Licensing Law and who has timely paid all outstanding default judgments on forfeited surety bonds. A bail bondsman licensed as a limited surety agent shall file proof of appointment by an insurer by power of attorney with the bond. If authorized by law, a paid surety licensed under the Bail Bondsmen Licensing Law may deposit cash with the court in lieu of a surety or property bond, provided that the paid surety executes the appearance bond.

B. **Property bondsman.** If a property bond is submitted by a compensated surety, the bail bondsman or solicitor must be licensed as a property bondsman and must file, in each court in which he posts bonds, an irrevocable letter of credit in favor of the court, a sight draft made payable to the court and a copy of his license.

C. **Property bond in certain districts.** A real or personal property bond may be executed for the release of a person pursuant to Rule 5-401 in any judicial district in which the chief judge of the district upon concurrence of a majority of the district judges of the district has entered an order finding that the provisions of Paragraph B of this rule will result in the detention of persons otherwise eligible for pretrial release pursuant to Rule 5-401. If a property bond is submitted by a compensated surety pursuant to this paragraph, the bail bondsman or solicitor must be licensed as a property bondsman and must pledge or assign real or personal property owned by the property bondsman as security for the bail bond. In addition, a licensed property bondsman must file, in each court in which he posts bonds:

(1) proof of the licensed bondsman's ownership of the property used as security for the bonds; and

(2) a copy of the bondsman's license.

The bondsman must attach to the bond a current list of all outstanding bonds, encumbrances and claims against the property each time a bond is posted, using the court approved form.

D. **Limits on property bonds.** No single property bond submitted pursuant this rule can exceed the amount of real or personal property pledged. The aggregate amount of all property bonds by the surety cannot exceed ten times the amount pledged. Any collateral, security or indemnity given to the bondsman by the principal shall be limited to a lien on the property of the principal, must be reasonable in relation to the amount of the bond and must be returned to the principal and the lien extinguished upon exoneration on the bond. If the collateral is in the form of cash or a negotiable security, it shall not exceed fifty percent (50%) of the amount of the bond and no other collateral may be taken by the bondsman. If the collateral is a mortgage on real property, the mortgage may not exceed one hundred percent (100%) of the amount of the bond. If

the collateral is a lien on a vehicle or other personal property, it may not exceed one hundred percent (100%) of the bond. If the bond is forfeited, the bondsman must return any collateral in excess of the amount of indemnification and the premium authorized by the superintendent of insurance.

[Adopted, effective October 1, 1987; as amended, effective September 1, 1990.]

ANNOTATIONS

Cross references. — For acceptance of bail by designee, see 31-3-1 NMSA 1978.

For Bail Bondsmen Licensing Act, see Chapter 59A, Article 51 NMSA 1978.

5-402. Release; during trial, pending sentence, motion for new trial and appeal.

A. **Release during trial.** A person released pending trial under Rule 5-401 shall continue on release under the same terms and conditions as previously imposed, unless the court determines that other terms and conditions or termination of release are necessary to assure his presence during the trial or to assure that his conduct will not obstruct the orderly administration of justice.

B. **Release pending sentencing.** A person released pending or during trial may continue on release pending the imposition of sentence under the same terms and conditions as previously imposed, unless the surety has been released or the court has determined that other terms and conditions or termination of release are necessary to assure:

(1) that such person will not flee the jurisdiction of the court;

(2) that his conduct will not obstruct the orderly administration of justice; or

(3) that the person does not pose a danger to any other person or to the community.

C. **Release after sentencing.** After imposition of a judgment and sentence, the court, upon motion of the defendant, may establish conditions of release pending appeal or a motion for new trial. The court may utilize the criteria listed in Paragraph B of Rule 5-401, and may also consider the fact of defendant's conviction and the length of sentence imposed. The defendant shall be detained unless the district court after a hearing determines that the defendant is not likely to flee and does not pose a danger to the safety of any other person or the community if released. In the event the court requires a bail bond in the same amount as that established for release pending trial, the bond previously furnished shall continue pending appeal or disposition of a motion for a new trial, unless the surety has been discharged by order of the court. Nothing in

this rule shall be construed as prohibiting the judge from increasing the amount of bond on appeal.

D. **Revocation of bail or modification of conditions of release pending appeal.** The taking of an appeal does not deprive the district court of jurisdiction under Rule 5-403, and the state may file a motion in the district court for revocation of bail or modification of conditions of release on appeal.

[As amended, effective October 15, 1986.]

Committee commentary. — Paragraph A of this rule is substantially similar to Rule 46(b) of the Federal Rules of Criminal Procedure. Under most circumstances, the defendant will have had conditions of release set by the magistrate at the initial appearance. This rule makes it clear that when the case is transferred to the district court directly after a preliminary hearing or indirectly by the filing of an indictment, the district court need not set new conditions of release. However, the rule also allows the district court to set other conditions at the time of trial under certain circumstances.

Paragraph C of this rule was added in 1975. The former rule provided that release should automatically continue pending appeal under the same terms and conditions previously imposed, unless the court determined that other conditions were necessary. The amended rule requires a motion for bail following the imposition of sentence and specifies the criteria which may be considered in setting bail for an appeal or if a motion for a new trial is pending. The amended rule preserves the original intent of the rule by allowing a defendant to proceed without a new bond pending appeal if the surety has not been discharged and the court does not set a higher bond. In addition, Paragraph C of this rule incorporates the provisions of former Subdivision (d) of this rule, requiring a bond only for the additional amount if the court decides to increase the amount of the bond.

The amended rule also requires a new determination of bail for a new trial. The conditions of release for an appeal might well be different than the conditions imposed for a new trial. Therefore, the district court, under Rule 5-401, may set new conditions of release when a new trial is granted.

The rule was also amended to provide for revocation or modification of conditions of release while the case is on appeal. New Paragraph D of this rule allows the state to seek revocation or modification under Rule 5-401. See commentary to Rule 5-401.

ANNOTATIONS

Defendant is not automatically entitled to release under same terms and conditions that were previously imposed pending or during trial after he has been adjudicated guilty but not yet sentenced. State v. Valles, 2004-NMCA-118, 136 N.M. 429, 99 P.3d 1164.

Release of surety. — By its terms, this rule recognizes that a surety may be released upon a finding of guilt. State v. Valles, 2004-NMCA-118, 136 N.M. 429, 99 P.3d 1164.

Release pending motion for new trial. — An individual has a qualified right to release pending a motion for a new trial, even after appellate affirmance of a conviction. Such a right, however, can be invoked only by a timely motion for a new trial, and by a motion for release pending a motion for a new trial duly filed and served in the manner required by this rule. In re Martinez, 99 N.M. 198, 656 P.2d 861 (1982).

Jurisdiction to revoke appeal bond. — Section 31-11-1C NMSA 1978 denied an appeal bond unless and until the court had a hearing and made specific findings; therefore, Paragraph C of this rule allowed the district court to establish conditions of release pending appeal or a motion for a new trial. State v. Rivera, 2003-NMCA-059, 133 N.M. 571, 66 P.3d 344, rev'd on other grounds, 2004-NMSC-001, 134 N.M. 768, 82 P.3d 939.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 775 to 778, 780 to 784.

Bail: duration of surety's liability on posttrial bail bond, 32 A.L.R.4th 575.

What is "a substantial question of law or fact likely to result in reversal or an order for a new trial" pursuant to 18 USCS § 3143(b)(2) respecting bail pending appeal, 79 A.L.R. Fed. 673.

22A C.J.S. Criminal Law § 419 et seq.

5-403. Revocation of release.

A. **Procedure; custody of defendant.** The court on its own motion or upon motion of the district attorney may at any time have the defendant arrested to review conditions of release. Upon review the court may:

(1) impose any of the conditions authorized under Paragraph A or C of Rule 5-401; or

(2) after a hearing and upon a showing that the defendant has been indicted or bound over for trial on a charge constituting a serious crime allegedly committed while released pending adjudication of a prior charge, revoke the bail or release.

B. **Appeal from review.** A person may appeal pursuant to Rule 5-405, if:

(1) after twenty-four (24) hours from the time of the imposition of the new conditions the person continues to be detained as a result of his inability to meet the new conditions of release; or

(2) the person is ordered released on a condition which requires that such person return to custody after specified hours.

C. **Record of review.** If the court, after a hearing pursuant to Subparagraph (2) of Paragraph A of this rule, enters an order imposing new conditions, the defendant shall be entitled, upon application, to a review of such conditions pursuant to Rule 5-401 and may appeal from such review pursuant to Rule 5-405, provided that, in such review, the court shall consider the record of any hearing held pursuant to this rule and any additional evidence the court may permit.

D. **Evidence.** Information stated in, or offered in connection with, any order entered pursuant to this rule need not conform to the Rules of Evidence.

[As amended, effective September 1, 1990.]

Committee commentary. — This rule grants broad latitude to the court to revoke the release of an accused person if circumstances arising after the initial release indicate that the defendant's release should not be continued. The rule was derived from the American Bar Association Standards Relating to Pretrial Release, Section 5.8 (Approved Draft 1968). It incorporates New Mexico case law holding that notice and hearing are required prior to a revocation of bail. See Tijerina v. Baker, 78 N.M. 770, 438 P.2d 514 (1968). See generally, Comment, Criminal Procedure - Preventive Detention in New Mexico, 4 N.M.L. Rev. 247 (1974).

The 1975 amendment to Rule 5-402 makes it clear that this rule may be invoked while the defendant is appealing his conviction. See Rule 5-402 and commentary.

ANNOTATIONS

Cross references. — For encouraging violation of bail as a misdemeanor, see 30-22-18 NMSA 1978.

This rule grants broad latitude to the trial court to revoke the release of an accused person if circumstances arising after the initial release indicate the release should not be continued. Exercise of that discretion provides no basis for disqualification. State v. Corneau, 109 N.M. 81, 781 P.2d 1159 (Ct. App. 1989).

Revocation proper although defendant had not been charged, arrested, indicted or bound over for any crime allegedly committed while he was released. State v. David, 102 N.M. 138, 692 P.2d 524 (Ct. App. 1984).

Law reviews. — For comment, "Criminal Procedure - Preventive Detention in New Mexico," see 4 N.M.L. Rev. 247 (1974).

For comment, "The Constitution Is Constitutional - A Reply to the Constitutionality of Pretrial Detention Without Bail in New Mexico," see 13 N.M.L. Rev. 145 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 8A Am. Jur. 2d Bail and Recognizance §§ 1, 14, 31, 77, 92, 104, 106, 143, 144, 146 to 148 .

Bail: duration of surety's liability on posttrial bail bond, 32 A.L.R.4th 575.

5-404. Bail for witness.

If it appears by affidavit that the testimony of a person is material in any felony proceeding and that it may become impracticable to secure his presence by subpoena, the court may require such person to give bail for his appearance as a witness. If the witness is not in court, a warrant for his arrest may be issued and upon return thereof the court may require him to give bail as provided in Rule 5-401 for his appearance as a witness. If a witness fails to give bail, he may be committed to the custody of the sheriff for a period not to exceed five (5) days, within which time his deposition shall be taken as provided in Rule 5-503. The court upon good cause shown may extend the time for taking such depositions for an additional period not exceeding five (5) days. Only in a capital, first or second degree felony case shall any surety be required for the bail of a witness.

Committee commentary. — The deposition of a material witness may be taken and can be introduced at trial pursuant to Rule 5-503.

The release of a material witness is handled generally in the same manner as one accused of an offense. There are two important exceptions: (1) the witness may not be held in custody for more than five (5) days, unless the time is extended to ten (10) days; and (2) unless the criminal offense charged is a capital, first or second degree felony, conditions may not be imposed which would require the witness to post a surety bond. See 31-3-7 NMSA 1978.

ANNOTATIONS

Cross references. — For bail for witnesses, see 31-3-7 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 1160, 1161, 1163 to 1167.

97 C.J.S. Witnesses §§ 6 to 16.

5-405. Appeal from orders regarding release.

A. **Right of appeal.** If after a hearing by the district court pursuant to Paragraphs E or F of Rule 5-401:

(1) the defendant is detained or continues to be detained because of a failure to meet a condition imposed; or

(2) the requirement to return to custody after specified hours is continued, the defendant may appeal such order to the Supreme Court or Court of Appeals, as jurisdiction may be vested by law, in accordance with the Rules of Appellate Procedure.

B. **Stay of proceedings.** An appeal pursuant to this rule does not stay proceedings in the district court.

[As amended, effective September 1, 1990; March 1, 1995.]

Committee commentary. — This rule as amended continues the same criteria for an appeal, i.e., when conditions of release have been imposed:

(1) which result in the continued detention of the defendant;

(2) which require the defendant to return to custody after specified hours; or

(3) which are designed to assure the orderly administration of justice under Paragraph C of Rule 5-401.

ANNOTATIONS

Cross references. — For procedure for appeal under this rule, see Rule 12-204 NMRA.

The 1995 amendment, effective March 1, 1995, deleted former Paragraph B, which read: "**Habeas corpus.** A defendant must exhaust his remedy under this rule before applying for a writ of habeas corpus", and redesignated former Paragraph C as Paragraph B.

Review of motion to reduce bond is unwarranted on appeal from conviction because the trial court's ruling on bond has no relation to the merits of the appeal. State v. Smith, 92 N.M. 533, 591 P.2d 664 (1979).

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

5-406. Bail bonds; exoneration; forfeiture.

A. **Exoneration of bond.** Unless otherwise ordered for good cause, a bond shall only be automatically exonerated:

(1) after twelve (12) months if the crime is a felony and no charges have been filed in the district court;

(2) after six (6) months if the crime is a misdemeanor or petty misdemeanor and no charges have been filed;

(3) at any time prior to entry of a judgment of default on the bond if the district attorney approves; or

(4) upon surrender of the defendant to the court by an unpaid surety.

B. **Surrender of an offender by a paid surety.** A person who is released upon execution of a bail bond by a paid surety may be arrested by the paid surety if the court has revoked the defendant's conditions of release pursuant to Rule 5-403 or if the court has declared a forfeiture of the bond pursuant to the provisions of this rule. If the paid surety delivers the defendant to the court prior to the entry of a judgment of default on the bond, the court may absolve the bondsman of responsibility to pay all or part of the bond.

C. **Forfeiture.** If there is a breach of condition of a bond, the court may declare a forfeiture of the bail. If a forfeiture has been declared, the court shall hold a hearing on the forfeiture prior to entering a judgment of default on the bond. A hearing on the forfeiture shall be held thirty (30) or more days after service of the Notice of Forfeiture and Order to Show Cause on the clerk of the court in the manner provided by Rule 5-407.

D. **Setting aside forfeiture.** The court may direct that a forfeiture be set aside in whole or in part upon a showing of good cause why the defendant did not appear as required by the bond or if the defendant is surrendered by the surety into custody prior to the entry of a judgment of default on the bond. Notwithstanding any provision of law, no other refund of the bail bond shall be allowed.

E. **Default judgment; execution.** If, after a hearing, the forfeiture is not set aside, a default judgment on the bond shall be entered by the court. If the default judgment is not paid within ten (10) days after it is filed and served on the surety in the manner provided by Rule 5-407, execution may issue thereon.

[Adopted, effective October 1, 1987.]

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — Forfeiture of bail for breach of conditions of release other than that of appearance, 68 A.L.R.4th 1082.

5-407. Bail bonds; notice.

By entering into a bond in accordance with the provisions of these rules, the obligors submit to the jurisdiction of the court and irrevocably appoint the clerk of the court as their agent upon whom any papers affecting their liability may be served. Their liability may be enforced on motion of the district attorney or upon the court's own motion without the necessity of an independent action. The motion and such notice of the

motion as the court prescribes may be served on the clerk of the court who shall forthwith mail copies to the obligors at their last known addresses.

[Adopted, effective October 1, 1987.]

ARTICLE 5
Discovery

5-501. Disclosure by the state.

A. **Information subject to disclosure.** Unless a shorter period of time is ordered by the court, within ten (10) days after arraignment or the date of filing of a waiver of arraignment, subject to Paragraph E of this rule, the state shall disclose or make available to the defendant:

(1) any statement made by the defendant, or codefendant, or copies thereof, within the possession, custody or control of the state, the existence of which is known, or by the exercise of due diligence may become known, to the district attorney;

(2) the defendant's prior criminal record, if any, as is then available to the state;

(3) any books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the state, and which are material to the preparation of the defense or are intended for use by the state as evidence at the trial, or were obtained from or belong to the defendant;

(4) any results or reports of physical or mental examinations, and of scientific tests or experiments, including all polygraph examinations of the defendant and witnesses, made in connection with the particular case, or copies thereof, within the possession, custody or control of the state, the existence of which is known, or by the exercise of due diligence may become known to the prosecutor;

(5) a written list of the names and addresses of all witnesses which the prosecutor intends to call at the trial, together with any statement made by the witness and any record of prior convictions of any such witness which is within the knowledge of the prosecutor; and

(6) any material evidence favorable to the defendant which the state is required to produce under the due process clause of the United States Constitution.

B. **Examination by defendant.** The defendant may examine, photograph or copy any material disclosed pursuant to Paragraph A of this rule.

C. **Depositions.** The state may move the court to perpetuate the testimony of any such witness by taking the witness' deposition pursuant to Rule 5-503 NMRA.

D. **Certificate of compliance.** The prosecutor shall file with the clerk of the court at least ten (10) days prior to trial a certificate stating that all information required to be produced pursuant to Paragraph A of this rule has been produced, except as specified. The certificate shall contain an acknowledgement of the continuing duty to disclose additional information. If information specifically excepted from the certificate is furnished by the prosecutor to the defendant after the filing of the certificate, a supplemental certificate shall be filed with the court setting forth the material furnished. A copy of the certificate and any supplemental certificate shall be served on the defendant.

E. **Disclosures for enhanced sentences.** If the state intends to use a prior criminal conviction to enhance a sentence, the state shall provide or make available to the defendant certified copies or other proof of any prior conviction to be offered during the sentencing hearing.

F. **Information not subject to disclosure.** The prosecutor shall not be required to disclose any material required to be disclosed by this rule if:

(1) the disclosure will expose a confidential informer; or

(2) there is substantial risk to some person of physical harm, intimidation, bribery, economic reprisals or unnecessary annoyance or embarrassment resulting from such disclosure, which outweighs any usefulness of the disclosure to defense counsel.

G. **Statement defined.** As used in this rule, and Rules 5-502 and 5-503, "statement" means:

(1) a writing made by a person having percipient knowledge of relevant facts and which contains such facts, other than drafts or notes that have been incorporated into a subsequent draft or final report; or

(2) any written, stenographic, mechanical, electrical or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral declaration and which is recorded contemporaneously with the making of the oral declaration.

H. **Failure to comply.** If the state fails to comply with any of the provisions of this rule, the court may enter an order pursuant to Rule 5-505 NMRA or hold the prosecutor in contempt or take other disciplinary action pursuant to Rule 5-112 NMRA.

[As amended, effective December 1, 1998; as amended by Supreme Court Order 07-8300-02, effective March 15, 2007.]

Committee commentary. — This rule was derived from Rule 16(a) of the Federal Rules of Criminal Procedure. See generally, 62 F.R.D. 271, 304-313 (1974); 48 F.R.D. 553, 587-606 (1970).

This rule and Rule 5-502 require the prosecution and the defense to exchange certain information. Judicial involvement should be in the rare case.

Subparagraph (6) of Paragraph A of this rule was added in 1979 to make it clear that the state has a duty to provide the defense with exculpatory material evidence. See Brady v. Maryland, 373 U.S. 83 (1963) and Giles v. Maryland, 386 U.S. 66 (1967). Failure to produce such evidence may result in the entry of an order pursuant to Rule 5-505 or if discovered after trial in a new trial unless the nondisclosure constitutes harmless error. See Paragraph A of Rule 5-113 and United States v. Agurs, 427 U.S. 97 (1976).

There are a number of supreme court decisions recognizing the duty of the prosecutor to produce evidence which is material and exculpatory. See for example: Trimble v. State, 75 N.M. 183, 402 P.2d 162 (1965) (loss of certain letters and erasure of parts of tape held violation of due process of law); State v. Gomez, 75 N.M. 545, 408 P.2d 48 (1965) (failure, upon request, to disclose contents of supplemental police report held reversible error); State v. Morris, 69 N.M. 244, 365 P.2d 668 (1961) (failure to produce letter prior to trial held not suppression of material evidence requiring reversal); Chacon v. State, 88 N.M. 198, 539 P.2d 218 (Ct. App. 1975) (negligent nondisclosure of supplemental police report and statement of a witness misfiled in the district attorney's office found to be material evidence and reversible error); State v. Vigil, 79 N.M. 80, 439 P.2d 729 (Ct. App. 1968) (nondisclosure of evidence held not reversible error when defendant knew the evidence was in possession of the state and made no demand for its production); and State v. Turner, 81 N.M. 571, 469 P.2d 720 (Ct. App. 1970) (there must be particularized need for materials not produced for there to be reversible error).

Some of the appellate court decisions announced since the adoption of Subparagraph (5) of Paragraph A of this rule have not always indicated that the rule was being construed. Relying on a prerule decision, State v. Herrera, 84 N.M. 365, 503 P.2d 648 (Ct. App. 1972) holds that the defendant is entitled to statements of the witness, in that case a police report. State v. Vigil, 87 N.M. 345, 533 P.2d 578 (1975) holds that, once the witness has testified at trial the defendant is entitled to a copy of a written statement submitted by the witness to the grand jury. Subparagraph (5) of Paragraph A of this rule may require the statement of the witness to be disclosed prior to his testifying. (See Rule 5-506.)

In State v. Sparks, 85 N.M. 429, 512 P.2d 1265 (Ct. App. 1973), the court noted that this rule did not give the defendant a right to testimony of a witness before the grand jury. However, the court then held that the constitutional right to confrontation gave the defendant the right to the transcribed testimony for use in cross examination of the witness once the witness had testified. In State v. Felter, 85 N.M. 619, 515 P.2d 138 (1973), the supreme court made it clear that, absent some showing of particularized

need, the defendant is not entitled to a copy of the grand jury testimony before the witness has testified at trial.

In State v. Quintana, 86 N.M. 666, 526 P.2d 808 (Ct. App.), cert. denied, 86 N.M. 656, 526 P.2d 798 (1974), the court held that the failure of the state to "strictly comply" with Subparagraph (5) of Paragraph A of this rule was not reversible error without a showing that substantial rights of the defendant had been prejudiced. In State v. Billington, 86 N.M. 44, 519 P.2d 140 (Ct. App. 1974), the court held that failure of the state to comply with the rule was grounds for continuance of the trial as a matter of law. The cases might be reconciled on the basis of the importance of the witnesses whose names were not disclosed by the state in each case.

Paragraph D of this rule (prior to the 1980 amendment) was derived from Rule 34(b) of the Federal Rules of Civil Procedure, the procedure for production of documents and things and entry upon land for inspection. Paragraph E of this rule was derived from American Bar Association Standards Relating to Discovery and Procedure Before Trial, Section 2.5 (Approved Draft 1970).

On the privilege of the state to refuse to disclose the identity of an informer, see Rule 11-510. See also, State v. Bauske, 86 N.M. 484, 525 P.2d 411 (Ct. App. 1974).

ANNOTATIONS

I. GENERAL CONSIDERATION.

Cross references. — For record of grand jury testimony, see Rule 5-506 NMRA and 31-6-8 NMSA 1978.

For subsequent stalking offenses, see 30-3A-3.1 NMSA 1978.

For subsequent robbery offenses, see 30-16-2 NMSA 1978.

For subsequent offenses under Riot Control Act, see 30-20-8 NMSA 1978.

For subsequent convictions as drug percursor, see 30-31B-12 NMSA 1978.

For subsequent convictions for illegal use of telephone devices, see 30-33A-4 NMSA 1978.

For sentencing of habitual offenders, see 31-18-18 to 31-18-20 NMSA 1978.

For imposition of an enhanced penalty for a second of subsequent driving while under the influence of alcohol or drugs see, 66-8-102 NMSA 1978.

For forms on certificate and supplemental certificate of disclosure of information, see Rules 9-412 and 9-413 NMRA.

The 1998 amendment, effective December 1, 1998, added present Paragraph E and redesignated former Paragraphs E through G as Paragraphs F through H.

The 2007 amendment, effective March 15, 2007, rewrote Paragraph G to limit the scope of the definition of "statement" to verbatim recordings and to exclude notes which are in substance recitals of oral statements. *See State v. Blackmer*, 2005-NMSC-008, ¶ 26, 137 N.M. 258, 110 P.3d 66.

Definition of "statement" in Paragraph G of this rule is broad. State v. Blackmer, 2005-NMSC-008, 137 N.M. 258, 110 P.3d 66.

Despite the breadth of the definition of "statement", there are limits on the state's duty to disclose witness' statements. State v. Blackmer, 2005-NMSC-008, 137 N.M. 258, 110 P.3d 66.

An undocumented statement is not within the definition of "statement" in Paragraph G of this rule. State v. Blackmer, 2005-NMSC-008, 137 N.M. 258, 110 P.3d 66.

Dismissal with prejudice for failure to comply with discovery order. — Where defendant was stopped for driving while intoxicated; there was a gap of six minutes in the videotape of the stop; defendant sought specific discovery of the arresting officer's private cell phone records for the time of the six-minute gap; defendant showed that the cell phone records were in the control of the state, because they were in the possession of the officer during the time in question; defendant showed that the cell phone records were potentially material to the defense given that the records might contain information indicating why the officer stopped defendant; defendant showed that denial of the discovery was prejudicial in that the information was material to the defense of unlawful stop, but not produced, defendant would be denied the opportunity to prove an unlawful stop and obtain suppression relief; the district court ordered the state to determine the existence of records within the state's control and produce the records or make them available for an in camera review and permitted the state to seek protection from production based on lack of relevance or confidentiality; and the state refused to comply with the court's discovery order, the court did not abuse its discretion in dismissing the case with prejudice. State v. Ortiz, 2009-NMCA-092, __ N.M. __, __ P.3d __.

Deprivation of evidence. — Where defendant claims that he is prejudiced by late disclosure of witnesses and documents, defendant must demonstrate that the state breached a duty or intentionally deprived defendant of evidence; that the evidence was material because there is a reasonable probability that had the evidence been disclosed, the result of the proceedings would have been different; that the non-disclosure of the evidence prejudiced the defendant because defendant's case would have been improved by an earlier disclosure or that it would have been prepared differently for trial; and that the district court did not cure the failure to timely disclose the evidence. State v. Duarte, 2007-NMCA-012, 140 N.M. 930, 149 P.3d 1027; State v. Ruiz, 2007-NMCA-014, 141 N.M. 53, 150 P.3d 1003, cert. denied, 2007-NMCERT-001.

Victim advocate employed by district attorney's office is part of the prosecution team. State v. Blackmer, 2005-NMSC-008, 137 N.M. 258, 110 P.3d 66.

Purpose of rule is: (1) to facilitate plea discussions; (2) to facilitate preparation for cross-examination; and (3) to allow the taking of a deposition or statement. State v. Quintana, 86 N.M. 666, 526 P.2d 808 (Ct. App.), cert. denied, 86 N.M. 656, 526 P.2d 798 (1974).

This rule governs discovery disclosure by the State. State v. McDaniel, 2004-NMCA-022, 135 N.M. 84, 84 P.3d 701, cert. denied, 2004-NMCERT-002.

The three-part test under which a conviction must be reversed includes three elements: (1) the state either breached some duty or intentionally deprived the defendant of evidence; (2) the improperly "suppressed" evidence was material; and (3) the suppression of this evidence prejudiced the defendant. Where the state initially deprives the defendant of evidence but then later produces the evidence, a fourth consideration is necessary; namely, whether the failure to timely disclose the evidence was cured by the trial court. State v. Sandoval, 99 N.M. 173, 655 P.2d 1017 (1982).

Prejudice part of the test to obtain reversal for a violation of this rule requires the court to assess whether the omitted evidence created a reasonable doubt which did not otherwise exist. State v. Clark, 105 N.M. 10, 727 P.2d 949 (Ct. App. 1986).

Destruction of evidence. — Destruction of seized marijuana by a federal agency did not prejudice defendant because she essentially did not lose the benefit of a defense without the evidence. State v. Sanchez, 1999-NMCA-004, 126 N.M. 559, 972 P.2d 1150.

Delay in disclosing evidence. — Where delay in conducting scientific tests was caused by a combination of factors, including defendant's unavailability prior to his arrest, the state's workload, and the complexity of the testing, the state did not breach its duty to disclose test results in a timely fashion once they were available. State v. Rojo, 1999-NMSC-001, 126 N.M. 438, 971 P.2d 829.

Negligent noncompliance punishable. — The state can be found to be in contempt not only for wilful noncompliance with this rule but also for negligent noncompliance. State v. Wisniewski, 103 N.M. 430, 708 P.2d 1031 (1985).

Waiver of trial court error by compromise. — Record of trial revealing that defense counsel raised objection for failure to order state to furnish information of the beginning of the trial and counsel's acceptance of compromise on this point constitutes a waiver by defendant of the trial court's failure to order the state to furnish information at the beginning of the trial. State v. Snow, 84 N.M. 399, 503 P.2d 1177 (Ct. App.), cert. denied, 84 N.M. 390, 503 P.2d 1168 (1972) (decided under former law).

Sufficiency of indictment. — Indictments alleging fraud filed against several defendants were not vague and adequately apprised them of the specific charges against them, where the defendants had access to the grand jury proceedings, the prosecutor notified them that the state's file was open for their examination, and the state filed a statement of facts in response to defendants' motion that it be required to identify those practices, representations, or matters of conduct which were alleged to have been fraudulent. State v. Crews, 110 N.M. 723, 799 P.2d 592 (Ct. App. 1989).

Availability of discovery at probation revocation hearing. — A probationer was entitled to reasonable discovery, including disclosure of adverse witnesses, prior to a probation revocation hearing. State v. DeBorde, 1996-NMCA-042, 121 N.M. 601, 915 P.2d 906.

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

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

For annual survey of New Mexico law relating to evidence, see 12 N.M.L. Rev. 379 (1982).

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

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 1258 to 1262; 23 Am. Jur. 2d Depositions and Discovery § 1 et seq.

Right of accused in state courts to inspections or disclosure of evidence in possession of prosecution, 7 A.L.R.3d 8.

Right of defendant in criminal case to inspection of statement of prosecution's witness for purposes of cross-examination or impeachment, 7 A.L.R.3d 181.

Right of accused in state courts to inspection or disclosure of tape recording of his own statements, 10 A.L.R.4th 1092.

Accused's right to production of composite drawing of subject, 13 A.L.R.4th 1360.

Exclusion of evidence in state criminal action for failure of prosecution to comply with discovery requirements as to physical or documentary evidence or the like - modern cases, 27 A.L.R.4th 105.

Right of accused in state courts to have expert inspect, examine, or test physical evidence in possession of prosecution - modern cases, 27 A.L.R.4th 1188.

Exclusion of evidence in state criminal action for failure of prosecution to comply with discovery requirements as to statements made by defendants or other nonexpert witnesses - modern cases, 33 A.L.R.4th 301.

What is accused's "statement" subject to state court criminal discovery, 57 A.L.R.4th 827.

Failure of police to preserve potentially exculpatory evidence as violating criminal defendant's rights under state constitution, 40 A.L.R.5th 113.

Failure of state prosecutor to disclose exculpatory photographic evidence as violating due process, 93 A.L.R.5th 527.

Use of Freedom of Information Act (5 USCS § 552) as substitute for, or as means of, supplementing discovery procedures available to litigants in federal civil, criminal, or administrative proceedings, 57 A.L.R. Fed. 903.

Constitutional duty of federal prosecutor to disclose Brady evidence favorable to accused, 158 A.L.R. Fed. 401.

21A C.J.S. Criminal Law §§ 792, 793, 816; 23 C.J.S. Depositions and Discovery § 108 et seq.

II. INFORMATION SUBJECT TO DISCLOSURE.

Work product. — The New Mexico rules for criminal procedure contain no general rule protecting discovery of work product. State v. Blackmer, 2005-NMSC-008, 137 N.M. 258, 110 P.3d 66.

The criminal procedure rules expressly protect some defense counsel work product but do not expressly protect a prosecutor's work product. State v. Blackmer, 2005-NMSC-008, 137 N.M. 258, 110 P.3d 66.

Material that is opinion work product should have the same protection in criminal actions as in civil actions; that material enjoys nearly absolute immunity. State v. Blackmer, 2005-NMSC-008, 137 N.M. 258, 110 P.3d 66.

Inclusion of undocumented verbal assertions within the scope of the authorized interview of the victim by a victim advocate goes beyond the rule. State v. Blackmer, 2005-NMSC-008, 137 N.M. 258, 110 P.3d 66.

This rule broadens the right of discovery. State v. Sparks, 85 N.M. 429, 512 P.2d 1265 (Ct. App. 1973).

Evidence which the state intends to use at trial must be disclosed. State v. Clark, 105 N.M. 10, 727 P.2d 949 (Ct. App. 1986).

District attorney should not hesitate to show his entire file to defendant, as it is the district attorney's primary duty to see that the defendant has a fair trial and that justice is done. State v. Manus, 93 N.M. 95, 597 P.2d 280 (1979).

Prosecution did not violate this rule when it failed to turn over material it neither possessed nor controlled and because the prosecution was not in control of the material, it was error for the trial court to hold them responsible for the delay in producing the discovery. State v. Jackson, 2004-NMCA-057, 135 N.M. 689, 92 P.3d 1263, cert. granted, 2004-NMCERT-005.

There is no reversible error absent showing of prejudice by the state's nondisclosure of information, and the burden is on defendant to show that he has been prejudiced by the nondisclosure. State v. Perrin, 93 N.M. 73, 596 P.2d 516 (1979).

Right to testimony of witness before grand jury. — This rule gives a defendant the right to "any recorded testimony of the defendant before a grand jury", but no parallel right is accorded for the testimony of a witness before the grand jury. Once witness has testified at criminal trial, about that which he testified before the grand jury, the accused is entitled to examination of that witness's grand jury testimony relating to the crime. State v. Sparks, 85 N.M. 429, 512 P.2d 1265 (Ct. App. 1973).

Once the witness has testified at the criminal trial about that which he testified before the grand jury, the accused is entitled to an order permitting examination of that portion of the witness' grand jury testimony relating to the crime for which defendant is charged; however, the accused's examination of the grand jury testimony of the witness should be confined to matters relating to the offense with which the accused is charged and for which he is being tried, and about which the witness testified before the grand jury. State v. Vigil, 85 N.M. 735, 516 P.2d 1118 (1973).

Defendant, at criminal trial, is entitled to inspect grand jury testimony of state's witnesses where prosecutor calls state's witnesses and uses grand jury testimony as basis for his questions. State v. Morgan, 67 N.M. 287, 354 P.2d 1002 (1960) (decided under former law).

Reference to grand jury testimony. — Mere reference to the fact that the witness had previously testified before the grand jury does not constitute a use of the prior testimony entitling defendant to grand jury testimony. State v. Baca, 85 N.M. 55, 508 P.2d 1352 (Ct. App. 1973) (decided under former law).

Solution to problem of availability of grand jury testimony is found in 31-6-8 NMSA 1978. State v. Felter, 85 N.M. 619, 515 P.2d 138 (1973).

Limited right to discovery under former law. — Prior to enactment of these rules, there was no right to discovery by a defendant in criminal proceedings under New Mexico statutes or rules. Discovery was accorded only where to deny it would have deprived a defendant of a constitutional right, and where a particularized need had been

demonstrated. State v. Turner, 81 N.M. 571, 469 P.2d 720 (Ct. App. 1970) (decided under former law).

Scope of duty to produce information. — Under Subdivision (a)(5) (see now Paragraph A(3)) the district attorney must, upon request of the defendant, produce any of the described items which are favorable or unfavorable to the defendant, but which are necessary or essential in aiding the defendant in the preparation of his defense, i.e., which bear upon the guilt or innocence of the accused. The district attorney cannot hide behind negligent or deliberate suppression of any one of the items described nor should he hesitate to show his entire file to the defendant, since it is not the primary duty of the district attorney to convict a defendant, but to see that the defendant has a fair trial and that justice is done. Chacon v. State, 88 N.M. 198, 539 P.2d 218 (Ct. App. 1975).

The state has a duty to disclose material evidence favorable to the defendant, of which it has knowledge. The defendant also has a corresponding duty to make available to the prosecution his or her list of witnesses and such documents and papers and reports which he or she intends to use as evidence at trial, and there shall be a continuing duty of disclosure on both of the parties. State v. Stephens, 99 N.M. 32, 653 P.2d 863 (1982).

The state must disclose items which are material to the preparation of the defense. State v. Clark, 105 N.M. 10, 727 P.2d 949 (Ct. App. 1986).

Rule does not provide for discovery of criminal record of decedent of whose murder defendant is charged. State v. Marquez, 87 N.M. 57, 529 P.2d 283 (Ct. App.), cert. denied, 87 N.M. 47, 529 P.2d 273 (1974).

Other police investigations. — Defendant had no right to disclosure of police investigations of other murders, which he sought to show were linked to the murder for which he was convicted. State v. Brown, 1998-NMSC-037, 126 N.M. 338, 969 P.2d 313.

Accused must show more than mere desire for all prosecution's information. — For an accused to be granted the right to inspect evidence in the possession of the prosecution, he must show something more than a mere desire for all the information obtained by the prosecution. State v. Tackett, 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).

Physical delivery not contemplated. — This rule does not necessarily contemplate the physical delivery of items into the hands of defense counsel, rather it contemplates a request specifying a reasonable time, place and manner of making the inspection and performing the related acts, and where the defendant did not make such a request but instead went directly to the trial court and obtained an order which made no such specification, and took no steps to have the state produce and permit inspection of the items, he cannot complain. State v. Quintana, 86 N.M. 666, 526 P.2d 808 (Ct. App.), cert. denied, 86 N.M. 656, 526 P.2d 798 (1974).

Use of confidential records. — Records may be confidential as against the public at large but an inspection must be allowed when the defendant's guilt or innocence may hinge on whether the jury believes the arresting officer is the aggressor. State v. Pohl, 89 N.M. 523, 554 P.2d 984 (Ct. App. 1976).

Where defendant, in a prosecution for battery upon a peace officer, had shown two prior instances of the officers' alleged misconduct, her request for an in camera inspection by the judge of all records of internal affairs investigations concerning allegations of police brutality or excessive use of force which had been filed against the officer could not be called a fishing expedition, and the trial court erred in not conducting such an inspection to determine whether the files contained evidence relevant and material to the defense; the judgment was conditionally affirmed pending such a determination, since in the absence of a determination of what the files would have shown the court could not hold there was no prejudice. State v. Pohl, 89 N.M. 523, 554 P.2d 984 (Ct. App. 1976).

Effect of suppression of evidence. — Suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. State v. Turner, 81 N.M. 571, 469 P.2d 720 (Ct. App. 1970) (decided under former law).

The deliberate suppression by the prosecutor of evidence favorable to and requested by the accused violates due process when the evidence is material either to guilt or punishment. State v. Stephens, 99 N.M. 32, 653 P.2d 863 (1982).

Failure to comply not prejudicial. — The defendant was not prejudiced by the state's failure to disclose the plea agreement documents pursuant to this rule prior to offering them into evidence at the habitual offender hearing. State v. Roybal, 120 N.M. 507, 903 P.2d 249 (Ct. App. 1995).

Failure to comply not prejudicial where chemist's worksheets not submitted. — Defendant's claim on appeal that admission of a chemist's testimony concerning test results was plain error because the chemist did not bring his worksheets to court, thus denying defendant the right to cross-examine concerning underlying facts as authorized by the rules of evidence, was without merit, since defendant could have but did not inform himself of the contents of the worksheets by proceeding under this rule. State v. Carrillo, 88 N.M. 236, 539 P.2d 626 (Ct. App. 1975).

Or where blood test witness and copies not provided. — Despite the fact that the state verbally informed defense counsel of blood type test results, but did not list as a witness the agent who later testified about it, and did not provide written copies of the test results nor make specimens available for independent testing, the failure to comply with the rules was not prejudicial to the conduct of the defense. State v. Quintana, 86 N.M. 666, 526 P.2d 808 (Ct. App.), cert. denied, 86 N.M. 656, 526 P.2d 798 (1974).

Or evidence exculpating defendant. — Prior to enactment of rules of criminal procedure, court of appeals held that trial court did not err in denying defendant's motion for mistrial upon the ground that defendant did not know until near the end of the state's case that defendant's fingerprints had been sought and not found on the allegedly stolen car and an order had been granted to give defendant all exculpatory matter, where it was not shown that defendant was prejudiced in his defense, nor does it appear that defendant was denied the right to secure the presence at the trial of the officer who had unsuccessfully attempted to secure the fingerprints. State v. Sluder, 82 N.M. 755, 487 P.2d 183 (Ct. App. 1971) (decided under former law).

Data underlying furnished test report available but not requested. — Where during the state's opening argument the comment was made that primer residue had been found on defendant's hands, and defense counsel objected to the statement as "not true," claiming that the expert's report furnished to him concluded that the test on defendant was "negative," but the state explained that the raw test data, according to the expert, showed some residue, though insufficient to establish the results as "positive," a mistrial would not have been required if the motion had been made, as the state had furnished "any results or reports . . . of scientific tests," as required by this rule, and the underlying data was available if it, too, had been requested. State v. Hovey, 106 N.M. 300, 742 P.2d 512 (1987).

Court conducts in camera hearing to determine whether eyewitness' identity subject to disclosure. — Where an informer's testimony, pursuant to Rule 510, N.M.R. Evid. (see now Rule 11-510 NMRA), discloses the identity of a possible eyewitness to a crime, the trial court, under the disclosure requirements of Subdivision (e) (see now Paragraph E) of this rule and Rule 30, N.M.R. Crim. P. (see now Rule 5-505 NMRA), should conduct an in camera hearing to determine, first, whether the possible eyewitness would be able to give testimony that is relevant and helpful to the defense of the accused or is necessary to a fair determination of the defendant's guilt or innocence, and, second, whether disclosure would subject the possible eyewitness to a substantial risk of harm outweighing any usefulness of the disclosure to defense counsel. State v. Gallegos, 96 N.M. 54, 627 P.2d 1253 (Ct. App. 1981), overruled on other grounds State v. Martin, 101 N.M. 595, 686 P.2d 937 (1984).

Defendant not prejudiced by inadvertent nondisclosure of evidence. — Where after a tape was played to the jury, the state informed the court that the tape had not been available to the defendant in the police evidence locker, and that the tape had been given to the defendant in an inaudible form only, the trial court found that, although there was a technical violation of this rule, it was due to inadvertence and lack of communication, and that the defendant was not prejudiced by the nondisclosure of the tape. State v. McGee, 95 N.M. 317, 621 P.2d 1129 (Ct. App. 1980).

Hypnosis of witness must be disclosed. — It is incumbent upon either the prosecution or defense to disclose to opposing counsel that a witness called by a party has undergone hypnosis in order to facilitate memory recall. State v. Beachum, 97 N.M. 682, 643 P.2d 246 (Ct. App. 1981).

Lack of opportunity to interview witness held not grounds for continuance. — The trial court does not err in refusing to grant a mistrial or a continuance because defense counsel lacked an opportunity to interview a witness. State v. Ewing, 97 N.M. 484, 641 P.2d 515 (Ct. App. 1982).

Denial of in-camera inspection of police files. — Prior to enactment of rules of criminal procedure, court of appeals held that trial court did not err in denying defendant's motion for in-camera inspection of police files for purpose of identifying or of investigating officers, where defendant was accorded, by direct inquiry, the right he sought through an examination of police files. State v. Sluder, 82 N.M. 755, 487 P.2d 183 (Ct. App. 1971) (decided under former law).

Where undisclosed statement and report material. — An undisclosed witness statement which tended to corroborate defense witness as to how entry was obtained and tended to contradict the testimony of police witnesses, both in the case-in-chief and in rebuttal, as to the method of entry, was clearly material to that issue, as was an undisclosed supplemental police report which also tended to corroborate defense witnesses and to contradict the testimony of police witnesses that entry was by use of a pry bar. Chacon v. State, 88 N.M. 198, 539 P.2d 218 (Ct. App. 1975).

It was not error to refuse to require state to produce report not within its possession, custody or control. State v. Bustamante, 91 N.M. 772, 581 P.2d 460 (Ct. App. 1978).

Standard for determining right to new trial for violation. — Where a violation of Subdivision (a)(5) (see now Paragraph A(3)) is not discovered until after trial, the standards to be applied in determining whether defendant is entitled to a new trial because of nondisclosure are that the nondisclosed items must be material to the guilt or innocence of the accused, or to the penalty to be imposed, and furthermore, that nondisclosure of items material to the preparation of the defense is not reversible error in the absence of prejudice. Chacon v. State, 88 N.M. 198, 539 P.2d 218 (Ct. App. 1975).

In order to obtain a new trial for a violation of Subdivision (a)(5) (see now Paragraph A(3)), the nondisclosed items must be material to the guilt or innocence of the accused or to the penalty to be imposed, but where the nondisclosure does not prejudice the defendant, there are no grounds for reversal. State v. Smith, 92 N.M. 533, 591 P.2d 664 (1979).

III. LIST OF STATE WITNESSES.

Purpose of discovery allowed in rule is to assist defense counsel in the preparation of a defense by providing the opportunity to interview the government's witnesses. State v. Orona, 92 N.M. 450, 589 P.2d 1041 (1979).

Defendant does not have absolute and unlimited right of access to state's prospective witnesses. State v. Orona, 92 N.M. 450, 589 P.2d 1041 (1979).

But court may not absolutely restrict access without good cause shown. — In the absence of some demonstrable good cause, a trial court may not impose an absolute restriction on defense counsel's access to the state's prospective witnesses. State v. Orona, 92 N.M. 450, 589 P.2d 1041 (1979).

Failure to disclose no aid to defendant unless prejudice shown. — The failure of the state to disclose a witness will not aid the defendant unless he can show that he was prejudiced thereby. State v. Manus, 93 N.M. 95, 597 P.2d 280 (1979).

No prejudice where blood test witness not listed. — Despite the fact that the state verbally informed defense counsel of blood type test results, but did not list as a witness the agent who later testified about it, and did not provide written copies of the test results nor make specimens available for independent testing, nevertheless, the failure to comply with the rules was not prejudicial to the conduct of the defense. State v. Quintana, 86 N.M. 666, 526 P.2d 808 (Ct. App.), cert. denied, 86 N.M. 656, 526 P.2d 798 (1974).

Testimony of omitted witnesses to be important and critical. — The district attorney's failure to notify defendant's counsel in advance about two witnesses, one an employee of a funeral home whose testimony related solely to the chain of custody of the decedent's tee shirt, and a physician whose testimony as to the medical cause of death was merely technical and cumulative, although not in compliance with the rules and the court's order, was not prejudicial to the defense; before defendant can be prejudiced, the testimony of an omitted witness must be important and critical, not technical or cumulative. State v. Quintana, 86 N.M. 666, 526 P.2d 808 (Ct. App.), cert. denied, 86 N.M. 656, 526 P.2d 798 (1974).

Before a defendant can be prejudiced by the state's failure to disclose a witness until five days before trial, the testimony of the omitted witness must be important and critical, not technical and cumulative. State v. Hernandez, 104 N.M. 268, 720 P.2d 303 (Ct. App. 1986).

Where rule substantially complied with. — Where well before trial defense knew of the existence of the witnesses who were endorsed on the back of the information or who testified in pretrial proceedings, and counsel could have taken and in some instances did take statements or depositions of these witnesses to learn the substance of their testimony, this rule was substantially complied with. State v. Quintana, 86 N.M. 666, 526 P.2d 808 (Ct. App.), cert. denied, 86 N.M. 656, 526 P.2d 798 (1974).

Sanctions for failure to list witness. — Striking a key prosecution witness because of the failure of the state to include his name on pretrial witness lists was not an abuse of discretion. State v. Martinez, 1998-NMCA-022, 124 N.M. 721, 954 P.2d 1198.

Showing of prejudice sufficient to reverse order denying access. — To reverse an order denying a defendant access to state witnesses, no more prejudice need be shown than that the order may have made a potential avenue of defense unavailable to the defendant. State v. Orona, 92 N.M. 450, 589 P.2d 1041 (1979).

Rebuttal witnesses usually not in purview of rule. — As for whether rebuttal witnesses come within the purview of the witness list requirement of production of names and addresses of all witnesses to be called by the district attorney, the general rule seems to be that they do not, so long as the rebuttal is true rebuttal and not an attempt to present the state's case-in-chief in the rebuttal. State v. Manus, 93 N.M. 95, 597 P.2d 280 (1979).

Trial court may place limitations on use of previously recorded statement by a witness where the statement, unsworn, is full of defamatory comments concerning a number of persons and there is nothing indicating disclosure of the defamatory comments to anyone other than defendant and his counsel has any usefulness. State v. Davis, 92 N.M. 563, 591 P.2d 1160 (Ct. App. 1979).

Disclosure of prior arrests within judge's discretion. — Where the defendant is not entitled, under the rules, to information concerning prior arrests of all witnesses which the district attorney intends to call at trial and where the defendant does not provide any other basis which would entitle him to disclosure of such arrest records, disclosure must necessarily fall within the exercise of the judge's discretion. State v. Smith, 92 N.M. 533, 591 P.2d 664 (1979).

No misconduct in not listing address for transient. — Where the witness is a transient who moves around constantly, there is no misconduct by the prosecution in not listing an address for him. State v. Hutchinson, 99 N.M. 616, 661 P.2d 1315 (1983).

5-502. Disclosure by the defendant.

A. **Information subject to disclosure.** Unless a shorter period of time is ordered by the court, within thirty (30) days after the date of arraignment or filing of a waiver of arraignment or not less than ten (10) days before trial, whichever date occurs earlier, the defendant shall disclose or make available to the state:

(1) books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody or control of the defendant, and which the defendant intends to introduce in evidence at the trial;

(2) any results or reports of physical or mental examinations and of scientific tests or experiments, including all polygraph examinations of the defendant and witnesses, made in connection with the particular case, or copies thereof, within the possession or control of the defendant, which the defendant intends to introduce in evidence at the trial or which were prepared by a witness whom the defendant intends to call at trial if the results or reports relate to his testimony; and

(3) a list of the names and addresses of the witnesses the defendant intends to call at the trial, together with any statement made by the witness.

B. **Examination by state.** The state may examine, photograph or copy any material disclosed pursuant to Paragraph A of this rule.

C. **Information not subject to disclosure.** Except as to scientific or medical reports, this rule does not authorize the discovery or inspection:

(1) of reports, memoranda or other internal defense documents made by the defendant, his attorneys or agents, in connection with the investigation or defense of the case; or

(2) of statements made by the defendant to his agents or attorneys.

D. **Certificate of compliance.** The defendant shall file with the clerk of the court at least ten (10) days prior to trial a certificate stating that all information required to be produced pursuant to Paragraph A of this rule has been produced, except as specified. The certificate shall contain an acknowledgement of the continuing duty to disclose additional information. If information specifically excepted from the certificate is furnished by the defendant after the filing of the certificate, a supplemental certificate shall be filed with the court setting forth the material furnished. A copy of the certificate and any supplemental certificate shall be served on the state.

If the defendant fails to comply with any of the provisions of this rule, the court may enter an order pursuant to Rule 5-505 or hold the defendant or the defense counsel in contempt or take other disciplinary action pursuant to Rule 5-112.

Committee commentary. — This rule was derived from Rule 16(b) of the Federal Rules of Criminal Procedure. See generally, 62 F.R.D. 271, 306, 314-16 (1974); 48 F.R.D. 553, 607-09 (1970). Unlike its federal counterpart, this rule requires an exchange of information without a written request.

Although the defendant may not be compelled to produce evidence if it would result in a violation of his privilege against self-incrimination, this rule has been upheld as not contravening the privilege against self-incrimination or the right to due process of law guaranteed by the Fifth Amendment to the United States Constitution. Gray v. Sanchez, 86 N.M. 146, 520 P.2d 1091 (1974). See also, Jones v. Superior Court, 58 Cal.2d 56, 22 Cal. Rptr. 879, 372 P.2d 919 (1962); Prudhomme v. Superior Court, 2 Cal.3d 320, 85 Cal. Rptr. 129, 466 P.2d 673 (1970); Williams v. Florida, 399 U.S. 78, 90 S. Ct. 1893, 26 L. Ed. 2d 466 (1970); Wardius v. Oregon, 412 U.S. 470 (1973); United States v. Nobles, 422 U.S. 232, 955 S. Ct. 2160, 45 L. Ed. 2d 141 (1975).

See Paragraph F of Rule 5-501 for the definition of "statement" as used in this rule.

ANNOTATIONS

Cross references. — For disclosure by government, see Rule 5-501 NMRA.

For forms on certificate and supplemental certificate of disclosure of information, see Rules 9-412 and 9-413 NMRA.

Compiler's notes. — Paragraph C of this rule is similar to Rule 16(b)(2) of the Federal Rules of Criminal Procedure.

Defendant has a duty to disclose demonstrative evidence. State v. Ruiz, 2007-NMCA-014, 141 N.M. 53, 150 P.3d 1003, cert. denied, 2007-NMCERT-001.

Work product. — The criminal procedure rules expressly protect some defense counsel work product but do not expressly protect a prosecutor's work product. State v. Blackmer, 2005-NMSC-008, 137 N.M. 258, 110 P.3d 66.

Material that is opinion work product should have the same protection in criminal actions as in civil actions; that material enjoys nearly absolute immunity. State v. Blackmer, 2005-NMSC-008, 137 N.M. 258, 110 P.3d 66.

Constitutionality of rule. — This rule is not an unconstitutional violation of U.S. Const., amend. V. Gray v. Sanchez, 86 N.M. 146, 520 P.2d 1091 (1974).

Constitutional to permit disclosure of physician's analysis of polygraph results. — Disclosure of analysis and conclusions of doctor appointed on behalf of defendant to examine results of a polygraph examination would not deny defendant due process, interfere with his right to put on a defense, deny equal protection of the law nor violate his privilege against self-incrimination. State v. Gallegos, 92 N.M. 370, 588 P.2d 1045 (Ct. App.), cert. denied, 92 N.M. 353, 588 P.2d 554 (1978).

Polygraph test results not discoverable if not to be used at trial. — Polygraph test results are not discoverable by the state absent notice by defendant of an intent to use such evidence at trial. Tafoya v. Baca, 103 N.M. 56, 702 P.2d 1001 (1985).

State may observe tests, conduct own tests. — While a defendant is not required to disclose test results not intended to be introduced at trial, this does not mean that the state cannot observe the testing or conduct its own independent tests. State v. Baca, 115 N.M. 536, 854 P.2d 363 (Ct. App. 1993).

Disclosure of transcripts of pre-trial interviews. — As part of discovery, a trial court may enter an order compelling a defendant to turn over to the state transcripts of pre-trial interviews with witnesses for the prosecution. State v. Stills, 1998-NMSC-009, 125 N.M. 66, 957 P.2d 51.

Scope of duty to disclose. — The state has a duty to disclose material evidence favorable to the defendant, of which it has knowledge. The defendant also has a corresponding duty to make available to the prosecution his or her list of witnesses and

such documents and papers and reports which he or she intends to use as evidence at trial, and there shall be a continuing duty of disclosure on both of the parties. State v. Stephens, 99 N.M. 32, 653 P.2d 863 (1982).

Limiting expert testimony. — A trial court may limit the issues on which an expert witness may testify when the defendant indicates in discovery that the expert will only testify as to certain issues and does not inform the court that the witness will testify as to other issues until after the state's expert witnesses have testified. Limiting such testimony is proper when the court finds that defense counsel is engaging in delaying tactics and that limiting the testimony is necessary to protect the integrity of the judicial system and the efficient administration of justice. State v. Stills, 1998-NMSC-009, 125 N.M. 66, 957 P.2d 51.

Defendant had burden of establishing lawyer-client privilege as to doctor's report. — Defendant objecting to discovery of a doctor's report, prepared for defendant's counsel under court order, has the burden of establishing the existence of the lawyer-client privilege. State v. Gallegos, 92 N.M. 370, 588 P.2d 1045 (Ct. App.), cert. denied, 92 N.M. 353, 588 P.2d 554 (1978).

Disclosure of witnesses. — Where the defendant failed to furnish the state a list of the names and addresses of the witnesses he intended to call at the trial as he had been ordered to do by the trial court pursuant to Subdivision (b) (see now Paragraph A(3)), the state objected to calling these witnesses and the trial court granted the state's motion, reserving reconsideration of the matter until the district attorney had spoken to the witnesses, but, without explanation, defendant did not call any of these witnesses to the stand, it was held that he voluntarily abandoned any further effort to have these witnesses appear and that he could not be heard on appeal to complain of error in their exclusion. State v. Bojorquez, 88 N.M. 154, 538 P.2d 796 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

Effect of omitting reference to limitation provisions from disclosure order. — Failure to copy into order pertaining to disclosure of evidence and witnesses a reference to Subdivision (c) (see now Paragraph C), pertaining to information not subject to disclosure, does not render the order beyond the jurisdiction of the court. Gray v. Sanchez, 86 N.M. 146, 520 P.2d 1091 (1974).

Absent legal authorization, judge lacks authority to order production of handwriting exemplars on pain of contempt, prior to arrest or charge. Sanchez v. Attorney Gen., 93 N.M. 210, 598 P.2d 1170 (Ct. App. 1979).

Hypnosis of witness must be disclosed. — It is incumbent upon either the prosecution or defense to disclose to opposing counsel that a witness called by a party has undergone hypnosis in order to facilitate memory recall. State v. Beachum, 97 N.M. 682, 643 P.2d 246 (Ct. App. 1981).

Voluntary disclosure of the results of a medical examination constituted a waiver of the defendant's right against forced disclosure and also destroyed any privileges claimed by the defense. State v. Jackson, 97 N.M. 467, 641 P.2d 498 (1982).

Where an attorney's notes concerning a witness' statement were used in an effort to impeach the witness, such notes were no longer shielded by the work-product doctrine and the trial court could properly require the disclosure of the notes under Rule 613(a), N.M.R. Evid. (see now Rule 11-613). State v. Turner, 97 N.M. 575, 642 P.2d 178 (Ct. App. 1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 1258 to 1262.

Sanctions against defense in criminal case for failure to comply with discovery requirements, 9 A.L.R.4th 837.

Right of prosecution to discovery of case-related notes, statements, and reports - state cases, 23 A.L.R.4th 799.

What is "oral statement" of accused subject to disclosure by government under Rule 16(a)(1)(A), Federal Rules of Criminal Procedure, 39 A.L.R. Fed. 432.

Right of indigent defendant under Rule 17(b) of the Federal Rules of Criminal Procedure to appearance of witnesses necessary to adequate defense, 42 A.L.R. Fed. 233.

22A C.J.S. Criminal Law §§ 508 et seq., 524 et seq.

5-503. Depositions; statements.

A. **Statements.** Any person, other than the defendant, with information which is subject to discovery shall give a statement. A party may obtain the statement of the person by serving a written "notice of statement" upon the person to be examined and upon each party not less than five (5) days before the date scheduled for the statement. The notice shall state the time and place for taking of the statement. A subpoena may also be served to secure the presence of the person to be examined or the materials to be examined during the statement. If a subpoena is served to secure a witness or materials, a copy of the subpoena shall be served upon each party.

B. **Depositions; when allowed.** A deposition may be taken pursuant to this rule upon:

(1) agreement of the parties; or

(2) order of the court at any time after the filing of the indictment or information or complaint in the district court, upon a showing that it is necessary to take the person's deposition to prevent injustice.

C. **Scope of discovery.** Unless otherwise limited by order of the court, parties may obtain discovery regarding any matter, not privileged, which is relevant to the offense charged or the defense of the accused person, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

D. **Time and place of deposition.** Counsel must make reasonable efforts to confer in good faith regarding scheduling of a deposition or statement before serving a notice of deposition or a notice of statement. Unless agreed to by the parties, any deposition allowed under this rule shall be taken at such time and place as ordered by the court. The attendance of witnesses at depositions may be compelled by subpoena as provided in these rules.

E. **Notice of examination: general requirements; special notice; notice of non-appearance; nonstenographic recording; production of documents and things; deposition of organization; deposition by telephone.**

(1) A party taking the deposition of any person upon oral examination pursuant to court order shall give at least ten (10) days notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

(2) The party taking the deposition shall state in the notice the method by which the testimony shall be recorded. Unless the court orders otherwise, it may be recorded by sound, sound-and-visual or stenographic means, and the party taking the deposition shall bear the cost of the recording. Any party may arrange for a transcription or copy of the deposition or statement to be made from the recording of a deposition or statement at the party's expense.

(3) With prior notice to the deponent and other parties, any party may designate another method to record the deponent's testimony in addition to the method specified by the person taking the deposition. The additional record or transcript shall be made at that party's expense unless the court otherwise orders. If the deposition is taken by an official court reporter, the official transcript shall be the transcript prepared by the official court reporter.

(4) Unless otherwise agreed by the parties, a deposition shall be conducted before an officer appointed or designated under Rule 5-503.1 NMRA and shall begin with a statement on the record by the officer that includes:

(a) the officer's name and business address;

(b) the date, time, and place of the deposition;

(c) the name of the deponent;

(d) the administration of the oath or affirmation to the deponent; and

(e) an identification of all persons present. If the deposition is recorded other than stenographically, the officer shall repeat items (a) through (c) at the beginning of each unit of recorded tape or other recording medium. The appearance or demeanor of deponents or attorneys shall not be distorted through camera or sound-recording techniques. At the end of the deposition, the officer shall state on the record that the deposition is complete and shall set forth any stipulations made by counsel concerning the custody of the transcript or recording and the exhibits, or concerning other pertinent matters.

(5) A party may, in the party's notice and in a subpoena, name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors or managing agents or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subparagraph does not preclude taking a deposition by any other procedure authorized in these rules.

(6) The parties may agree in writing or the court may, upon motion, order that a deposition be taken by telephone or other remote electronic means. For the purposes of this rule and Rule 5-503.1(A) NMRA, 5-503.2(A)(1) NMRA and 5-503.2(B)(1) NMRA, a deposition taken by such means is taken in the county and at a place where the witness is to answer questions. The officer taking the deposition must be physically present with the witness.

F. **Depositions; examination and cross-examination; record of examination; oath; objections.** Examination and cross-examination of witnesses in depositions may proceed as permitted at trial under the New Mexico Rules of Evidence, except Rule 11-103 NMRA and Rule 11-615 NMRA. The officer before whom the deposition is to be taken shall put the witness on oath or affirmation and shall personally, or by someone acting under the officer's direction and in the officer's presence, record the testimony of the witness. The testimony shall be taken stenographically or recorded by any other method authorized by Paragraph D(2) of this rule. All objections made at the time of the examination to the qualifications of the officer taking the deposition, to the manner of taking it, to the evidence presented, to the conduct of any party, or to any other aspect of the proceedings, shall be noted by the officer upon the record of the deposition; but

the examination shall proceed, with the testimony being taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition and the party taking the deposition shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim.

G. **Statements; depositions; motion to terminate or limit examination.** At any time during a deposition or statement, on motion of a party, the witness or the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass or oppress the witness or the deponent, the court in which the action is pending, or the court in the county where the deposition or statement is being taken, may order the examination to cease or may limit the scope and manner of the taking of the deposition or statement pursuant to Rule 5-507 NMRA. If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party, the witness or the deponent, the taking of the deposition or statement shall be suspended for the time necessary to make a motion for an order.

H. **Depositions; review by witness; changes; signing.** If requested by the deponent or a party before completion of the deposition, the deponent shall have thirty (30) days after being notified by the officer that the transcript or recording is available in which to review the transcript or recording and, if there are changes in form or substance, to sign a statement reciting such changes and the reasons given by the deponent for making them. The officer shall indicate in the certificate prescribed by Paragraph I(1) of this rule whether any review was requested and, if so, shall append any changes made by the deponent during the period allowed.

I. **Certification by officer; exhibits; copies; notice of transcription.**

(1) The officer shall certify on the deposition that the witness was duly sworn by the officer and that the deposition is a true record of the testimony given by the witness. If the deposition is transcribed, the officer shall provide the original of the deposition or statement to the party ordering the transcription and shall give notice thereof to all parties. The party receiving the original shall maintain it, without alteration, until final disposition of the case in which it was taken or other order of the court. Documents and things produced for inspection during the examination of the witness shall, upon the request of a party, be marked for identification and annexed to and returned with the deposition, and may be inspected and copied by any party, except that if the person producing the materials desires to retain them the person may:

(a) offer copies to be marked for identification and annexed to the deposition or statement and to serve thereafter as originals, if the person affords to all parties fair opportunity to verify the copies by comparison with the originals; or

(b) offer the originals to be marked for identification, after giving to each party an opportunity to inspect and copy them, in which event the materials may then be used

in the same manner as if annexed to the deposition. Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case.

(2) Upon payment of reasonable charges therefor, the officer shall furnish a copy of the transcript or other recording of the deposition to any party or to the deponent.

(3) Any party filing a deposition shall give prompt notice of its filing to all other parties.

J. **Final disposition of depositions.** The original deposition may be destroyed as provided in the judicial retention of records schedule.

[As amended, effective July 1, 1973; July 1, 1980; September 1, 1981; October 1, 1983; February 1, 1991; August 1, 1992; May 15, 2000; as amended by Supreme Court Order 05-8300-13, effective September 15, 2005.]

Committee commentary. — This rule was derived from Rule 1.220(f) of the Florida Rules of Criminal Procedure. See Rule 15 of the Federal Rules of Criminal Procedure. Depositions are to be used in criminal cases only in exceptional circumstances. McGuinness v. State, 92 N.M. 441, 589 P.2d 1032 (1979); State v. Barela, 86 N.M. 104, 519 P.2d 1185 (Ct. App. 1974). See also R. Giron, McGuinness v. State, Limiting the Use of Depositions at Trial, 10 N.M.L. Rev. 207 (1979-1980).

"Statement" as used in Paragraph A of this rule includes any statement given by a witness, including a videotape or recorded statement. The committee considered whether the prosecution or defense could take the deposition of a codefendant who has been granted witness immunity, but left this matter to the supreme court. The committee is of the opinion that any statement made by a codefendant who will become a witness for the state is discoverable under Rule 5-501. See, for example, State v. Vigil, 87 N.M. 345, 533 P.2d 578 (Ct. App. 1975); State v. Herrera, 84 N.M. 365, 503 P.2d 648 (Ct. App. 1972); and Mascarenas v. State, 80 N.M. 537, 458 P.2d 789 (1969). See also 5-501 for the definition of "statement". See also commentary to Rule 5-116.

Paragraph A of this rule requires witnesses to cooperate in the giving of a statement. A witness may not refuse to give a statement because defense counsel or the prosecuting attorney may not be able to be present during the taking of the statement.

Paragraph B of this rule provides for the use of a deposition when the witness may be unable to attend the trial or a hearing.

The court of appeals has indicated that one of the purposes of a deposition is to enable the defense to impeach a witness on cross examination at trial. State v. Billington, 86 N.M. 44, 519 P.2d 140 (Ct. App. 1974). However, under Paragraph B of this rule, the right to take the deposition would appear to be limited to the situation where the person

will be unable or unwilling to attend the trial or a hearing. See State v. Billington, supra, 86 N.M. at 48-49 (dissenting opinion) and State v. Blakely, 90 N.M. 744, 568 P.2d 270 (Ct. App. 1977).

The use of a deposition at trial by the state requires strict compliance with Paragraph N of this rule. See State v. Barela, supra; State v. Berry, 86 N.M. 138, 520 P.2d 558 (Ct. App. 1974); State v. De Santos, 91 N.M. 428, 575 P.2d 612 (Ct. App.), cert. denied, 91 N.M. 491, 596 P.2d 297 (1978). This is an exception to the hearsay rule. Paragraph N of this rule was revised in 1981 to make the New Mexico rules governing depositions consistent with Rule 15 of the Federal Rules of Criminal Procedure and to clarify the relationship between the Rules of Evidence and the Rules of Criminal Procedure governing the use of depositions. See Rule 11-802 and McGuinness v. State, supra. See also, Subparagraph (1) of Paragraph D of Rule 11-801, California v. Green, 399 U.S. 149 (1970), and Paragraph A of Rule 11-804. The Rules of Evidence relating to the admissibility of evidence are applicable to evidence admitted by deposition.

This rule was amended in 1982 to comply with Supreme Court Miscellaneous Order 8000, June 28, 1982, requiring that the record in all criminal cases be on audio recording devices. See Rule 22-303. Because depositions may be taken in hospitals or out-of-state or by a video recorder, the committee did not require the use of audio recording devices approved by the administrative office of the courts. Since depositions are for use at trial, it is anticipated that in most cases the trial court will have the deposition taken by an official court reporter or tape monitor on an audio recording device approved by the administrative office of the courts.

ANNOTATIONS

The 1992 amendment, effective for cases filed in the district courts on or after August 1, 1992, made gender neutral substitutions throughout the rule; rewrote Paragraph A; made a stylistic change in Paragraph B; in Paragraph D, deleted "or compelled statement" from the end of the heading and following "any deposition" in the first sentence and deleted the former last sentence, relating to allowance by the court that the compelled statement be taken with only attorneys present; rewrote Paragraph F; substituted "deposition" for "examination" in the heading for Paragraph G; inserted "of deposition and in a subpoena" near the beginning of the first sentence in Paragraph H; in Paragraph J, substituted "of the witness" for "of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass or oppress the deponent or party" and added the third sentence; rewrote Paragraph M; and, in Paragraphs O and R, inserted "Depositions" in the headings.

The 2000 amendment, effective May 15, 2000 rewrote the rule to expand the deposition rule to permit the parties to stipulate to the taking of depositions. Procedural amendments were also made to track District Court Civil Rule 1-030 NMRA.

The 2005 amendment, effective September 15, 2005, deleted at the beginning of the second sentence in Paragraph A "If upon request of a party, a person other than the defendant refuses to give a statement" and added the last sentence of Paragraph A relating to service of subpoenas on all parties.

Compiler's notes. — Paragraphs A to C of this rule are similar to Rule 15(a) and (b) of the Federal Rules of Criminal Procedure.

Paragraph N of this rule is similar to Rule 15(d) of the Federal Rules of Criminal Procedure.

The Florida Rules of Criminal Procedure, referred to in the first sentence in the first paragraph of the committee commentary, were extensively revised in 1972. Rule 3.190(j), presently deals with depositions.

Discovery of information about confidential informant's prior work. — Where police officers used a confidential informant to purchase methamphetamine; the confidential informant was the only eye witness to the alleged crime; the state's case rested on the veracity of the confidential informant; the defendant requested disclosure of information about the confidential informant's prior work as a confidential informant; the trial court held an in camera hearing to review the documents the defendant sought to discover; and the trial court ordered defense counsel not to disclose the information to any other person, the trial court did not abuse its discretion in ordering the state to produce the information. State v. Layne, 2008-NMCA-103, 144 N.M. 574, 189 P.3d 707.

Police officer witnesses not under legal process may refuse to be interviewed and may dictate the terms of the interview sought by defense counsel. They have no obligation to subject themselves to trick questions or hassling by defense counsel in voluntary interviews, and the police department may properly adopt a policy that officers should refuse to be interviewed by defense counsel except in the presence of an attorney for the prosecution. State v. Williams, 91 N.M. 795, 581 P.2d 1290 (Ct. App. 1978).

Defendant has no constitutional right to depose victim in a criminal case; the right exists solely under this rule. State v. Herrera, 92 N.M. 7, 582 P.2d 384 (Ct. App.), cert. denied, 91 N.M. 751, 580 P.2d 972 (1978).

Driver license revocation proceedings. — There is no automatic due process right to take prehearing depositions in driver license revocation cases. Dente v. State Taxation & Revenue Dep't, 1997-NMCA-099, 124 N.M. 93, 946 P.2d 1104.

Reasonable limitations on questions asked at deposition do not deprive defendant of due process. State v. Herrera, 92 N.M. 7, 582 P.2d 384 (Ct. App.), cert. denied, 91 N.M. 751, 580 P.2d 972 (1978).

Scope of authority to take depositions. — In criminal cases the trial court has no authority, apart from this rule, to allow the taking of depositions for their use at trial. State v. Berry, 86 N.M. 138, 520 P.2d 558 (Ct. App. 1974).

Absent legal authorization, judge lacks authority to order production of handwriting exemplars on pain of contempt, prior to arrest or charge. Sanchez v. Attorney Gen., 93 N.M. 210, 598 P.2d 1170 (Ct. App. 1979).

Where deposition not admissible. — As there was no showing that the presence of a witness who was out of the state could not be secured by subpoena or other lawful means, then his deposition is not admissible under this rule. State v. Berry, 86 N.M. 138, 520 P.2d 558 (Ct. App. 1974).

Generally as to use of depositions. — While depositions are allowable in criminal cases, the circumstances permitting their use must be exceptional, and the necessity of their use at trial must be clearly established by the prosecution. McGuinness v. State, 92 N.M. 441, 589 P.2d 1032 (1979).

Use of deposition by state at trial requires strict compliance with Subdivision (n) (see now Paragraph N). McGuinness v. State, 92 N.M. 441, 589 P.2d 1032 (1979); State v. Martinez, 95 N.M. 445, 623 P.2d 565 (1981), overruled on other grounds Fuson v. State, 105 N.M. 632, 735 P.2d 1138 (1987).

There must be strict compliance with Subdivision (n) (see now Paragraph N). Where deposition of absent witness was admitted absent any showing as to whereabouts of the witness at time of trial, whether he was unable to attend because of illness or infirmity, or whether he was in or out of state, and where district attorney did not attempt to procure his attendance at trial by subpoena, defendant's federal constitutional right to confront witnesses was violated and such admission constituted reversible error. State v. Barela, 86 N.M. 104, 519 P.2d 1185 (Ct. App. 1974).

Burden is upon the state to prove the unavailability of its witness. State v. Ewing, 97 N.M. 235, 638 P.2d 1080, aff'd in part, rev'd on other grounds, 97 N.M. 484, 641 P.2d 515 (1982).

And court considers total circumstances in determining state's diligence. — In determining whether the state was diligent in attempting to produce a witness for trial, the trial court may take into consideration the totality of the circumstances. State v. Ewing, 97 N.M. 235, 638 P.2d 1080, aff'd in part, rev'd on other grounds, 97 N.M. 484, 641 P.2d 515 (1982).

Unavailability of witness due to claim of constitutional privilege did not render deposition admissible. — Where a witness is excused from testifying on the ground that he cannot do so without incriminating himself, his deposition is not thereby rendered admissible. McGuinness v. State, 92 N.M. 441, 589 P.2d 1032 (1979).

Once a witness is permitted to claim his privilege against self-incrimination, he becomes unavailable as a witness under Rule 804, N.M.R. Evid. (see now Rule 11-804), and thus his deposition would not be excluded at trial because of the hearsay rule, but that fact does not authorize admission of the deposition if it is excludable because of this rule. McGuinness v. State, 92 N.M. 441, 589 P.2d 1032 (1979).

Sixth amendment right of confrontation not violated by admission of deposition of uncooperative unavailable witness. — See Ewing v. Winans, 749 F.2d 607 (10th Cir. 1984).

Where principal witness is unavailable because she is ill and infirm, it is not error for the trial judge to take the totality of the circumstances into consideration, including the witness' advanced age and the condition of her health, to admit her deposition at trial. State v. Vialpando, 93 N.M. 289, 599 P.2d 1086 (Ct. App.), cert. denied, 93 N.M. 172, 598 P.2d 215 (1979).

Deposition for civil suit not admissible. — A deposition of the victim for purposes of a civil suit cannot be used in a criminal proceeding when the victim's spouse is being cross-examined. State v. Cordova, 100 N.M. 643, 674 P.2d 533 (Ct. App. 1983).

Denial of continuance to allow deposition. — A judge did not abuse his discretion by refusing to order a continuance to allow the defendant to depose a reporter who interviewed the victim and to compel her to disclose her interview notes, since defense counsel had decided not to proceed with a scheduled deposition of the reporter a few days before trial and failed to call the reporter as a witness at trial. State v. Bobbin, 103 N.M. 375, 707 P.2d 1185 (Ct. App. 1985).

No error in continuing trial where no abuse of discretion and expert's deposition admitted. — Defendant's contention that the trial court erred in not continuing the trial to a date when an expert witness could testify in person was without merit where there was nothing showing an abuse of discretion in denying a continuance and a deposition of the expert was properly admitted at trial. State v. De Santos, 91 N.M. 428, 575 P.2d 612 (Ct. App. 1978).

Law reviews. — For comment, "McGuinness v. State: Limiting the Use of Depositions at Trial," see 10 N.M.L. Rev. 207 (1979-1980).

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

For annual survey of New Mexico law relating to criminal procedure, see 12 N.M.L. Rev. 271 (1982).

For annual survey of New Mexico law relating to evidence, see 12 N.M.L. Rev. 379 (1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law § 1177; 23 Am. Jur. 2d Depositions and Discovery § 108.

Admissibility of deposition of child of tender years, 30 A.L.R.2d 771.

Sufficiency of showing of grounds for admission of deposition in criminal case, 44 A.L.R.2d 768.

Construction of statute or rule admitting in evidence deposition of witness absent or distant from place of trial, 94 A.L.R.2d 1172.

Admissibility in evidence of deposition as against one not a party at time of its taking, 4 A.L.R.3d 1075.

Disqualification of attorney, otherwise qualified, to take oath or acknowledgment from client, 21 A.L.R.3d 483.

Pretrial testimony or disclosure on discovery by party to personal injury action as to nature of injuries or treatment as waiver of physician-patient privilege, 25 A.L.R.3d 1401.

Accused's right to depose prospective witnesses before trial in state court, 2 A.L.R.4th 704.

Propriety of state court's grant or denial of application for pre-action production or inspection of documents, persons, or other evidence, 12 A.L.R.5th 577.

Accused's right to depose prospective witnesses before trial in federal court under Rule 15(a) of Federal Rules of Criminal Procedure, 43 A.L.R. Fed. 865.

Effect on federal criminal proceeding of unavailability to defendant of alien witness through deportation or other government action, 56 A.L.R. Fed. 698.

Right to perpetuation of testimony under Rule 27 of Federal Rules of Civil Procedure, 60 A.L.R. Fed. 924.

Use, in federal criminal prosecution, of deposition of absent witness taken in foreign country, as affected by Federal Rule of Criminal Procedure 15(b) and (d) requiring presence of accused and that deposition be taken in manner provided in civil actions, 105 A.L.R. Fed. 537.

5-503.1. Persons before whom depositions may be taken.

A. **Within the United States.** Depositions shall be taken before an officer authorized to administer oaths by the laws of the place where the examination is held,

or before a person appointed by the court in which the action is pending. A person so appointed has power to administer oaths and take testimony.

B. **In foreign countries.** In a foreign country, depositions may be taken:

(1) on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States;

(2) before a person commissioned by the court, and a person so commissioned shall have the power by virtue of the commission to administer any necessary oath and take testimony; or

(3) pursuant to a letter rogatory. A commission or a letter rogatory shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter rogatory that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter rogatory may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter rogatory may be addressed "To the Appropriate Authority in *(here name the country)*". Evidence obtained in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the United States under these rules.

C. **Disqualification for interest.** Except as agreed to by the parties pursuant to Rule 5-512 NMRA, no deposition shall be taken before a person who is a relative or employee or attorney or counsel of any of the parties, or is a relative or employee of such attorney or counsel, or is financially interested in the action.

As used in this rule, an "employee" means a person who is employed in the office of the defendant, the prosecutor or an attorney representing a defendant in the proceedings.

[Approved, effective May 15, 2000; as amended, effective September 30, 2002.]

ANNOTATIONS

The 2002 amendment, effective September 30, 2002, in Paragraph A, substituted "Depositions" for "Within the United States or within a territory or insular possession subject to the dominion of the United States" at the beginning of the first sentence and deleted "of the United States" following "oaths by the laws" near the middle of the first sentence; and inserted "Except as agreed to by the parties pursuant to Rule 5-512 NMRA" at the beginning of Paragraph C.

5-503.2. Depositions; failure to make discovery; sanctions.

A. **Motion for order compelling discovery.** A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery in depositions as follows:

(1) An application for an order to a deponent who is not a party but whose deposition is being taken within the state or for an order to a party may be made to the court where the action is pending. If a deposition is being taken outside the state this shall not preclude the seeking of appropriate relief in the jurisdiction where the deposition is being taken.

(2) If a deponent fails to answer a question propounded or submitted under Rule 5-503 NMRA, or a corporation or other entity fails to make a designation under Rule 5-503(E)(5) NMRA, or if a party, in response to a request for inspection fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 5-507 NMRA.

(3) For purposes of this paragraph an evasive or incomplete answer is to be treated as a failure to answer.

(4) If the motion is granted, the court may, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

Any motion filed pursuant to this paragraph shall state that counsel has made a good faith effort to resolve the issue with opposing counsel prior to filing a motion to compel discovery.

If the motion is denied, the court may, after opportunity for hearing, require the moving party or the attorney advising the moving party or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

B. **Failure to comply with order.**

(1) If a deponent fails to be sworn or to answer a question after being directed to do so by a court with jurisdiction, the failure may be considered a contempt of that court.

(2) If a party or an officer, director or managing agent of a party or a person designated under Rule 5-503 NMRA to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under Paragraph A of this rule, or if a party fails to obey an order under Rule 5-507 NMRA, the court in which the action is pending may make such orders in regard to the failure as are just.

[Approved, effective May 15, 2000.]

ANNOTATIONS

Exclusion of testimony for refusal to comply with discovery order. — Where police officers used a confidential informant to purchase methamphetamine; the confidential informant was the only eye witness to the alleged crime; the state's case rested on the veracity of the confidential informant; the defendant requested disclosure of information about the confidential informant's prior work as a confidential informant; the trial court held an in camera hearing to review the documents the defendant sought to discover; the trial court ordered defense counsel not to disclose the information to any other person; and the state refused to comply with the discovery order, the trial court did not abuse its discretion in excluding the confidential informant's evidence from trial. State v. Layne, 2008-NMCA-103, 144 N.M. 574, 189 P.3d 707.

5-504. Videotaped depositions; testimony of certain minors who are victims of sexual offenses.

A. **When allowed.** Upon motion, and after notice to opposing counsel, at any time after the filing of the indictment, information or complaint in district court charging a criminal sexual penetration or criminal sexual contact on a child under sixteen (16) years of age, the district court may order the taking of a videotaped deposition of the victim, upon a showing that the child may be unable to testify without suffering unreasonable and unnecessary mental or emotional harm. The district judge must attend any deposition taken pursuant to this paragraph and shall provide such protection of the child as the judge deems necessary.

B. **Use at trial.** At the trial of a defendant charged with criminal sexual penetration or criminal sexual contact on a child under sixteen (16) years of age, any part or all of the videotaped deposition of a child under sixteen (16) years of age taken pursuant to Paragraph A of this rule, may be shown to the trial judge or the jury and admitted as evidence as an additional exception to the hearsay rule of the Rules of Evidence if:

(1) the child is unable to testify before the court without suffering unreasonable and unnecessary mental or emotional harm;

(2) the deposition was presided over by a district judge and the defendant was present and was represented by counsel or waived counsel; and

(3) the defendant was given an adequate opportunity to cross-examine the child, subject to such protection of the child as the judge deems necessary.

C. **Additional use at trial.** In addition to the use of a videotaped deposition as permitted by Paragraph B of this rule, a videotaped deposition may be used for any of the reasons set forth in Paragraph N of Rule 5-503.

[As amended, effective July 1, 1988.]

Committee commentary. — This rule was drafted by the rules committee in response to House Memorial 26, Second Session of the Thirty-Third Legislature, 1978 and Section 30-9-17 NMSA 1978. The purpose of 30-9-17, *supra*, is to protect a child who has been allegedly sexually abused from further mental stress. The committee explored several alternatives prior to preparing this draft.

First of all, the committee explored the possibility of removing all spectators from the courtroom during the child's testimony. This was rejected as it may not be constitutionally permissible to bar wholly the public and the press from the courtroom without the concurrence of the defendant under either the New Mexico Constitution or the United States Constitution. *See Gannett Co. v. DePasquale*, 99 S. Ct. 2898 (1979); *Estes v. Texas*, 381 U.S. 532, 587, 85 S. Ct. 1628, 1662, 14 L. Ed. 2d 543, 583 (1965). Prior to the *Gannett* decision, it was generally recognized that the right to a public trial under the United States Constitution could not even be waived by the defendant. See *Constitution of the United States*, congressional research service, 1973. There is also a right to a public trial under the New Mexico Constitution; however, there are no decisions relating to the waiver of this right.

Next, the committee considered further protections which could be afforded to the child. It was noted that the present rules already provide for the court to protect the child during discovery. See Rule 5-507 NMRA.

Several members of the committee had grave concerns about the constitutionality of not requiring an available witness to confront the accused. Section 30-9-17 NMSA 1978 provides only that good cause must be shown for the taking of the videotaped deposition. The rule sets forth specifically what is required to make a showing of good cause for a deposition of an alleged rape victim. Under the rule, the child must be under the age of sixteen and unable to testify without suffering unreasonable and unnecessary mental or emotional harm.

In 1988, the committee was requested to consider proposing amendments to Rule 5-504 NMRA which would further protect the child from unnecessary psychological harm. The committee was advised that in order to show good cause, some children have been subjected to two or three psychological evaluations. These evaluations in themselves have, in some cases, created unnecessary psychological harm to the child defeating the purpose of the statute and court rule. Since the present rule does not require a psychological examination, the committee did not believe that further amendments were necessary. Further, the committee is of the opinion that in the rare case that a psychological examination is necessary to show good cause, the trial judge should appoint an independent psychiatrist or psychologist to examine the child and the report to the court. No other examination should be required. The court's determination that psychological harm may result should be made outside the adversarial process.

The committee is of the opinion that the court should consider the following factors in determining whether a videotaped deposition should be taken to avoid a victim child from suffering unreasonable and unnecessary mental or emotional harm:

(1) the child is unable to testify because of fear;

(2) there is a substantial likelihood, established by expert testimony, that the child would suffer emotional trauma from testifying;

(3) the child suffers a mental or other infirmity; or

(4) conduct by defendant or defense counsel causes the child to be unable to continue testifying.

[Commentary revised, effective May 1, 2002.]

ANNOTATIONS

Use of victim's depositions constitutional. — In a prosecution for criminal sexual contact with a minor, use of the victim's videotaped deposition did not deny the defendant the right of confrontation. The defendant was not deprived of his right to fairly and fully cross-examine the child during the deposition, and the jury, which heard the child's testimony and viewed the child, via videotape, while she testified, had an adequate opportunity to observe the child's demeanor. State v. Vigil, 103 N.M. 583, 711 P.2d 28 (Ct. App. 1985).

In a prosecution for sexual abuse, trial judge did not abuse his discretion in allowing the children to testify by way of depositions that were videotaped outside the presence of the defendant and then shown to the jury, since the judge made the requisite findings that the individualized harm which would otherwise result in the child victims outweighed the defendant's right to a face-to-face confrontation with his accusers. State v. Fairweather, 116 N.M. 456, 863 P.2d 1077 (1993).

Videotaped testimony of deceased witness held admissible. — Where no prejudice was shown by the defendant in indicating which portions of a videotape were objectionable even though Rule 29 (see now Rule 5-503 NMRA) was not complied with, a videotape of the testimony of the state's eyewitness, who died prior to trial, was admissible. State v. Martinez, 95 N.M. 445, 623 P.2d 565 (1981), overruled on other grounds Fuson v. State, 105 N.M. 632, 735 P.2d 1138 (1987) (decided prior to adoption of rule).

Record insufficient to justify denial of right to confront victim. — Where a child was charged with criminal sexual contact with his sister, and, at trial, the victim testified in chambers with only counsel and the judge present and the accused child observed the victim testify on a video monitor located in another room, the procedure was invalid without particularized findings of special harm to the particular child witness which were supported by substantial evidence, because the child's right of confrontation required that he be permitted to confront each of the witnesses against him, including the child victim. State v. Benny E., 110 N.M. 237, 794 P.2d 380 (Ct. App. 1990).

Defendant absent from trial voluntarily. — Since the factors articulated in State v. Clements, 108 N.M. 13, 765 P.2d 1195 (Ct. App. 1988), for courts to consider in determining when the public interest is clearly persuasive so that the court may proceed in absentia, are to be applied only when the defendant is absent from trial voluntarily, exclusion of defendant, accused of criminal sexual penetration of a minor, from the courtroom during the child's testimony, because of emotional distress it would have caused the child, was reversible error. State v. Rodriguez, 114 N.M. 265, 837 P.2d 459 (Ct. App. 1992).

Child unavailable due to trauma. — Showing a traumatic effect to the child is sufficient to render the child unavailable to testify. Vigil v. Tansy, 917 F.2d 1277 (10th Cir. 1990), cert. denied, 498 U.S. 1100, 111 S. Ct. 995, 112 L. Ed. 2d 1078 (1991).

Second deposition allowed. — While it appears that the procedure outlined in 30-9-17 NMSA 1978 and this rule contemplates only one deposition, at which defense counsel should be on notice that this is his chance to confront the victim, where the defendant never alerted the trial court why, following a deposition, a new video deposition was necessary and where he never specifically informed the appellate court, with references to the record, why a new video deposition was necessary, it could not be said that the trial court erred in allowing defendant to take a second deposition and then allowing both the first and second videotaped depositions into evidence. State v. Larson, 107 N.M. 85, 752 P.2d 1101 (Ct. App. 1988).

Inaudible videotape resulting in mistrial. — Where videotape of testimony of 11-year-old victim of alleged criminal sexual penetration was inaudible at trial and child was unavailable to testify in person because of illness and possible emotional harm, there existed a "manifest necessity" for declaring a mistrial, so that double jeopardy did not bar defendant's retrial. State v. Messier, 101 N.M. 582, 686 P.2d 272 (Ct. App. 1984).

Charging paper not required. — There is nothing in this rule requiring the deposition to be taken pursuant to the charging paper upon which the defendant is ultimately tried. The deposition may be taken pursuant to a complaint and then introduced at a trial on an indictment or information. State v. Larson, 107 N.M. 85, 752 P.2d 1101 (Ct. App. 1988).

Waiver of required state showing. — In a prosecution for criminal sexual penetration of a minor, since, in order to gain a continuance, the defendant had agreed to allow the admission of videotaped depositions at trial, he could not complain on appeal that the state failed to make the requisite showing for admissibility of the depositions. State v. Trujillo, 119 N.M. 772, 895 P.2d 672 (Ct. App. 1995).

Implicit waiver of right to confrontation. — Where defendant at trial did not file a response to the state's motion for a videotaped deposition, nor did he object at the time of the taking of the deposition or at the time that the district court admitted the deposition tape as evidence, but, to the contrary, defendant relied on both the deposition tape and the interview tape in his opening and closing arguments, defendant's actions indicate that he implicitly waived his right to face-to-face confrontation by conduct. State v. Herrera, 2004 NMCA-015, 135 N.M. 79, 84 P.3d 696, cert. denied, 2004-NMCERT-004.

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

For annual survey of criminal procedure in New Mexico, see 18 N.M.L. Rev. 345 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Necessity or permissibility of mental examination to determine competency or credibility of complainant in sexual offense prosecution, 45 A.L.R.4th 310.

5-505. Continuing duty to disclose.

A. **Additional material or witnesses.** If, subsequent to compliance with Rule 5-501 or 5-502, and prior to or during trial, a party discovers additional material or witnesses which he would have been under a duty to produce or disclose at the time of such previous compliance if it were then known to the party, he shall promptly give written notice to the other party or the party's attorney of the existence of the additional material or witnesses.

B. **Failure to comply.** If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from calling a witness not disclosed, or introducing in evidence the material not disclosed, or it may enter such other order as it deems appropriate under

the circumstances, including but not limited to holding an attorney in contempt of court pursuant to Rule 5-112 of these rules.

Committee commentary. — This rule was derived from Rule 16, Part III of the Colorado Rules of Criminal Procedure and Rules 16(c) and (d)(2) of the Federal Rules of Criminal Procedure. See 62 F.R.D. 271, 306-07, 316-17 (1974).

In State v. Billington, 86 N.M. 44, 519 P.2d 140 (Ct. App. 1974), the court held that the violation of this rule by the state entitled the defendant to a continuance. The court believed that the defendant had a right to take the deposition of a witness whose name was not given under Subparagraph (5) of Paragraph A of Rule 5-501 or seek other discovery for trial preparation and, therefore, a continuance was required as a matter of law.

In State v. Quintana, 86 N.M. 666, 526 P.2d 808 (Ct. App.), cert. denied, 86 N.M. 656, 526 P.2d 798 (1974), the opinion of the court states that an alleged violation of this rule could not be raised on appeal where the defendant did not object to the introduction of evidence on the grounds that this rule was violated. The concurring opinion emphasized that on appeal the defendant had to show that some prejudice resulted from the state's failure to comply with the discovery rules.

ANNOTATIONS

Scope of duty to disclose. — The state has a duty to disclose material evidence favorable to the defendant, of which it has knowledge. The defendant also has a corresponding duty to make available to the prosecution his or her list of witnesses and such documents and papers and reports which he or she intends to use as evidence at trial, and there shall be a continuing duty of disclosure on both of the parties. State v. Stephens, 99 N.M. 32, 653 P.2d 863 (1982).

Dismissal may be appropriate order. — Upon failure to obey a discovery order, the court may enter such order as is appropriate under the circumstances, and dismissal may be an appropriate order. State v. Doe, 92 N.M. 354, 588 P.2d 555 (Ct. App. 1978).

Dismissal is not proper remedy for prosecutor's interference with defendant's discovery attempts; it is even less appropriate when the record fails to disclose any discovery violations. State v. Smallwood, 94 N.M. 225, 608 P.2d 537 (Ct. App. 1980).

Court conducts in camera hearing to determine whether eyewitness' identity subject to disclosure. — Where an informer's testimony, pursuant to Rule 510(c), R. Evid. (see now Rule 11-501 NMRA), discloses the identity of a possible eyewitness to a crime, the trial court, under the disclosure requirements of Rule 27(e) (see now Rule 5-501 NMRA) and this rule, should conduct an in camera hearing to determine, first, whether the possible eyewitness would be able to give testimony that is relevant and helpful to the defense of the accused or is necessary to a fair determination of the defendant's guilt or innocence, and, second, whether disclosure would subject the

possible eyewitness to a substantial risk of harm outweighing any usefulness of the disclosure to defense counsel. State v. Gallegos, 96 N.M. 54, 627 P.2d 1253 (Ct. App. 1981), overruled on other grounds State v. Martin, 101 N.M. 595, 686 P.2d 937 (1984).

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

Sanction for failure to list witness. — Striking a key prosecution witness because of the failure of the state to include his name on pretrial witness lists was not an abuse of discretion. State v. Martinez, 1998-NMCA-022, 124 N.M. 721, 954 P.2d 1198.

Where no claim of surprise or inadequate inquiry made. — Where defendants objected to the admission of a letter not disclosed prior to trial by the district attorney, but made no claim of surprise to the trial court, nor did they seek a continuance or ask the trial court to conduct the "adequate inquiry" which on appeal they assert was required, the appellate court would not consider the claim that the trial court's inquiry was inadequate. State v. Smith, 88 N.M. 541, 543 P.2d 834 (Ct. App. 1975).

Nondisclosure not established. — Speculation that there might be test results of the defendant's hair in a prosecution for criminal sexual penetration and that the test results might have been exculpatory did not establish a nondisclosure of exculpatory evidence. State v. Martinez, 98 N.M. 27, 644 P.2d 541 (Ct. App. 1982).

Trial court did not err in refusing to grant mistrial or continuance because defense counsel lacked an opportunity to interview a witness. State v. Ewing, 97 N.M. 484, 641 P.2d 515 (Ct. App. 1982).

Continuing duty to disclosure additional material or witnesses is prescribed by Paragraph A of this rule. State v. McDaniel, 2004-NMCA-022, 135 N.M. 84, 84 P.3d 701, cert. denied, 2004-NMCERT-002.

No breach of duty to disclose. — Where the prosecutor did not violate the continuing duty to disclose or intentionally deprive defendant of evidence but promptly informed defendant about a witness as soon as the witness was located, as required by Paragraph A of this rule, the prosecutor did not act to intentionally deprive defendant of evidence, and there was no breach of the duty to disclose. State v. McDaniel, 2004-NMCA-022, 135 N.M. 84, 84 P.3d 701, cert. denied, 2004-NMCERT-002.

Defendant was not prejudiced by late disclosure of witness where defendant has not shown how his cross-examination would have been improved by an earlier disclosure or how he would have prepared differently for trial, in light of a review of the record which showed that the jury had sufficient information to assess the credibility of the witness and her motive for testifying, and during cross-examination, defense counsel repeatedly challenged the neighbor's credibility. State v. McDaniel, 2004-NMCA-022, 135 N.M. 84, 84 P.3d 701, cert. denied, 2004-NMCERT-002.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 1258 to 1262.

Sanctions against defense in criminal case for failure to comply with discovery requirements, 9 A.L.R.4th 837.

22A C.J.S. Criminal Law §§ 532 to 534.

5-506. Grand jury proceedings.

A. **Indictment.** Grand jury indictments shall be public when they are filed with the court. Upon request, the court may order an indictment sealed until arrest.

B. **Sound recording.** A sound recording shall be made of the testimony of all witnesses and any explanation or instructions of the prosecutor and any comments made by the prosecutor or other persons in the presence of the grand jury. No record shall be made of the deliberations of the grand jury.

C. **Copy of recording.** At any time after indictment, on request of a party, the district court clerk shall furnish a copy of the tape recording of:

(1) the defendant's testimony before the grand jury; and

(2) the entire proceedings, unless the state objects to some portions of the tape, in which case the court shall determine which portions of the proceedings are to be furnished to defendant.

D. **Disclosure.** The district court may prohibit disclosure of that portion of testimony or proceedings which creates substantial risk of harm to some person or which is irrelevant to the defendant.

[As amended, effective August 1, 1989.]

Committee commentary. — This rule provides that the district court shall order the preparation of a copy of the tape recording of testimony of a defendant or a witness on the state's witness list before the grand jury.

Prior to the adoption of this rule and the amendment of Rule 5-501, the prosecution was not required to produce the statement of the defendant before the grand jury. Section 31-6-8 NMSA 1978, enacted by the 1979 legislature, provides that a transcript of testimony before the grand jury is to be made only upon order of the district court.

The rule in New Mexico is that:

"(O)nce the witness has testified at the criminal trial about that which he testified before the grand jury, the accused is entitled to an order permitting examination of that portion of the witness' grand jury testimony relating to the crime for which the defendant is charged". Valles v. State, 90 N.M. 347, 563 P.2d 610 (Ct. App. 1977), cert. denied, 90 N.M. 637, 567 P.2d 486, quoting from State v. Sparks, 85 N.M. 429, 512 P.2d 1265 (Ct. App. 1973), cert. denied, 92 N.M. 353, 588 P.2d 554 (1978); State v. Felter, 85 N.M. 619, 515 P.2d 138 (1973); State v. Tackett, 78 N.M. 450, 432 P.2d 415 (1967), cert. denied, 390 U.S. 1026, 20 L. Ed. 2d 283, 88 S. Ct. 1414 (1968); and State v. Morgan, 67 N.M. 287, 354 P.2d 1002 (1960), holding that the defendant is entitled to a copy of the transcript of testimony of a witness before the grand jury prior to the time that the witness testifies at trial only on a showing of particularized need.

Paragraph D of this rule addresses the problem that can result from the release of certain information such as the addresses of witnesses and the names of confidential informants. The district court may prohibit such disclosures when consistent with the constitutional right to a fair trial.

ANNOTATIONS

Cross references. — For list and statement of state witnesses, see Rule 5-501 NMRA.

For record of grand jury testimony, see 31-6-8 NMSA 1978.

A record of advisement of elements of crime charged required. — The practice of providing the grand jury with a written manual containing UJI instructions and not indicating on the record that the jury has been at least referred to the appropriate sections of the manual for each crime listed on indictments does not comply with Paragraph B of this rule, 31-6-8 and 31-6-10 NMSA 1978, 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.

Sufficiency of indictment. — Indictments alleging fraud filed against several defendants were not vague and adequately apprised them of the specific charges against them, where the defendants had access to the grand jury proceedings, the prosecutor notified them that the state's file was open for their examination, and the state filed a statement of facts in response to defendants' motion that it be required to identify those practices, representations, or matters of conduct which were alleged to have been fraudulent. State v. Crews, 110 N.M. 723, 799 P.2d 592 (Ct. App. 1989).

Am. Jur. 2d, A.L.R. and C.J.S. references. — What is "judicial proceeding" within Rule 6(e)(3)(C)(i) of the Federal Rules of Criminal Procedure permitting disclosure of matters occurring before grand jury when so directed by court preliminarily to or in connection with such proceeding, 52 A.L.R. Fed. 411.

Relief, remedy, or sanction for violation of Rule 6(e) of Federal Rules of Criminal Procedure, prohibiting disclosure of matters occurring before grand jury, 73 A.L.R. Fed. 112.

5-507. Depositions; statements; protective orders.

A. **Motion.** Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition or statement, the court in the district where the deposition or statement is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, undue burden or expense, the risk of physical harm, intimidation, bribery or economic reprisals. The order may include one or more of the following restrictions:

(1) that the deposition or statement requested not be taken;

(2) that the deposition or statement requested be deferred;

(3) that the deposition or statement may be had only on specified terms and conditions, including a designation of the time or place;

(4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

(5) that the deposition or statement be conducted with no one present except persons designated by the court;

(6) that a deposition or statement after being sealed be opened only by order of the court;

(7) that a trade secret or other confidential research, development or commercial information not be disclosed or be disclosed only in a designated way; and

(8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

B. **Written showing of good cause.** Upon motion, the court may permit the showing of good cause required under Paragraph A of this rule to be in the form of a written statement for inspection by the court in camera, if the court concludes from the statement that there is a substantial need for the in camera showing. If the court does not permit the in camera showing, the written statement shall be returned to the movant

upon request. If no such request is made, or if the court enters an order granting the relief sought, the entire text of the statement shall be sealed and preserved in the records of the court to be made available to the appellate court having jurisdiction in the event of an appeal.

C. **Denial of order.** If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery.

[As amended, effective August 1, 1992; May 15, 2000.]

Committee commentary. — This rule provides a protective order procedure only for the taking of depositions. Some of the same criteria for denying a party the opportunity to take a deposition are also used for denying discovery of evidence held by the state under Paragraph E of Rule 5-501.

The grounds for the protective order are taken from Paragraph C of Rule 1-026 and American Bar Association Standards Relating to Discovery and Procedure Before Trial, Section 2.5 (Approved Draft 1970). The American Bar Association Special Committee on Federal Rules of Procedure urged that the proposed amendments to Rule 16 of the Federal Rules of Criminal Procedure include the Standards. See 52 F.R.D. 87, 98 (1971). However, the Bar Association recommendations were not included in the federal amendments. See 62 F.R.D. 271, 307, 316-17 (1974).

ANNOTATIONS

The 1992 amendment, effective for cases filed in the district courts on or after August 1, 1992, inserted "statement" in the catchline and "or statement" throughout the rule.

The 2000 amendment, effective May 15, 2000, in Paragraph A, substituted "Motion" for "Restrictions, upon showing of good cause" in the bold heading, substituted "the person from whom discovery is sought" for "a person to be examined pursuant to Rule 5-305" and inserted "alternatively, on matters relating to a deposition or statement" substituted "expense," for "from" preceding "the risk"; inserted "party or" in Paragraph C; and made minor stylistic changes throughout the rule.

Reasonable limitations on questions asked at deposition do not deprive defendant of due process. State v. Herrera, 92 N.M. 7, 582 P.2d 384 (Ct. App.), cert. denied, 91 N.M. 751, 580 P.2d 972 (1978).

Court may limit harassing and intimidating inquiry into victim's past sexual conduct. — Harassment and intimidation are grounds for restricting a deposition, so a trial court may limit inquiry into a victim's past sexual conduct where defendant's reason for the inquiry is to harass the victim and possibly frighten her from appearing as a witness. State v. Herrera, 92 N.M. 7, 582 P.2d 384 (Ct. App.), cert. denied, 91 N.M. 751, 580 P.2d 972 (1978).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law § 1177.

5-508. Notice of alibi; entrapment defense.

A. **Notice.** In criminal cases not within magistrate court trial jurisdiction, upon the written demand of the district attorney, specifying as particularly as is known to the district attorney, the place, date and time of the commission of the crime charged, a defendant who intends to offer evidence of an alibi or entrapment as a defense shall, not less than ten (10) days before trial or such other time as the district court may direct, serve upon such district attorney a notice in writing of the defendant's intention to introduce evidence of an alibi or evidence of entrapment.

B. **Content of notice.** A notice of alibi or entrapment shall contain specific information as to the place at which the defendant claims to have been at the time of the alleged offense and, as particularly as known to defendant or the defendant's attorney, the names and addresses of the witnesses by whom the defendant proposes to establish an alibi or raise an issue of entrapment. Not less than five (5) days after receipt of defendant's witness list or at such other time as the district court may direct, the district attorney shall serve upon the defendant the names and addresses, as particularly as known to the district attorney, of the witnesses the state proposes to offer in rebuttal to discredit the defendant's alibi or claim of entrapment at the trial of the cause.

C. **Continuing duty to give notice.** Both the defendant and the district attorney shall be under a continuing duty to promptly disclose the names and addresses of additional witnesses which come to the attention of either party subsequent to filing their respective witness lists as provided in this rule.

D. **Failure to give notice.** If a defendant fails to serve a copy of such notice as herein required, the court may exclude evidence offered by such defendant for the purpose of proving an alibi, except the testimony of the defendant himself. If such notice is given by a defendant, the district court may exclude the testimony of any witness offered by the defendant for the purpose of proving an alibi or entrapment if the name and address of such witness was known to defendant or the defendant's attorney but was not stated in such notice. If the district attorney fails to file a list of witnesses and serve a copy on the defendant as provided in this rule, the court may exclude evidence offered by the state to contradict the defendant's alibi or entrapment evidence. If notice is given by the district attorney, the court may exclude the testimony of any witnesses offered by the district attorney for the purpose of contradicting the defense of alibi or entrapment if the name and address of the witness is known to the district attorney but was not stated in such notice. For good cause shown the court may waive the requirements of this rule.

E. **Admissibility as evidence.** The fact that a notice of alibi was given or anything contained in such notice shall not be admissible as evidence in the trial of the case.

[As amended, effective May 1, 1998.]

Committee commentary. — This rule was derived from Rule 3.200 of the Florida Rules of Criminal Procedure. The constitutionality of the Florida rule was upheld in Williams v. Florida, 399 U.S. 78, 90 S. Ct. 1893, 26 L. Ed. 2d 446 (1970). In a more recent case, the United States Supreme Court declared the Oregon notice of alibi rule unconstitutional because the Oregon rules fail to give the defendant reciprocal discovery rights. Wardius v. Oregon, 412 U.S. 470, 93 S. Ct. 2208, 37 L. Ed. 2d 470 (1973).

A similar rule has now been adopted in the federal rules as Rule 12.1. See 62 F.R.D. 271, 292-95 (1974). See also, American Bar Association Standards Relating to Discovery and Procedure Before Trial, Section 3.3 (Approved Draft 1970).

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A similar rule has now been adopted in the federal rules as Rule 12.1. See 62 F.R.D. 271, 292-95 (1974). *See also*, American Bar Association Standards Relating to Discovery and Procedure Before Trial, Section 3.3 (Approved Draft 1970).

ANNOTATIONS

The 1998 amendment, effective May 1, 1998, inserted "entrapment defense" in the Rule heading; in Paragraph A, substituted "alibi or entrapment as a defense" for "alibi in his defense" near the middle and "of the defendant's intention to introduce evidence of an alibi or evidence of entrapment" for "of his intention to claim such alibi" near the end of Paragraph A, designated the second and third sentence of Paragraph A as Paragraph B and redesignated the remaining Paragraphs accordingly; in Paragraph B, substituted "A notice of alibi or entrapment" for "Such notice" at the beginning, "the defendant's" for "his", "the defendant" for "he", "an alibi or raise an issue of entrapment" for "such alibi" at the end of the first sentence, and inserted "or claim of entrapment" near the end of the second sentence; in Paragraph D, inserted "or entrapment" throughout the paragraph, substituted "the defendant's" for "his" near the end of the second sentence, deleted "thereof" preceding "on the defendant"; and made minor stylistic changes.

Rule 5-508(E) NMRA applies regardless of whether or not the defendant has elected to abandon his or her alibi defense. State v. O'Neal, 2008-NMCA-022, 143 N.M. 437, 176 P.3d 1169.

No prejudice for noncompliance. — Where the district court erred in allowing the State to introduce evidence regarding the defendant's notice of alibi, the defendant was not prejudiced where the defendant never withdrew his notice of alibi and the State's evidence regarding the notice of alibi was consistent with the defendant's alibi theory. State v. O'Neal, 2008-NMCA-022, 143 N.M. 437, 176 P.3d 1169.

Failure to give notice of alibi. — Defendant's defense of mistaken identity, which consisted of the argument that because she and her sister bear a close resemblance, the arresting officers mistook the defendant as the one who purchased ingredients used in the manufacture of methamphetamine and that defendant was at her sister's apartment during the time in question, was simply evidence to support an alibi and because defendant failed to give the state notice of her alibi defense, the district court properly refused admission of a photograph of defendant's sister which defendant offered to show the resemblance between the sisters. State v. Kent, 2006-NMCA-134, 140 N.M. 606, 145 P.3d 86, cert. denied, 2006-NMCERT-010.

Constitutionality. — Since New Mexico's alibi rule provides for reciprocal discovery rights and provides ample opportunity for an investigation of the facts, it does not violate due process. State v. Smith, 88 N.M. 541, 543 P.2d 834 (Ct. App. 1975).

Purpose. — The notice of alibi rule is designed to enhance the search for truth in the criminal trial by insuring both the defendant and the state ample opportunity to investigate certain facts crucial to the determination of guilt or innocence. State v. Watley, 109 N.M. 619, 788 P.2d 375 (Ct. App. 1989).

Right to compulsory process not violated. — The alibi rule does not violate the right to compulsory process, since it does not prevent a defendant from compelling the attendance of witnesses, but rather, provides reasonable conditions for the presentation of alibi evidence. State v. Smith, 88 N.M. 541, 543 P.2d 834 (Ct. App. 1975).

Improper notice by defendant. — In deciding whether or not to admit alibi evidence when a proper notice has not been served by the defendant, the trial court should balance the potential for prejudice to the prosecution against the impact on the defense and whether the evidence might have been material to the outcome of the trial. Neither the purpose nor intent behind the notice-of-alibi rule appears to have been frustrated in the case at hand where the state had the opportunity to prepare its case by interviewing disclosed witnesses and investigating facts necessary to adjudicate the guilt or innocence of the defendant. McCarty v. State, 107 N.M. 651, 763 P.2d 360 (1988).

Application of rule does not force defendant to incriminate himself. — In applying the alibi rule so as to exclude evidence of alibi not disclosed to the district attorney and thus giving defendant a choice between foregoing the defense or taking the stand himself to present it, the trial court did not violate defendant's privilege against self-incrimination. State v. Smith, 88 N.M. 541, 543 P.2d 834 (Ct. App. 1975).

Adequate inquiry into defendant's violation of rule. — The record did not support the claim that the trial court acted arbitrarily and without adequate inquiry into the circumstances surrounding defendant's violation of the notice of alibi rule when it excluded the evidence in question, where it showed the parties were given opportunity to present their contentions to the trial court and after certain exhibits were admitted, attorneys for the parties argued to the court, and where furthermore the contention was not raised in the trial court. State v. Smith, 88 N.M. 541, 543 P.2d 834 (Ct. App. 1975).

Defendant found not prejudiced by alleged lack of sufficiency of written demand. — The appellate court did not need to decide whether the lack of sufficiency of the district attorney's written demand of notice of an alibi defense was waived because not raised until after trial, since the record affirmatively showed that the defense had later been provided the information allegedly missing from the original written demand, and thus defendants were not prejudiced by any technical deficiency. State v. Smith, 88 N.M. 541, 543 P.2d 834 (Ct. App. 1975).

Prejudicial effect of noncompliance. — In considering the potential for prejudice to the prosecution from the admission of previously undisclosed alibi testimony, the trial court must take into account not only the prejudicial effect of noncompliance with this rule on the immediate case, but also the necessity to enforce the rule to preserve the integrity of the trial process. The trial judge should consider whether noncompliance was a willful attempt to prevent the state from investigating necessary facts. State v. Watley, 109 N.M. 619, 788 P.2d 375 (Ct. App. 1989).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 223 to 243.

Validity and construction of statutes requiring defendant in criminal case to disclose matter as to alibi defense, 45 A.L.R.3d 958.

Construction and application of Rule 12.1, Federal Rules of Criminal Procedure, requiring, upon written notice, exchange of names of witnesses to be used to establish or rebut defendant's alibi, 42 A.L.R. Fed. 878.

22A C.J.S. Criminal Law §§ 463, 464.

5-509. Habitual criminal proceedings; notice of attack on prior sentence.

A. **Notice.** If the defense in an habitual criminal sentencing proceeding intends to attack the validity of any prior conviction, unless a shorter period of time is ordered by the court, no later than ten (10) days before the habitual criminal sentencing proceeding, the defendant shall provide the state with a written notice of such intention. The defendant's notice of intent to attack a prior conviction shall contain specific information as to each conviction the defendant intends to attack as invalid and the names and addresses of the witnesses by whom the defendant proposes to establish

such defense. Not less than five (5) days after receipt of defendant's witness list or at such other time as the district court may direct, the district attorney shall serve upon the defendant the names and addresses, as particularly as known to the district attorney, of the witnesses the state proposes to offer in rebuttal to discredit the defendant's claim that the prior conviction was invalid.

B. **Continuing duty to give notice.** Both the defendant and the district attorney shall be under a continuing duty to promptly disclose the names and addresses of additional witnesses which come to the attention of either party subsequent to filing their respective witness lists as provided in this rule.

C. **Failure to give notice.** If a defendant fails to serve a copy of such notice as herein required, the court may exclude evidence offered by such defendant for the purpose of proving a prior conviction was invalid, except the testimony of the defendant himself. If such notice is given by a defendant, the district court may exclude the testimony of any witness offered by the defendant for the purpose of proving the invalidity of a prior conviction if the name and address of such witness was known to defendant or his attorney but was not stated in such notice. If the district attorney fails to file a list of witnesses and serve a copy thereof on the defendant as provided in this rule, the court may exclude evidence offered by the state to contradict the defendant's evidence. If such notice is given by the district attorney, the court may exclude the testimony of any witnesses offered by the district attorney for the purpose of contradicting the defendant's claim that a prior conviction was invalid if the name and address of such witness is known to the district attorney but was not stated in such notice. For good cause shown the court may waive the requirements of this rule.

[As adopted, effective August 1, 1989.]

ANNOTATIONS

Failure to give notice that a conviction will be contested. — Even if the defendant fails to provide the state with notice that the validity of a prior conviction will be contested, the state has the initial burden of showing that the defendant is, in fact, the same person as the person named in the prior conviction. State v. Clements, 2009-NMCA-085, __ N.M. __, 215 P.3d 54.

5-511. Subpoena.

A. **Form; issuance.**

(1) Every subpoena shall:

(a) state the name of the court from which it is issued;

(b) state the title of the action and its criminal action number;

(c) command each person to whom it is directed to attend and give testimony or to produce and permit inspection and copying of designated books, documents or tangible things in the possession, custody or control of that person, or to permit inspection of premises, at a time and place therein specified; and

(d) be substantially in the form approved by the Supreme Court.

A command to produce evidence or to permit inspection may be joined with a command to appear at trial or hearing, deposition or statement, or may be issued separately.

(2) All subpoenas shall issue from the court for the district in which the matter is pending.

(3) The clerk shall issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall complete it before service. An attorney authorized to practice law in New Mexico and who represents a party, as an officer of the court, may also issue and sign a subpoena on behalf of the court.

B. **Service; place of examination.**

(1) A subpoena may be served any place within the state.

(2) A subpoena may be served by any person who is not a party and is not less than eighteen (18) years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and, if that person's attendance is commanded:

(a) if the witness is to be paid from funds appropriated by the legislature to the administrative office of the courts for payment of state witnesses or for the payment of witnesses in indigency cases, by processing for payment to such witness the fee and mileage prescribed by regulation of the administrative office of the courts;

(b) for all persons not described in Subparagraph (2)(a) of this paragraph, by tendering to that person the full fee for one day's expenses provided by Subsection A of Section 10-8-4 NMSA 1978 as per diem for nonsalaried public officers attending a board or committee meeting and the mileage provided by Subsection D of Section 10-8-4 NMSA 1978. The fee for per diem expenses shall not be prorated. If attendance is required for more than one day, a full day's expenses shall be paid prior to commencement of each day attendance is required. When the subpoena is issued on behalf of the state or an officer or agency thereof, including the public defender department, fees and mileage need not be tendered. Prior to or at the same time as service of any subpoena commanding production of documents and things or inspection of premises before trial, notice shall be served on each party in the manner prescribed by Rule 5-103 NMRA.

(3) A person may be required to attend a deposition or statement within one hundred (100) miles of where that person resides, is employed or transacts business in person, or at such other place as is fixed by an order of the court.

(4) A person may be required to attend a hearing or trial at any place within the state.

(5) Proof of service when necessary shall be made by filing with the clerk of the court a return substantially in the form approved by the Supreme Court.

(6) A subpoena may be issued for taking of a deposition within this state in a criminal action pending outside the state pursuant to Section 38-8-1 NMSA 1978 upon the filing of a miscellaneous proceeding in the judicial district in which the subpoena is to be served. Upon the docketing of the miscellaneous proceeding, the subpoena may be issued and shall be served as provided by this rule.

(7) A subpoena may be served in an action pending in this state on a person in another state or country in the manner provided by law or rule of the other state or country.

C. **Protection of persons subject to subpoenas.**

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction.

(2)

(a) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, statement, hearing or trial.

(b) Subject to Subparagraph (2) of Paragraph D of this rule, a person commanded to produce and permit inspection and copying may, within fourteen (14) days after service of the subpoena or before the time specified for compliance if such time is less than fourteen (14) days after service, serve upon all parties written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any

person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3)

(a) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it:

(i) fails to allow reasonable time for compliance,

(ii) requires a person who is not a party or an officer of a party to travel to a place more than one hundred (100) miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of Subparagraph (3)(b)(iii) of this paragraph, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(b) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development or commercial information,

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than one hundred (100) miles to attend trial,

the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena.

D. **Duties in responding to subpoena.**

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents,

communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

E. **Contempt.** Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued. An adequate cause for failure to obey exists when a subpoena purports to require a non-party to attend or produce at a place not within the limits provided in Subparagraph (3)(a)(ii) of Paragraph C of this rule.

[Approved, effective May 15, 2000.]

Committee commentary. — *See* the committee comments following Rule 1-045 NMRA for a discussion of the comparable civil rule governing subpoenas. Prior to the adoption of this rule, Rule 1-045 NMRA governed subpoenas in criminal cases. *See* Rule 5-603 NMRA prior to the May 15, 2000, amendment of that rule.

5-512. Stipulations regarding discovery procedure.

Unless the court orders otherwise, or previous orders of the court conflict, the parties may by written stipulation:

A. provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions; and

B. modify the procedures provided by these rules for other methods of discovery.

[Approved, effective September 30, 2002.]

ANNOTATIONS

Effective dates. — Pursuant to a court order dated July 31, 2002, this rule is effective September 30, 2002.

ARTICLE 6
Trials

5-601. Pretrial motions, defenses and objections.

A. **Change of venue.** Change of venue shall be accomplished according to law.

B. **Defenses and objections which may be raised.** Any defense, objection or request which is capable of determination without a trial on the merits may be raised before trial by motion.

C. **Defenses and objections which must be raised.** The following defenses or objections must be raised prior to trial:

(1) defenses and objections based on defects in the initiation of the prosecution; or

(2) defenses and objections based on defects in the complaint, indictment or information other than a failure to show jurisdiction in the court or to charge an offense, which objections shall be noticed by the court at any time during the pendency of the proceeding. Failure to present any such defense or objection, other than the failure to show jurisdiction or charge an offense, constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. If any such objection or defense is sustained and is not otherwise remediable, the court shall order the complaint, indictment or information dismissed.

D. **Time for making motions.** All motions, unless otherwise provided by these rules or unless otherwise ordered by the court, shall be made at the arraignment or within ninety (90) days thereafter, unless upon good cause shown the court waives the time requirement.

E. **Evidentiary hearing.** If an evidentiary hearing is required, the motion shall be accompanied by a separate written request for an evidentiary hearing, including a statement of the ultimate facts intended to be proven at such an evidentiary hearing. Unless a shorter period of time is ordered by the court, at least five (5) days before the hearing on the motion, each party shall submit to the other party's attorney the names and addresses of the witnesses the party intends to call at the evidentiary hearing, together with any statement subject to discovery made by the witness which has not been previously disclosed pursuant to Rule 5-501 or 5-502.

F. **Ruling of court.** All motions shall be disposed of within a reasonable time after filing.

G. **Defenses and objections not waived.** No defense or objection shall be waived by not being raised or made at arraignment.

H. **Notice of withdrawal of motion.** If a motion is scheduled for hearing, a party shall give at least five (5) days notice of withdrawal of the motion.

[As amended, effective May 1, 1999.]

Committee commentary. — *See* Sections 38-3-3 to 38-3-8 NMSA 1978, for the statutes pertaining to change of venue. The original venue for a criminal case is the county in which the crime was committed. Section 30-1-14 NMSA 1978.

Paragraphs B and C of this rule were derived from Rules 12(b)(1) and (2) and 12(f) of the Federal Rules of Criminal Procedure. *See generally,* 48 F.R.D. 553, 579 (1970) and

62 F.R.D. 571, 287-92 (1974). Unlike the federal rule, Paragraph C of this rule does not include motions to suppress evidence as a matter which must be raised prior to trial. If a motion to suppress is made prior to trial, it is governed by Rule 5-212. Subparagraph (2) of Paragraph C, and Paragraph G of this rule superseded decisions holding that motions to quash an indictment must be raised prior to the arraignment and plea. *See* Section 31-6-3 NMSA 1978; *State v. Elam,* 86 N.M. 595, 526 P.2d 189 (Ct. App.), *cert. denied,* 86 N.M. 593, 526 P.2d 187 (1974).

Paragraph H was added in 1999 to provide an affirmative duty of an attorney to give five days notice of withdrawal of a motion. Failure to provide adequate notice can result in unnecessary costs. *See State v. Rivera,* 1998-NMSC-024, 125 N.M. 532, 964 P.2d 93. A willful violation of this paragraph can result in contempt of court and the imposition of disciplinary action. *See* Rule 5-112 NMRA. Paragraph H is intended to preclude local rules which may result in imposition of costs incurred by the court because of an alleged negligent failure of the attorney to provide adequate notice of the withdrawal of a motion. The committee is of the opinion that such a rule would have a chilling effect upon the zealous representation of a defendant in a criminal case.

ANNOTATIONS

The 1999 amendment, effective May 3, 1999, substituted "ninety (90) days" for "twenty (20) days" in Paragraph D, made a stylistic change and inserted "subject to discovery" in the second sentence of Paragraph E, deleted the second sentence of Paragraph F which provided that all motions not ruled upon within 30 days after filing shall be deemed denied, substituted "at arraignment" for "before entering a plea" in Paragraph G, and added Paragraph H.

As a general rule, a motion to suppress evidence is not required to be made before trial and may be made at trial. State v. Katrina G., 2008-NMCA-069, 144 N.M. 205, 185 P.3d 376.

Failure to request an evidentiary hearing. — Where, two days before trial, the child filed a motion to suppress evidence obtained pursuant to a nighttime search of the child's home pursuant to a search warrant that did not contain a written authorization for a nighttime search, the court determined that testimony at an evidentiary hearing on the motion was required, there was no time or opportunity for an evidentiary hearing before and during trial because a Supreme Court order that extended the time for trial imposed a trial deadline, the child had delayed filing the motion, and the child did not request an evidentiary hearing or propose alternatives to an evidentiary hearing, the trial court did not deny the child her constitutional rights to a hearing by denying the motion to suppress. State v. Katrina G., 2008-NMCA-069, 144 N.M. 205, 185 P.3d 376.

Entrapment. — Where a defendant's claim of entrapment is uncorroborated, the question of the defendant's credibility is best left to the jury to decide and although the district court may determine entrapment as a matter of law, it may decline to do so

where facts or credibility are disputed. State v. Shirley, 2007-NMCA-137, 142 N.M. 765, 170 P.3d 1003, cert. denied, 2007-NMCERT-010.

Pre-trial exclusion of expert testimony. — The trial court erred when it decided, pre-trial, that the testimony of the state's expert witness was insufficient to relate the defendant's blood alcohol test result back to the time the defendant was driving and that the testimony of the defendant's expert witness was more credible than that of the state's expert witness. State v. Hughey, 2007-NMSC-036, 142 N.M. 83, 163 P.3d 470.

Denial of psychological evaluation of victim of sexual abuse. — Where defendant filed motion twelve days before his second trial to allow his expert to conduct forensic psychological evaluations of minor victims of sexual abuse, the motion was not timely and was properly denied and where defendant did not show how a present evaluation for post-traumatic stress disorder could be relevant in regard to whether the post-traumatic stress disorder suffered by the minor victims would be consistent with traumatic events other than or in addition to sexual abuse, there was no prejudice from denial of defendant's motion. State v. Paiz, 2006-NMCA-144, 140 N.M. 815, 149 P.3d 579, cert. denied, 2006-NMCERT-011.

Rule does not apply to motions for new trial. State v. Shirley, 103 N.M. 731, 713 P.2d 1 (Ct. App. 1985).

Rule does not require findings in connection with pretrial motion. State v. Blea, 92 N.M. 269, 587 P.2d 47 (Ct. App.), cert. denied, 92 N.M. 260, 586 P.2d 1089 (1978), 441 U.S. 908, 99 S. Ct. 1999, 60 L. Ed. 2d 377 (1979), overruled on other grounds State v. Harrison, 95 N.M. 383, 622 P.2d 288 (1980).

Absent legal authorization, judge lacks authority to order production of handwriting exemplars on pain of contempt, prior to arrest or charge. Sanchez v. Attorney Gen., 93 N.M. 210, 598 P.2d 1170 (Ct. App. 1979).

When affidavit for disqualification of judge must be filed. — Denial of the request that the trial judge be disqualified was not error as the disqualification affidavit must be filed before the court has acted judicially on a material issue. State v. Clark, 83 N.M. 484, 493 P.2d 969 (Ct. App. 1971), cert. denied, 83 N.M. 473, 493 P.2d 958 (1972).

Right to and purpose of change of venue. — All laws for removal of causes from one vicinage to another were passed for the purpose of promoting the ends of justice by getting rid of the influence of some local prejudice which might be supposed to operate detrimentally to the interests and rights of one or the other of the parties to the suit. This is a common-law right belonging to our courts, and as such can be exercised by them in all cases, when not modified or controlled by state constitutional or statutory enactments. State v. Valdez, 83 N.M. 632, 495 P.2d 1079 (Ct. App.), aff'd, 83 N.M. 720, 497 P.2d 231, cert. denied, 409 U.S. 1077, 93 S. Ct. 694, 34 L. Ed. 2d 666 (1972).

Right to trial in county of offense is conditional. — The right of a trial by jury as that right was known at the time of the adoption of the constitution did not include an absolute right to a trial by a jury of the county where the offense was committed, but that the right was conditioned upon the possibility of a fair and impartial trial being had in that county. State v. Valdez, 83 N.M. 632, 495 P.2d 1079 (Ct. App.), aff'd, 83 N.M. 720, 497 P.2d 231, cert. denied, 409 U.S. 1077, 93 S. Ct. 694, 34 L. Ed. 2d 666 (1972).

By the common law an accused had the right to be tried in the county in which the offense was alleged to have been committed, where the witnesses were supposed to have been accessible, and where he might have the benefit of his good character if he had established one there, but, if an impartial trial could not be had in such county, it was the practice to change the venue upon application of the people to some other county where such trial could be obtained. State v. Valdez, 83 N.M. 632, 495 P.2d 1079 (Ct. App.), aff'd, 497 P.2d 231, cert. denied, 409 U.S. 1077, 93 S. Ct. 694, 34 L. Ed. 2d 666 (1972).

Change of venue on court's own motion. — Under the facts of the incident out of which the charges against the defendant arose, with the attendant publicity and the fear, unrest and prejudice of the citizens of Rio Arriba and surrounding counties, the trial court's inherent power permitted it to order a change of venue on its own motion. State v. Valdez, 83 N.M. 632, 495 P.2d 1079 (Ct. App.), aff'd, 83 N.M. 720, 497 P.2d 231, cert. denied, 409 U.S. 1077, 93 S. Ct. 694, 34 L. Ed. 2d 666 (1972).

There is nothing in the constitution or statutes limiting the inherent power of the court to order a change of venue sua sponte when an impartial trial cannot be had in a particular district. State v. Valdez, 83 N.M. 632, 495 P.2d 1079 (Ct. App.), aff'd, 83 N.M. 720, 497 P.2d 231, cert. denied, 409 U.S. 1077, 93 S. Ct. 694, 34 L. Ed. 2d 666 (1972).

The process of determining whether or not the facts necessary for a change of venue exist is the same as that followed in determining any other fact in a case. State v. Valdez, 83 N.M. 632, 495 P.2d 1079 (Ct. App.), aff'd, 83 N.M. 720, 497 P.2d 231, cert. denied, 409 U.S. 1077, 93 S. Ct. 694, 34 L. Ed. 2d 666 (1972).

Denial of motion for change of venue found based on substantial evidence. — Where the trial court's ruling is supported by substantial evidence, the trial court did not abuse its discretion in not accepting as true the evidence introduced in support of a motion for change of venue, and the fact that newspaper articles were introduced in support of motion does not change the rule. Even with the newspaper articles in support of the motion, the trial court, on the evidence presented, could properly deny the motion. State v. Atwood, 83 N.M. 416, 492 P.2d 1279 (Ct. App. 1971), cert. denied, 83 N.M. 395, 492 P.2d 1258 (1972) (decided under former law).

Specific findings must be requested. — Unless specific findings are requested in denial of motion for change of venue, the absence of findings is waived. State v. Mosier, 83 N.M. 213, 490 P.2d 471 (Ct. App. 1971) (decided under former law).

A defense is "capable of determination" under Subdivision (d) (see now Paragraph B) if a trial of the facts surrounding the commission of the alleged offense would be of no assistance in determining the validity of the defense. State v. Mares, 92 N.M. 687, 594 P.2d 347 (Ct. App.), cert. denied, 92 N.M. 675, 593 P.2d 1078 (1979).

Deciding lawfulness of peace officer/defendant's shooting of victim in advance of trial is a violation of Subdivision (d) (see now Paragraph B) because lawfulness is not capable of determination without a trial on the merits. State v. Mares, 92 N.M. 687, 594 P.2d 347 (Ct. App.), cert. denied, 92 N.M. 675, 593 P.2d 1078 (1979).

Court's authority to consider purely legal issue. — The district court had authority to consider, prior to trial, the purely legal issue of whether burglary charges could be predicated on unauthorized entry by climbing over a fence, and had authority to dismiss the charges. State v. Foulenfont, 119 N.M. 788, 895 P.2d 1329 (Ct. App. 1995).

When a defendant raises constitutional free speech defense to charges under the Sexual Exploitation of Children Act, 30-6A-1 to -4 NMSA 1978 , the district court may conduct a limited pretrial review of the materials upon which charges rest to determine whether the materials meet constitutional requirements; the district court should first review the material to ensure that it meets statutory guidelines, then review the material to ensure that constitutionally protected speech is not prosecuted. State v. Rendleman, 2003-NMCA-150, 134 N.M. 744, 82 P.3d 554, cert. denied, 134 N.M. 744, 82 P.3d 554.

On a pretrial motion to dismiss charges alleging violations of the Sexual Exploitation of Children Act, 30-6A-1 to -4 NMSA 1978, the district court may dismiss the charges where, on the undisputed face of the materials before the court, a jury could not find beyond a reasonable doubt that the material meets the elements of the offense as defined by the Act. State v. Rendleman, 2003-NMCA-150, 134 N.M. 744, 82 P.3d 554, cert. denied, 134 N.M. 744, 82 P.3d 554.

Motion based on grand jury notice held untimely. — Because defendant did not file his motion to dismiss for failure to provide target notice until eight months after his arraignment, and he did not show any cause below or on appeal for waiving the time limit, the trial court correctly found the motion to be untimely. State v. Vallejos, 1998-NMCA-151, 126 N.M. 161, 967 P.2d 836.

Defect in notice of grand jury investigation must be raised before trial. — The issue of whether notice has been given to the target of a grand jury investigation as required by 31-6-11B NMSA 1978 is a claimed defect in the initiation of the prosecution; it must be raised prior to trial and, when raised, is to be decided by the trial court inasmuch as it does not involve a trial on the merits. Rogers v. State, 94 N.M. 218, 608 P.2d 530 (Ct. App. 1980).

Motion to quash an indictment must be made before arraignment and plea. State v. Paul, 82 N.M. 619, 485 P.2d 375 (Ct. App.), cert. denied, 82 N.M. 601, 485 P.2d 357 (1971) (decided under former law).

When variance between charge and proof must be raised. — A question of variance between charge and proof cannot be raised for the first time by motion in arrest of judgment. State v. Mares, 61 N.M. 46, 294 P.2d 284 (1956) (decided under former law).

A variance between charge and proof cannot be raised for the first time after verdict by a motion for new trial. State v. Mares, 61 N.M. 46, 294 P.2d 284 (1956) (decided under former law).

Motion to strike jury panel after seeing defendant in handcuffs. — Where defendant moved to strike the entire jury panel because some of them had observed the defendant in handcuffs in the custody of a deputy sheriff in the corridor prior to the commencement of the trial, and where defendant later made a new motion for a mistrial because a number of the jurors observed defendant in handcuffs in the custody of a deputy sheriff returning to the trial, but where it was not contended that defendant was in handcuffs in the courtroom at any time during jury selection or trial, there was no abuse of discretion on the part of the trial judge in denying either or both of defendant's motions. State v. Gomez, 82 N.M. 333, 481 P.2d 412 (Ct. App. 1971) (decided under former law).

No prejudice shown when named witness did not testify. — That one of the four persons named was not called to testify where there was nothing to indicate defendant was in any way prejudiced by the failure of the trial court to grant a continuance because this person had been named, but not called, as a witness was not error. State v. Mora, 81 N.M. 631, 471 P.2d 201 (Ct. App.), cert. denied, 81 N.M. 668, 472 P.2d 382 (1970) (decided under former law).

Burden was upon defendant to demonstrate a lack of jurisdiction in the district court. Having presented no evidence as to lack of jurisdiction, defendant did not meet his burden in connection with the pretrial motion for dismissal on jurisdictional grounds. State v. Cutnose, 87 N.M. 307, 532 P.2d 896 (Ct. App.), cert. denied, 87 N.M. 299, 532 P.2d 888 (1975).

Unconstitutional statute does not "charge an offense". — Defendant's motion to quash the indictment for failure to charge an offense on grounds of the unconstitutionality of the statute in question fell within this rule's exception "to charge an offense" and thus it was not filed late though filed after arraignment and plea. State v. Elam, 86 N.M. 595, 526 P.2d 189 (Ct. App.), cert. denied, 86 N.M. 593, 526 P.2d 187 (1974).

Continuance in order to obtain certain witnesses properly denied. — Where defendant never indicated what particular facts certain requested witnesses would prove, or that he knew of no other witnesses by which such facts could be proved, defendant simply did not present a basis for a continuance, either on the question of a "sanity hearing" or on the merits of the cause. State v. Hollowell, 80 N.M. 756, 461 P.2d 238 (Ct. App. 1969) (decided under former law).

Continuance in order to retain counsel properly denied. — Defendant's request for time to attempt to retain his own counsel in place of court-appointed counsel was denied as it presented no independent basis for a continuance. State v. Hollowell, 80 N.M. 756, 461 P.2d 238 (Ct. App. 1969) (decided under former law).

That names of witnesses were not endorsed on information and defendant's alleged surprise at their being called as witnesses are insufficient as a basis for continuance. State v. Mora, 81 N.M. 631, 471 P.2d 201 (Ct. App.), cert. denied, 81 N.M. 668, 472 P.2d 382 (1970) (decided under former law).

Continuance for polygraph test properly denied. — The trial court's denial of defendant's oral motion, made immediately before the trial began, that the trial setting be vacated so as to enable defendant to have a polygraph examination, where no evidence was offered in support of the motion and the hearing thereon consisted entirely of representations of counsel, on grounds that the examiner chosen by defendant had stated that any examination results would not be meaningful because of pain suffered by defendant as a result of alleged injuries suffered in an automobile accident, and that defendant had had prior opportunities to obtain the examination, was not an abuse of discretion. State v. Robertson, 90 N.M. 382, 563 P.2d 1175 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

Denial of motion for continuance where testimony of missing witness is not supportive. — Trial court did not abuse its discretion in denying defendant's motion for continuance sought upon the ground that defendant was unable to secure the presence of a particular witness, where the record disclosed that the testimony expected from the absent witness would not support or aid defendant in his defense. State v. Sluder, 82 N.M. 755, 487 P.2d 183 (Ct. App. 1971) (decided under former law).

Matter of continuance of cause rests within sole discretion of trial court and its action will not be questioned unless it appears that there has been an abuse of discretion. State v. Baca, 85 N.M. 55, 508 P.2d 1352 (Ct. App. 1973).

A motion for continuance is directed to the discretion of the court and the denial of the motion is not error unless there is a clear abuse of discretion. State v. Martinez, 83 N.M. 9, 487 P.2d 919 (Ct. App. 1971) (decided under former law).

The granting or denying of a motion for continuance rests in the sound discretion of the court and unless such discretion is abused will not be reversed. State v. Paul, 82 N.M. 791, 487 P.2d 493 (Ct. App. 1971) (decided under former law).

The granting of a motion for continuance lies in the sound discretion of the trial court and the denial of such a motion will not be deemed error unless there is a clear abuse of discretion. State v. Deats, 82 N.M. 711, 487 P.2d 139 (Ct. App. 1971) (decided under former law).

The granting or denying of a motion for continuance rests in the sound discretion of the trial court and will not be interfered with except for abuse. State v. Tapia, 81 N.M. 365, 467 P.2d 31 (Ct. App. 1970) (decided under former law).

Where motion for continuance is sufficient there is no room for discretion. — Where there was no objection to the sufficiency of the motion for continuance or its supporting affidavit and the state did not seek to prevent a continuance by an admission that the witness, if present, would testify to the facts stated in the application for continuance, then under these circumstances the defendant was entitled to a continuance as a matter of right and there was no room for the court to exercise any discretion; therefore, the court's failure to grant a continuance was error. State v. Sibold, 83 N.M. 678, 496 P.2d 738 (Ct. App. 1972).

The granting or denial of a motion for continuance is within the discretion of the trial court and where no reasons were given showing that the denial of the postponement was prejudicial, or that substantial justice could be more clearly obtained, there was no abuse of discretion. State v. Garcia, 82 N.M. 482, 483 P.2d 1322 (Ct. App. 1971).

Continuance denied on grounds that court had a no continuances policy and wanted to maintain its docket was abuse of discretion where defense counsel was unprepared to go to trial; case was new to defense counsel and complex; co-defendant entered a plea agreement with state and agreed to testify for the state on the morning of the trial; state did not oppose the continuance; there was no evidence that the delay would cause any inconvenience to the parties or the court; defendant's motion was the first continuance requested and only three months had elapsed from time of arraignment to the date of trial. State v. Stefani, 2006-NMCA-073, 139 N.M. 719, 137 P.3d 659, cert. denied, 2006-NMCERT-006.

Hearing required for issue as to "illegal taint". — Where there is an issue as to an "illegal taint", the issue is to be resolved by a consideration of the totality of the circumstances surrounding the out-of-court identification. This requires an evidentiary hearing. State v. Turner, 81 N.M. 571, 469 P.2d 720 (Ct. App. 1970) (decided under former law).

Failure to name specific subsection of statute not claimed in trial court. — Where defendant claims that the charge against him for being an habitual offender was "defective" for failure to name a specific subsection of the statute, but no such claim was made in the trial court, then it will not be considered on appeal. State v. Jordan, 88 N.M. 230, 539 P.2d 620 (Ct. App. 1975).

Failure to request statement of facts pursuant to Rule 5-205 NMRA. — Where on the morning of trial defendant moved to quash the indictment on the grounds that he had just learned certain facts from the prosecutor, but defendant had never requested a statement of facts pursuant to Rule 9 (see now Rule 5-205 NMRA), the trial court properly ruled that the motion was not timely filed. State v. Palmer, 89 N.M. 329, 552 P.2d 231 (Ct. App. 1976).

Failure to bring motion to suppress to court's attention. — The trial court did not err in failing to conduct a hearing on a pretrial motion to suppress statements made by defendants when the motion was never brought to its attention. State v. Dosier, 88 N.M. 32, 536 P.2d 1088 (Ct. App.), cert. denied, 88 N.M. 28, 536 P.2d 1084 (1975).

Defendant failed to establish prejudice from untimely motion. — Where habitual offender asserted the trial court erred in granting the prosecutor's motions to fingerprint him on the morning of trial because the motion was untimely, but his claim of prejudice was not supported in the record, the trial court did not abuse its discretion in granting the motion. State v. Wildenstein, 91 N.M. 550, 577 P.2d 448 (Ct. App. 1978).

Wrongful termination of diversion agreement is defense which must be raised. — A claim that a prosecutor has wrongly terminated a diversion agreement is a defense to the initiation of a criminal prosecution and must be raised prior to trial. State v. Trammel, 100 N.M. 547, 673 P.2d 827 (Ct. App. 1983).

“Reasonable time” rule applies to motion for extending the time for commencement of trial under Rule 5-604. — Because Rule 5-604 NMRA does not provide a time within which the applicable court must rule on a timely-filed motion for extending the time for commencement of trial, it must be construed according to other rules of criminal procedure. Specifically, Paragraph F of this rule establishes a general rule that all motions shall be disposed of within a reasonable time after filing and Rule 5-104(B)(1) NMRA recognizes the discretion of the district court to enlarge a time limitation contained in the Rules of Criminal Procedure if requested before the applicable time limitation expires. Under those rules, the district court has reasonable time after filing to rule on a timely-filed petition under Rule 5-604(E) NMRA, regardless of the expiration of the six-month period of Rule 5-604(B) NMRA. State v. Sandoval, 2003-NMSC-027, 133 N.M. 399, 62 P.3d 1281.

Motion to dismiss involving factual matters. — Where a defendant’s motion to dismiss involves factual matters that are not capable of resolution without a trial on the merits, the district court lacks authority to grant the motion pretrial. State v. Gomez, 2003-NMSC-012, 133 N.M. 763, 70 P.3d 753.

Motion to dismiss timely made at trial. — A motion to dismiss on the ground that the information failed to charge an offense is timely made at trial. State v. Martin, 94 N.M. 251, 609 P.2d 333 (Ct. App.), cert. denied, 94 N.M. 628, 614 P.2d 545 (1980).

Timing of motion to dismiss involving fundamental right. — Defendant's failure to comply with the time limitation of Subdivision (d) (see now Paragraph D) did not waive his right to seek dismissal of an indictment on the ground of prosecutorial vindictiveness, which issue involved his fundamental right to due process of law. State v. Lujan, 103 N.M. 667, 712 P.2d 13 (Ct. App. 1985).

Failure to request statement of facts deemed waiver. — Where an information charged conspiracy to commit a felony as well as three other separate felonies, it

provided sufficient notice of the underlying felony or felonies; and when the defendant did not request a statement of facts, he waived any claim that he did not know which of the three felonies, or whether all of them, constituted the felony he was charged with conspiring to commit. State v. Martin, 94 N.M. 251, 609 P.2d 333 (Ct. App.), cert. denied, 94 N.M. 628, 614 P.2d 545 (1980).

Any relief available for a Rule 5-201C violation is waived where this violation is raised for the first time on appeal. State v. Keener, 97 N.M. 295, 639 P.2d 582 (Ct. App. 1981).

Motion for dismissal under Rule 5-604. — A motion seeking a dismissal under Rule 37 (see now Rule 5-604) for a violation of the right to a speedy trial is not governed by the requirements of Subdivision (e) (see now Paragraph D) of this rule. State v. Aragon, 99 N.M. 190, 656 P.2d 240 (Ct. App. 1982).

Paragraph D does not modify Paragraph C. State v. Urban, 108 N.M. 744, 779 P.2d 121 (Ct. App. 1989).

Determination whether evidentiary hearing required. — The trial court must decide initially whether an evidentiary hearing is required. Ordinarily, that will be based upon the statement of facts intended to be proved. If an evidentiary hearing is not required, the trial court may decide the issues raised by the motion without a hearing. State v. Urban, 108 N.M. 744, 779 P.2d 121 (Ct. App. 1989).

Paragraph E seems to provide two steps: (1) upon receipt of a motion and separate written request for an evidentiary hearing, the trial court determines whether an evidentiary hearing is required; and (2) after the motion has been set for a hearing, the parties provide each other with the required information within the time limit of the rule or the alternative time limit provided by the court. State v. Urban, 108 N.M. 744, 779 P.2d 121 (Ct. App. 1989).

Speedy trial hearing under Paragraph E. — A defendant is not entitled to an evidentiary hearing under Paragraph E on a speedy trial claim where, although he has been incarcerated, he has not been charged, since the sixth amendment speedy trial guarantee does not apply until charges are pending. State v. Urban, 108 N.M. 744, 779 P.2d 121 (Ct. App. 1989).

Selective prosecution claim is an application for dismissal on constitutional grounds, to be decided by the trial judge after evidence is presented at a pretrial hearing. State v. Cochran, 112 N.M. 190, 812 P.2d 1338 (Ct. App. 1991).

Pretrial review of death penalty aggravating circumstances. — A motion to dismiss an aggravating circumstance that presents a purely legal question should be granted when the district court finds that the aggravating circumstance does not apply as a matter of law. When the applicability of an aggravating circumstance raises a question of fact or a mixed question of fact and law, the district court should grant the defendant's

motion to dismiss the aggravating circumstance only when it finds that there is not probable cause to support the aggravating circumstance. To reach an appropriate decision, the district court may conduct a limited evidentiary hearing on a pretrial motion to dismiss aggravating circumstances when necessary. State v. Ogden, 118 N.M. 234, 880 P.2d 845, cert. denied, 513 U.S. 936, 115 S. Ct. 336, 130 L. Ed. 2d 294 (1994).

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

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 1109, 1110; 75 Am. Jur. 2d Trial § 91 et seq.

Defendant's appeal from plea conviction as affected by prosecutor's failure or refusal to dismiss other pending charges, pursuant to plea agreement, until expiration of time for appeal, 86 A.L.R.3d 1262.

Validity and effect of criminal defendant's express waiver of right to appeal as part of negotiated plea agreement, 89 A.L.R.3d 864.

Power of state trial court in criminal case to change venue on its own motion, 74 A.L.R.4th 1023.

Actions by state official involving defendant as constituting "outrageous" conduct violating due process guaranties, 18 A.L.R.5th 1.

Availability in federal court of defense of entrapment where accused denies committing acts which constitute offense charged, 54 A.L.R. Fed. 644.

88 C.J.S. Trial § 1 et seq; 89 C.J.S. Trial § 427 et seq.

5-602. Insanity; incompetency; lack of capacity.

A. **Defense of insanity.**

(1) Notice of the defense of "not guilty by reason of insanity at the time of commission of an offense" must be given at the arraignment or within twenty (20) days thereafter, unless upon good cause shown the court waives the time requirement of this rule.

(2) When the defense of "not guilty by reason of insanity at the time of commission of an offense" is raised, the issue shall be determined in nonjury trials by the court and in jury trials by a special verdict of the jury. If the defendant is acquitted on the ground of insanity, a judgment of acquittal shall be entered, and any proceedings for commitment of the defendant because of any mental disorder or developmental disability shall be pursuant to law.

B. **Determination of competency to stand trial.**

(1) The issue of the defendant's competency to stand trial may be raised by motion, or upon the court's own motion, at any stage of the proceedings.

(2) The issue of the defendant's competency to stand trial shall be determined by the judge, unless the judge finds there is evidence which raises a reasonable doubt as to the defendant's competency to stand trial.

(a) If a reasonable doubt as to the defendant's competency to stand trial is raised prior to trial, the court shall order the defendant to be evaluated as provided by law. Within sixty (60) days after receiving an evaluation of the defendant's competency, the court, without a jury, may determine the issue of competency to stand trial; or, in its discretion, may submit the issue of competency to stand trial to a jury, other than the trial jury.

(b) If the issue of the defendant's competency to stand trial is raised during trial, the trial jury shall be instructed on the issue. If, however, the defendant has been previously found by a jury to be competent to stand trial, the issue of the defendant's competency to stand trial shall be submitted to the trial jury only if the court finds that there is evidence which was not previously submitted to a jury which raises a reasonable doubt as to the defendant's competency to stand trial.

(3) If a defendant is found incompetent to stand trial:

(a) further proceedings in the criminal case shall be stayed until the defendant becomes competent to stand trial;

(b) the court where appropriate, may order treatment to enable the defendant to attain competency to stand trial, and, upon a determination by clear and convincing evidence that the defendant is dangerous, order the defendant detained in a secure facility;

(c) the court may review and amend the conditions of release pursuant to Rule 5-401.

(4) If the finding of incompetency is made during the trial, the court shall declare a mistrial.

C. **Mental examination.** Upon motion and upon good cause shown, the court shall order a mental examination of the defendant before making any determination of competency under this rule. If a defendant is determined to be indigent, the court shall pay for the costs of the examination from funds available to the court.

D. **Continuing judicial review.** Upon committing a defendant to undergo treatment to attain competency to stand trial, the court, not less than once every twelve (12)

months, shall review the progress of the defendant in attaining competency to stand trial.

E. **Statement made during mental examination.** A statement made by a person during a mental examination or treatment subsequent to the commission of the alleged crime shall not be admissible in evidence against such person in any criminal proceeding on any issue other than that of the person's sanity, ability to form specific intent or competency to stand trial.

F. **Notice of incapacity to form specific intent.** If the defense intends to call an expert witness on the issue of whether the defendant was incapable of forming the specific intent required as an element of the crime charged, notice of such intention shall be given at the time of arraignment or within twenty (20) days thereafter, unless upon good cause shown, the court waives the time requirement of this rule.

[As amended, effective August 1, 1989; November 1, 1991.]

Committee commentary. — The requirement of a notice of the defense of "not guilty by reason of insanity" under Subparagraph (1) of Paragraph A of this rule replaces the plea of not guilty by reason of insanity, eliminated by the 1982 enactment of Sections 31-9-3 and 31-9-4 NMSA 1978. See State v. Page, 100 N.M. 788, 676 P.2d 1353 (Ct. App. 1984). See also, Rule 5-303 for the types of permissible pleas. A similar notice is required by Rule 12.2 of the Federal Rules of Criminal Procedure.

Notice of incapacity to form specific intent pursuant to Paragraph F of this rule does not constitute notice of insanity as a defense under Subparagraph (1) of Paragraph A of this rule. See State v. Padilla, 88 N.M. 160, 161, 538 P.2d 802 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975). Also, a motion for psychiatric examination which states that counsel does not know whether defendant was sane when he committed the acts resulting in criminal charges and that the examination is sought for the purpose of making such a determination, does not constitute notice under Subparagraph (1) of Paragraph A of this rule. State v. Silva, 88 N.M. 631, 545 P.2d 490 (Ct. App.), cert. denied, 89 N.M. 6, 546 P.2d 71 (1976).

Subparagraph (2) of Paragraph A of this rule replaced former Section 41-13-3, 1953 Comp., which was repealed at the time of the adoption of the rule. In the event that the defendant is found not guilty by reason of insanity, he is acquitted of the crime and may be confined as mentally ill only through the civil commitment procedures.

Paragraph B meets the constitutional requirements of due process in dealing with a defendant who is allegedly not competent to stand trial. See Pate v. Robinson, 383 U.S. 375, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966). See also, Drope v. Missouri, 420 U.S. 162, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975). See generally, 81 Harv. L. Rev. 455 (1967). The issue of the defendant's competency to stand trial may be raised by motion or by the court. The issue may not be waived by the defendant. In Pate v. Robinson, supra, the court stated:

“it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently "waive" his right to have the court determine his capacity to stand trial.”

In State v. Mendoza, 108 N.M. 446, 774 P.2d 440, 459 (1989) the New Mexico Supreme Court stated:

a failure to make a determination of competency when reasonable grounds appear constitutes fundamental constitutional error.

Right to trial by jury.

Section 31-9-1.5 NMSA 1978, enacted by the 1988 Legislature, provides that a hearing to determine competency shall be conducted without a jury. This violates the right to trial by jury as set forth in the New Mexico Constitution if there is a reasonable doubt as to competency. If the question of the defendant's competency to stand trial is raised, the court must make an initial determination regarding competency. The court makes a final determination if there is no reasonable doubt regarding the issue of competency. If the judge finds a reasonable doubt as to the competency of the defendant, then the issue is submitted to the jury at the close of the case. State v. Ortega, 77 N.M. 7, 18, 419 P.2d 219 (1966); State v. Noble, 90 N.M. 360, 563 P.2d 1153 (1977). See also, State v. Chavez, 88 N.M. 451, 541 P.2d 631 (Ct. App. 1975) and State v. Lujan, 87 N.M. 400, 534 P.2d 1112 (1975).

If the issue of present competency is raised prior to trial, the trial judge, in his discretion, may without a jury determine whether the defendant is competent to stand trial or may submit the issue to a jury other than a jury which is to determine the guilt or innocence of the defendant. If the issue is raised at trial and there is evidence which has not been previously considered by a jury on the issue of competency to stand trial, which the trial court finds raises a reasonable doubt as to the defendant's competency, the jury is instructed to consider the issue prior to considering the defendant's guilt. See UJI 14-5104. A mistrial shall be declared if the defendant is found incompetent.

The defendant has the burden of proving lack of competence to stand trial by a preponderance or greater weight of the evidence. State v. Armstrong, 82 N.M. 358, 482 P.2d 61 (1971). See also the committee comment to UJI 13-304.

The defendant is competent to stand trial if the defendant: (1) understands the nature and gravity of the proceedings against him; (2) has a factual understanding of the criminal charges; and (3) is capable of assisting in his own defense. See, State v. Ortega, 77 N.M. 7, 18, 419 P.2d 219 (1966); State v. Chapman, 104 N.M. 324, 327, 721 P.2d 392 (1986); and UJI 14-5104.

If a defendant is found incompetent to stand trial, the trial court may order such medical treatment as may be necessary to enable the defendant to attain competency to stand trial. It is suggested that if the defendant is in need of treatment, including the taking of

drugs, the trial court may impose as a condition of release that the defendant submit to such treatment if required to allow the defendant to stand trial.

If the defendant is found incompetent to stand trial, the court may also review and amend the conditions of release previously imposed. In determining conditions of release, the court shall take into account the defendant's character and mental condition. The court may not, without a showing of dangerousness, impose more stringent standards of release simply on a showing of incompetency.

If the court determines that the defendant is not competent to stand trial, it may then determine if the defendant may be committed as mentally ill under laws governing civil commitment. Strict compliance with the commitment statutes must be observed. See Blevins v. Cook, 66 N.M. 381, 348 P.2d 742 (1960); State v. Sanchez, 80 N.M. 438, 457 P.2d 370 (1969); State v. Valdez, 88 N.M. 338, 540 P.2d 818 (1975). A commitment under such laws is considered to be official confinement for the purpose of credit against any sentence eventually imposed. State v. LaBadie, 87 N.M. 391, 534 P.2d 483 (Ct. App. 1975).

If the defendant is found incompetent to stand trial after the trial has commenced by a special verdict of the jury prior to its returning a verdict as to the guilt or innocence of the defendant, the court must declare a mistrial.

"Dangerous" defined; Section 31-9-1.2.

The term "dangerous" person is defined by Section 31-9-1.2 NMSA 1978 to mean a person who, if released, presents a serious threat of inflicting great bodily harm on another or of violating Section 30-9-11 or 30-9-13 NMSA 1978.

Under Section 31-9-1.2, supra, the defendant must present a serious threat of inflicting great bodily harm on another or a serious threat of committing a sex crime other than criminal sexual contact of an adult or indecent exposure. Federal Law, 18 USCA Section 4246, provides a more general standard of "dangerousness", that is, if the court finds by clear and convincing evidence that the defendant is suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury or serious damage to property of another, the court shall commit the person.

In Jackson v. Indiana, 406 U.S. 715, 92 S. Ct. 1845, 32 L. Ed. 2d 435 (1972), the United States Supreme Court held that a defendant who was not shown to be dangerous could not be subjected to more lenient commitment standards and to more stringent standards of release than those generally applicable to persons subject to commitment who are not charged with a criminal offense. The supreme court stated that:

". . . a person charged by a State with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he

will attain that capacity in the foreseeable future. If it is determined that this is not the case, then the State must either institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen, or release the defendant. Furthermore, even if it is determined that the defendant probably soon will be able to stand trial, his continued commitment must be justified by progress toward that goal.

The court distinguished the federal commitment statute from the Indiana commitment statute on the basis that the federal law has been "construed to require that a mentally incompetent defendant must also be found 'dangerous' before the defendant can be committed indefinitely". The supreme court went on to state that:

"Without a finding of dangerousness, one committed . . . [under federal law] can be held only for a 'reasonable period of time' necessary to determine whether there is a substantial chance of his attaining the capacity to stand trial in the foreseeable future. If the chances are slight, or if the defendant does not in fact improve, then he must be released or granted Sections 4247-4248 hearing". Jackson v. Indiana, supra, at 733.

Court ordered mental examination

Paragraph C of this rule, providing for a court ordered mental examination of the defendant, is substantially the same as former Section 41-13-3.2, 1953 Comp. For cases dealing with the sufficiency of the examination, see Annot., 23 A.L.R. Fed. 710 (1975). The defendant must show good cause before the court is required to order the examination. State v. Jaramillo, 89 N.M. 179, 538 P.2d 1202 (Ct. App. 1975).

Admissibilityof statement

Paragraph E of this rule provides that a statement by the defendant made during any mental examination or treatment subsequent to the commission of the crime may be admissible only on the issue of the defendant's sanity, ability to form specific intent or competency to stand trial. Compare this rule with 18 U.S.C. Section 4244. See also, United States v. Julian, 469 F.2d 371 (10th Cir. 1972). Under Rule 11-504 of the Rules of Evidence a court ordered mental examination is privileged except for the particular purpose for which the examination was ordered.

In State v. Milton, 86 N.M. 639, 526 P.2d 436 (Ct. App. 1974), a letter written by the defendant to his court-appointed psychiatrist was intercepted by the sheriff and copied. At trial, the copy was admitted and one sentence containing an "admission" was read to the jury. The court of appeals held that the letter was not a privileged communication under Subparagraph (2) of Paragraph D of Rule 11-504 as the letter was not a communication "made for the purposes of diagnosis or treatment of the defendant's mental condition". There is no discussion of Paragraph E of this rule by the court, and either the defendant raised no issue concerning the limiting instruction required by the rule or the instruction was given.

In State v. Jackson, 97 N.M. 467, 641 P.2d 498 (1982), the Supreme Court held that the voluntary disclosure of the results of a court ordered examination constitutes a waiver of the defendant's right against disclosure.

Notice of incapacity to form specific intent

Paragraph F of this rule requires the defendant to give notice to the state if he intends to call an expert witness on the issue of his ability to form the specific intent element of the crime charged. Compare Rule 12.2(b) of the Federal Rules of Criminal Procedure. For a discussion of what crimes include an element of specific intent, see generally, Thompson & Gagne, "The Confusing Law of Criminal Intent in New Mexico," 5 N.M.L. Rev. 63 (1974). [As revised, September 12, 1991.]

ANNOTATIONS

Cross references. — For determination of present competency, see 31-9-1 to 31-9-2 NMSA 1978.

The 1991 amendment, effective for cases filed on or after November 1, 1991, in Paragraph E, substituted "mental" for "psychiatric" in the heading and near the beginning of the text and added "ability to form specific intent or competency to stand trial" to the end of the paragraph.

Sufficient evidence of competency. — Where the defendant had an understanding of the charges against him and the consequences if he were found guilty; the defendant was able to identify most court participants in pictures of a typical courtroom, knew that witnesses would testify as to what happened, and understood that the defense attorney worked for him, that he should tell the defense attorney what he remembered about the incident for which he was charged, and tell defense attorney if he did not understand something; the defendant understood concepts when they were explained to him in other terms; and the defendant functioned reasonably well in daily life, held the same job for two years, engaged in social interactions with his co-workers, progressed through the eleventh grade, and obtained a driver’s license, the evidence was sufficient to support the district court’s determination that the defendant was competent to stand trial notwithstanding the fact that the the defendant’s expert testified that the defendant was incompetent to stand trial. State v. Rael, 2008-NMCA-067, 144 N.M. 170, 184 P.3d 1064.

Submission of competency issue to jury. — Subsection (b) of Rule 5-602(B)(2) NMRA requires a finding by the court of reasonable doubt as to the defendant’s competency before the issue may be submitted to the jury. State v. Rael, 2008-NMCA-067, 144 N.M. 170, 184 P.3d 1064.

Court may consider defense counsel's observations and opinions, but those observations and opinions alone cannot trigger reasonable doubts about defendant's

competency. State v. Flores, 2005-NMCA-135, 138 N.M. 636, 124 P.3d 1175, cert. denied, 2005-NMCERT-011.

Expert testimony is not required in order to obtain an evaluation of competency pursuant to Paragraph C of this rule. State v. Flores, 2005-NMCA-135, 138 N.M. 636, 124 P.3d 1175, cert. denied, 2005-NMCERT-011.

Competency is not and does not act as an element of an offense. State v. Flores, 2005-NMCA-135, 138 N.M. 636, 124 P.3d 1175, cert. denied, 2005-NMCERT-011.

Effect of competency on sentencing. — A competency determination does not enhance or increase a defendant's maximum sentence. State v. Flores, 2005-NMCA-135, 138 N.M. 636, 124 P.3d 1175, cert. denied, 2005-NMCERT-011.

Constitutionality of Paragraph B. — The supreme court has power to regulate pleading, practice and procedure, and this power may be applied to regulate the procedure to be followed in securing the right to a jury trial, but it may not be used to prohibit entirely the right to jury trial which, under the constitution, is to remain inviolate. Subdivision (b) (see now Paragraph B) of this rule does more than regulate the procedure for securing a jury trial; and to the extent that it eliminates the right to a jury determination on the question of mental capacity to stand trial, it violates N.M. Const., art. II, § 12 and is void. State v. Chavez, 88 N.M. 451, 541 P.2d 631 (Ct. App. 1975).

"Insanity". — The insanity defense does not comprehend an insanity which occurs at a crisis and dissipates thereafter. It is a true disease of the mind, that is, any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls, normally extending over a considerable period of time rather large in extent or degree as distinguished from a sort of momentary insanity arising from the pressure of circumstances. State v. Nagel, 87 N.M. 434, 535 P.2d 641 (Ct. App.), cert. denied, 87 N.M. 450, 535 P.2d 657 (1975).

Capability of understanding proceedings and making rational defense. — It is a generally accepted rule that no person shall be called upon to stand trial or be sentenced who because of mental illness is incapable of understanding the nature and object of the proceedings, or of comprehending his own condition in reference thereto, or of making a rational defense. State v. Cliett, 79 N.M. 719, 449 P.2d 89 (Ct. App. 1968) (decided under former law).

Nothing is required for mental competence to stand trial beyond a sufficient present ability to consult with his lawyer with a reasonable degree of rational as well as factual understanding of the proceedings against him. Gantar v. Cox, 74 N.M. 526, 395 P.2d 354 (1964) (decided under former law).

The test as to whether the accused is competent to stand trial is: has the defendant capacity to understand the nature of and object of the proceedings against him, to comprehend his own condition in reference to such proceedings and to make a rational

defense? State v. Armstrong, 82 N.M. 358, 482 P.2d 61 (1971) (decided under former law).

In considering the evidence and whether reasonable doubt exists, the court must keep in mind the requirement that defendant must have sufficient present ability to consult and understand as required under due process of law. State v. Flores, 2005-NMCA-135, 138 N.M. 636, 124 P.3d 1175, cert. denied, 2005-NMCERT-011.

Determination of sufficient evidence of insanity question of law. — The problem of determining whether there is sufficient evidence of insanity to permit the jury to consider it as a factual question is, in the first instance, a question of law for the court. State v. Murray, 91 N.M. 154, 571 P.2d 421 (Ct. App.), cert. denied, 91 N.M. 249, 572 P.2d 1257 (1977).

Ordinarily, issue then submitted to jury, but court may rule as matter of law. — If the trial court determines the evidence is sufficient to raise an issue as to defendant's sanity, ordinarily, the issue is submitted to the jury for decision. However, there may be instances where the evidence is so clear that the trial court may rule, as a matter of law, that defendant was insane. State v. Murray, 91 N.M. 154, 571 P.2d 421 (Ct. App.), cert. denied, 91 N.M. 249, 572 P.2d 1257 (1977).

The trial court is to rule whether a reasonable doubt exists as to the accused's sanity. State v. Chavez, 88 N.M. 451, 541 P.2d 631 (Ct. App. 1975).

And if court rules affirmatively the issue is to be submitted to jury for determination. State v. Chavez, 88 N.M. 451, 541 P.2d 631 (Ct. App. 1975).

If, in the progress of a trial on a criminal charge, the trial judge concludes from observation or otherwise that there is reason to doubt the sanity of the defendant at that time, he should submit that question to the jury along with the principal issue requiring a special verdict on that point. Territory v. Kennedy, 15 N.M. 556, 110 P. 854 (1910) (decided under former law).

The state is not required to affirmatively prove sanity but can rely on the presumption of sanity. State v. Wilson, 85 N.M. 552, 514 P.2d 603 (1973).

Except in a case where the evidence of insanity is so clear as to require a directed verdict, i.e., the presumption of sanity is rebutted as a matter of law, the presumption abides with the state throughout the case and continues even after the defendant has made a sufficient showing to procure insanity instructions. State v. Wilson, 85 N.M. 552, 514 P.2d 603 (1973).

Defendant must offer insanity evidence to raise jury question. — A defendant, who claims to have been insane at the time of the commission of the offense with which he is charged, must offer evidence tending to show his insanity at the time in order to

create a jury question upon this issue. State v. Wilson, 85 N.M. 552, 514 P.2d 603 (1973).

Unless jury question on this issue is raised by evidence adduced by the state which tends to show such insanity. State v. Wilson, 85 N.M. 552, 514 P.2d 603 (1973).

Burden on defendant to prove mental unsoundness. — The defendant in a criminal case has the burden of proving, by a preponderance of the evidence, that he is too mentally unsound to stand trial. State v. Armstrong, 82 N.M. 358, 482 P.2d 61 (1971).

Burden on defendant to prove incompetency. — When a defendant advances the contention that he is incompetent to stand trial, he has the burden of proving his claim by a preponderance of the evidence. State v. Santillanes, 91 N.M. 721, 580 P.2d 489 (Ct. App. 1978).

Court decides issue of competency to stand trial in one of three ways: (1) by deciding that there is no reasonable doubt that the defendant is incompetent to stand trial, in which case further proceedings shall be conducted concerning the question of involuntary hospitalization; (2) by deciding there is a reasonable doubt as to defendant's competency to stand trial, in which case the defendant has a right to have the question submitted to and answered by the same jury which is selected for and tries the case on its merits (via a special interrogatory submitted to the jury at the time the case is submitted to it for its verdict); and (3) by deciding that there is no reasonable doubt as to the defendant's competency to stand trial, in which case there is no question for a jury to decide, and such a determination is only subject to review for abuse of discretion. State v. Noble, 90 N.M. 360, 563 P.2d 1153 (1977).

Whenever a legitimate concern about the present ability of a defendant to consult and understand is brought to the court's attention, the court is required to consider whatever competency-related evidence is before the court and to determine whether there exists a reasonable doubt as the defendant's competency to stand trial. If the court determines that there is reasonable doubt as to defendant's competency, the court must have defendant's competency professionally evaluated by a qualified professional who must submit a report to the court. State v. Flores, 2005-NMCA-135, 138 N.M. 636, 124 P.3d 1175, cert. denied, 2005-NMCERT-011.

Judges may draw own conclusions. — Since judges may weigh evidence as to competency themselves and draw their own conclusions, there was no error in a judge's reasonable interpretation of evidence so as to conclude that a defendant was competent to stand trial, despite the defendant's alleged inability to remember because of amnesia, alcoholic blackout or epileptic seizure. State v. Coates, 103 N.M. 353, 707 P.2d 1163 (1985).

Adjudication of incompetency raises presumption that the defendant is incompetent. The presumption may be rebutted, but inasmuch as defendant has the benefit of the presumption, it is the state which has the burden at a redetermination

hearing of going forward with evidence to show that the defendant is competent to stand trial. State v. Santillanes, 91 N.M. 721, 580 P.2d 489 (Ct. App. 1978).

And shifts burden to state to prove competency. — Where there is an existing ruling that the defendant is incompetent and incompetency is to be redetermined by the jury, the state has the burden of persuading the fact finder that the defendant is competent to stand trial. State v. Santillanes, 91 N.M. 721, 580 P.2d 489 (Ct. App. 1978).

When jury should decide competency. — Where at the conclusion of a hearing the trial court states it cannot determine beyond a reasonable doubt whether the defendant is or is not competent to stand trial, the competency issue properly should be decided by a jury. State v. Santillanes, 91 N.M. 721, 580 P.2d 489 (Ct. App. 1978).

The right to have a jury determination of competency attaches only where competency to stand trial is at issue and when a reasonable doubt is raised after the trial has begun but before it has ended; in all other instances, the judge has discretion to make the determination himself or to submit the issue to a nontrial jury. State v. Nelson, 96 N.M. 654, 634 P.2d 676 (1981).

Proof by preponderance of evidence. — The proof required for incompetency has consistently been held to be proof by a preponderance of the evidence, and this same quantum of proof applies to a redetermination of competency. State v. Santillanes, 91 N.M. 721, 580 P.2d 489 (Ct. App. 1978); State v. Sena, 92 N.M. 676, 594 P.2d 336 (Ct. App. 1979).

Duty to inquire as to present sanity. — Once the issue of "present sanity" is raised, the trial court has a duty to inquire into the matter. State v. Cliett, 79 N.M. 719, 449 P.2d 89 (Ct. App. 1968) (decided under former law).

Where a prior record of insanity existed and other evidences of mental disorder, it was an abuse of trial court's discretion to refuse to inquire into the present mental condition of the defendant and submit the issue of sanity to the jury. State v. Folk, 56 N.M. 583, 247 P.2d 165 (1952) (decided under former law).

Incompetency issue may be raised at any stage in the proceedings. — Because the conviction or the sentencing of an incompetent violates due process of law, the question or issue of competency may be raised at any stage of a criminal proceeding where there is a sufficient basis for the question or issue. State v. Sena, 92 N.M. 676, 594 P.2d 336 (Ct. App. 1979).

The issue of competency to stand trial may be raised by motion at any stage of the proceedings. State v. Flores, 2005-NMCA-135, 138 N.M. 636, 124 P.3d 1175, cert. denied, 2005-NMCERT-011.

No right to jury trial on competency issue raised after trial. — There is no right to a jury trial on the issue of defendant's competency when the matter is first raised at any time after trial. State v. Baca, 95 N.M. 205, 619 P.2d 1249 (Ct. App. 1980).

Or when issue first raised at sentencing hearing. State v. Sena, 92 N.M. 676, 594 P.2d 336 (Ct. App. 1979).

There is no right to a jury trial on the issue of competency to stand trial when that issue is first raised at the sentencing hearing. State v. Nelson, 96 N.M. 654, 634 P.2d 676 (1981).

Rule not applicable to habitual offender proceeding. — The habitual offender proceeding is not a trial in the constitutional sense for purposes of making a determination as to competency, and this rule does not apply to such proceedings. State v. Nelson, 96 N.M. 654, 634 P.2d 676 (1981).

Motion for examination must show good cause. — In a prosecution for possession of heroin defendant's motion for a psychiatric examination was properly denied where the record was silent on any attempt of defendant to show good cause for a mental examination. State v. Jaramillo, 88 N.M. 179, 538 P.2d 1201 (Ct. App. 1975).

While Paragraph C employs mandatory language, i.e., "court shall order a mental examination," limiting this provision to the movant's showing of good cause effectively invokes the district court's exercise of its discretion. State v. Garcia, 2000-NMCA-014, 128 N.M. 721, 998 P.2d 186.

Good cause for mental examination not shown. — Evidence of defendant's alcoholism and refusal to plea bargain is insufficient to show good cause for an order of a mental examination under Subdivision (c) (see now Paragraph C). State v. Chacon, 100 N.M. 704, 675 P.2d 1003 (Ct. App. 1983).

The state's mere allegation that a psychiatric evaluator failed to inquire as to defendant's "dangerousness" did not per se render the original mental evaluation insufficient such that "good cause" existed for a second examination. State v. Garcia, 2000-NMCA-014, 128 N.M. 721, 998 P.2d 186.

Motion for examination does not constitute notice of insanity defense. — Motion for a psychiatric examination stating that counsel did not know whether defendant was sane when he committed the acts resulting in criminal charges and that the examination was sought for the purpose of making such a determination could not be construed as giving notice within the time provided by this rule that an insanity defense would be raised. State v. Silva, 88 N.M. 631, 545 P.2d 490 (Ct. App.), cert. denied, 89 N.M. 6, 546 P.2d 71 (1976).

A motion by the defendant for a court-ordered mental examination to determine competency gives no notice of an insanity defense. State v. Young, 91 N.M. 647, 579

P.2d 179 (Ct. App.), cert. denied, 91 N.M. 751, 580 P.2d 972, and cert. denied, 439 U.S. 957, 99 S. Ct. 357, 58 L. Ed. 2d 348 (1978).

Defendant must allege specific factual basis for relief sought when alleging incapacity to stand trial by reason of incompetency. State v. Cliett, 79 N.M. 719, 449 P.2d 89 (Ct. App. 1968) (decided under former law).

Procedure when defendant moves for jury trial on question of competency. — Where defendant moved for a jury trial on the question of his competency, the trial court should have determined, after an evidentiary hearing, whether there was reasonable doubt as to defendant's competency, and if the trial court ruled there was reasonable doubt, the issue was for the jury to decide. State v. Chavez, 88 N.M. 451, 541 P.2d 631 (Ct. App. 1975).

Expert testimony on issue of insanity is not binding of the fact finder and the jury may believe or disbelieve expert testimony as it chooses. Thus, such evidence presents a question of fact which is properly submitted to the jury to decide. State v. Noble, 90 N.M. 360, 563 P.2d 1153 (1977).

It is for the jury to reach a conclusion as to the sanity or insanity of the accused. The province of the experts is to aid the jury in reaching a conclusion. Their opinions are not to be taken as conclusive. The judgments of experts or the inferences of skilled witnesses, even when unanimous and uncontroverted, are not necessarily conclusive. The testimony of an expert is purely his opinion and is not testimony as to facts and is not conclusive, even when uncontradicted. State v. James, 85 N.M. 230, 511 P.2d 556 (Ct. App.), cert. denied, 85 N.M. 228, 511 P.2d 554 (1973).

Recent confinement in mental institution as raising issue of competency to plead. — Allegations of post-conviction confinement in a mental institution in 1962 and early 1963 when sufficiently close to the date of the defendant's plea raise a factual issue concerning his mental competency to plead. State v. Guy, 79 N.M. 128, 440 P.2d 803 (Ct. App. 1968) (decided under former law).

Allegations of post-conviction confinement in a mental institution and diagnosis as a psychotic are sufficiently close to the date of his plea to raise a factual issue concerning his competency to plead. State v. Cliett, 79 N.M. 719, 449 P.2d 89 (Ct. App. 1968) (decided under former law).

Record of insanity proceeding. — There is no objection to introduction of the record of insanity proceeding or one for appointment of guardian or a committee to handle the estate of an incompetent person where it is sought to establish that person as a defendant in a criminal prosecution is either insane at time of trial, or was insane at the time the crime was committed, if the earlier proceeding was had at a time not too remote, which question would go to its weight and not to its competency. State v. Folk, 56 N.M. 583, 247 P.2d 165 (1952) (decided under former law).

Demeanor at trial not sufficient to dispense with sanity hearing. — While defendant's demeanor at trial might be relevant to the ultimate decision as to his sanity, it cannot be relied upon to dispense with a hearing on that very issue. State v. Guy, 79 N.M. 128, 440 P.2d 803 (Ct. App. 1968) (decided under former law).

Insanity defense raised only after prosecution rests case in chief excluded. — Where the defendant attempts to raise an insanity defense for the first time after the prosecution rests its case in chief but no issue is raised as to defendant's competency to stand trial, and the defendant knew of an insanity defense the day before trial at latest, the prosecution would be prejudiced by allowing the insanity defense to be raised, and there is no abuse of discretion in excluding the tendered testimony. State v. Young, 91 N.M. 647, 579 P.2d 179 (Ct. App.), cert. denied, 91 N.M. 751, 580 P.2d 972, and cert. denied, 439 U.S. 957, 99 S. Ct. 357, 58 L. Ed. 2d 348 (1978).cert. denied, 91 N.M. 751, 580 P.2d 972 (1978), 439 U.S. 957, 99 S. Ct. 357, 58 L. Ed. 2d 348 (1978).

Relief in post-conviction proceeding not barred by earlier failure to plead incompetence. — Where at the time of a guilty plea, neither defendant nor his counsel suggested that defendant was mentally incompetent to plead, this failure, in and of itself, does not bar relief in a post-conviction proceeding. State v. Guy, 79 N.M. 128, 440 P.2d 803 (Ct. App. 1968) (decided under former law).

Issue of insanity decided at first trial found to bar issue at second trial. — Where the issue of defendant's sanity was an issue of fact in the first trial, insanity having been raised as an affirmative defense, it was actually litigated, and it was absolutely necessary to a decision in that trial, and the identical issue of fact, the sanity of the defendant, was raised in the second trial between the same parties (the state and the defendant) for offenses committed some 16 hours prior to the crime which was the subject of the first trial, it was held that the issue of insanity which was decided in defendant's favor at the first trial was the same issue of fact as the issue of insanity at the second trial and therefore collateral estoppel was a bar to the second trial. State v. Nagel, 87 N.M. 434, 535 P.2d 641 (Ct. App.), cert. denied, 87 N.M. 450, 535 P.2d 657 (1975).

Error found in counsel's waiver of issue of competency. — The trial court erred in refusing to grant defendant a new trial on grounds that her attorney's stipulation to the prosecution's facts and waiver of the issue of competency were the result of a plea bargain with the result that the issue of defendant's competency was never clearly determined or considered. State v. Romero, 86 N.M. 244, 522 P.2d 579 (1974).

Opinion as to sanity based partly on statements of third persons. — The opinion of a medical expert as to the sanity of a defendant in a criminal proceeding based partly upon the statements of third persons out of court is generally considered inadmissible. State v. Chambers, 84 N.M. 309, 502 P.2d 999 (1972).

Standard of review for refusal to submit competency issue to jury. — Where the court decides that there is no reasonable doubt as to the defendant's competency to

stand trial, in which case there is no question for the jury to decide, such a determination is only subject to review for abuse of discretion. State v. Montano, 93 N.M. 436, 601 P.2d 69 (Ct. App.), cert. denied, 93 N.M. 683, 604 P.2d 821 (1979).

Intoxication. — In light of defense attorney's representations that defendant was competent and not impaired, and, in the absence of evidence that defendant did not understand the proceedings or charges, or could not assist in his defense, the trial court's implicit determination that there was no reasonable doubt as to defendant's competence, or sobriety, did not constitute an abuse of discretion. State v. Padilla, 118 N.M. 189, 879 P.2d 1208 (Ct. App. 1994).

No abuse found in failing to submit competency issue to jury. — Where there was no conflict in the testimony presented at the hearing concerning the defendant's competency to stand trial, and no further pursuit of that question was made by defendant, the trial court did not abuse its discretion in not submitting the issue of competency to the jury. State v. Noble, 90 N.M. 360, 563 P.2d 1153 (1977).

Insufficient proof of incompetence. — Defense counsel's statements regarding his observations of defendant's unwillingness or possible inability to communicate with him and help in his own defense, regarding pretrial incarceration did not comprise sufficient testimony to support the defendant's contention that he was incompetent to stand trial. State v. Najar, 104 N.M. 540, 724 P.2d 249 (Ct. App. 1986).

The court did not abuse its discretion in determining that the defendant was competent to stand trial based on its consideration of the testimony of four experts, three of whom opined that the defendant was competent. State v. Duarte, 1996-NMCA-038, 121 N.M. 553, 915 P.2d 309.

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

For article, "The Guilty But Mentally Ill Verdict and Plea in New Mexico," see 13 N.M.L. Rev. 99 (1983).

For annual survey of New Mexico law relating to criminal procedure, see 13 N.M.L. Rev. 341 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 34 to 44, 46, 47, 49 to 61.

Validity and construction of statutes providing for psychiatric examination of accused to determine mental condition, 32 A.L.R.2d 434.

Modern status of rules as to burden and sufficiency of proof of mental irresponsibility in criminal case, 17 A.L.R.3d 146.

Mental or emotional condition as diminishing responsibility for crime, 22 A.L.R.3d 1228.

Necessity or propriety of bifurcated criminal trial on issue of insanity defense, 1 A.L.R.4th 884.

Mental subnormality of accused as affecting voluntariness or admissibility of confession, 8 A.L.R.4th 16.

Adequacy of defense counsel's representation of criminal client regarding incompetency, insanity, and related issues, 17 A.L.R.4th 575.

Power of court, in absence of statute, to order psychiatric examination of accused for purpose of determining mental condition at time of alleged offense, 17 A.L.R.4th 1274.

Competency to stand trial of criminal defendant diagnosed as "mentally retarded" - modern cases, 23 A.L.R.4th 493.

Competency to stand trial of criminal defendant diagnosed as "schizophrenic" - modern state cases, 33 A.L.R.4th 1062.

Admissibility of results of computer analysis of defendant's mental state, 37 A.L.R.4th 510.

Pyromania and the criminal law, 51 A.L.R.4th 1243.

Probation revocation: Insanity as defense, 56 A.L.R.4th 1178.

Instructions in state criminal case in which defendant pleads insanity as to hospital confinement in event of acquittal, 81 A.L.R.4th 659.

Propriety of transferring patient found not guilty by reason of insanity to less restrictive confinement, 43 A.L.R.5th 777.

Necessity and sufficiency of competency hearings, as judged by federal constitutional standards, in federal cases involving validity of guilty pleas entered by allegedly mentally incompetent state convicts, 37 A.L.R. Fed. 356.

Compliance with federal constitutional requirement that guilty pleas be made voluntarily and with understanding, in federal cases involving allegedly mentally incompetent state convicts, 38 A.L.R. Fed. 238.

Notice to government of defense based upon defendant's mental condition at time of alleged crime, and court-ordered psychiatric examination thereon, under Rule 12.2, Federal Rules of Criminal Procedure, 63 A.L.R. Fed. 552.

Competency to stand trial of criminal defendant diagnosed as "schizophrenic" - modern federal cases, 63 A.L.R. Fed. 696.

Pathological gambling as basis of defense of insanity in federal criminal case, 76 A.L.R. Fed. 749.

Construction and application of 18 USCS § 17, providing for insanity defense in federal criminal prosecutions, 118 A.L.R. Fed. 265.

57 C.J.S. Mental Health § 254 et seq.

5-603. Pretrial hearing.

At any time after the filing of the information or indictment, the court may order the attorneys to appear before it for a hearing, at which the defendant shall have the right to be present, to consider:

A. the simplification of the issues;

B. the possibility of obtaining admissions of fact and documents which will avoid unnecessary proof;

C. the number of expert witnesses, character witnesses or other witnesses who are to give testimony of a cumulative nature; and

D. such other matters as may aid in the disposition of the trial.

Upon request of any party, a record shall be made of a hearing, or any part thereof, held pursuant to this rule.

The court shall make an order reciting the agreements made and matters determined which shall be signed by the court and the attorneys for the parties, and when entered shall control the subsequent course of the proceedings, unless thereafter modified.

This rule shall not be invoked in the case of any defendant who is not represented by counsel.

Committee commentary. — This rule gives the court the authority to order a pretrial hearing to simplify the issues. The American Bar Association Standards Relating to Discovery and Procedure Before Trial recommend pretrial conferences be held in the following cases:

(1) when the anticipated trial is likely to be protracted;

(2) when the anticipated trial is otherwise likely to be complicated; and

(3) when counsel concur in requesting the conference. American Bar Association Standards Relating to Discovery and Procedure Before Trial, Section 5.4, Commentary (Approved Draft, 1970).

Some of the matters recommended to be considered at a pretrial conference include:

(1) making stipulations as to facts about which there can be no dispute;

(2) marking for identification various documents and other exhibits of the parties;

(3) waivers of foundation as to such documents;

(4) severance of defendants or offenses;

(5) seating arrangements for defendants and counsel;

(6) use of jurors and questionnaires;

(7) conduct of voir dire;

(8) number and use of peremptory challenges;

(9) procedure on objections where there are multiple counsel;

(10) order of presentation of evidence and arguments where there are multiple defendants;

(11) order of cross-examination where there are multiple defendants; and

(12) temporary absence of defense counsel during trial. American Bar Association Standards Relating to Discovery and Procedure Before Trial, Section 5.4(a) (Approved Draft, 1970).

With the adoption of UJI 14-5101 was amended to provide that the district court may order the parties to tender requested jury instructions prior to the close of the defendant's case. It is suggested that in complex cases, the pretrial hearing may be the appropriate time for a discussion of the applicable jury instructions.

ANNOTATIONS

Compiler's notes. — This rule is similar to Rule 17.1 of the Federal Rules of Criminal Procedure.

Absent legal authorization, judge lacks authority to order production of handwriting exemplars or be held in contempt, prior to arrest or charge. Sanchez v. Attorney Gen., 93 N.M. 210, 598 P.2d 1170 (Ct. App. 1979).

Furnishing free transcript of hearing to indigents. — As defendant had extensive notes of the preliminary hearing and although defendant claimed indigency insofar as being able to pay for the transcript, he made no reasonable showing in support of this claim, and defendant's attorney was employed counsel, these circumstances do not warrant defendant's being furnished with a free transcript. State v. Apodaca, 80 N.M. 244, 453 P.2d 764 (Ct. App. 1969) (decided under former law).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 550, 555 to 559.

Guilty plea safeguards as applicable to stipulation allegedly amounting to guilty plea in state criminal trial, 17 A.L.R.4th 61.

22 C.J.S. Criminal Law § 340 et seq.

5-604. Time of commencement of trial. [*Provisionally approved effective September 1, 2009, until September 1, 2010.*]

A. **Arraignment.** The defendant shall be arraigned on the information or indictment within fifteen (15) days after the date of the filing of the information or indictment or the date of arrest, whichever is later.

B. **Time limits for commencement of trial.** The trial of a criminal case or habitual criminal proceeding shall be commenced six (6) months after whichever of the following events occurs latest:

(1) the date of arraignment, or waiver of arraignment, in the district court of any defendant;

(2) if the proceedings have been stayed to determine the competency of the defendant to stand trial, the date an order is filed finding the defendant competent to stand trial;

(3) if a mistrial is declared or a new trial is ordered by the trial court, the date such order is filed;

(4) in the event of an appeal, including interlocutory appeals, the date the mandate or order is filed in the district court disposing of the appeal;

(5) if the defendant is arrested or surrenders in this state for failure to appear, the date of arrest or surrender of the defendant;

(6) if the defendant is arrested or surrenders in another state or country for failure to appear, the date the defendant is returned to this state;

(7) if the defendant has been placed in a preprosecution diversion program, the date of the filing with the clerk of the district court of a notice of termination of a preprosecution diversion program for failure to comply with the terms, conditions or requirements of such program;

(8) the date the court allows the withdrawal of a plea or the rejection of a plea made pursuant to Paragraphs A to F of Rule 5-304 NMRA.

C. **Extensions of time in district court.** For good cause shown, the time for commencement of trial may be extended by the district court for six (6) months. The district court may grant additional extensions, but in doing so the district court shall consider the following factors:

(1) the complexity of the case;

(2) the length of the delay in bringing the defendant to trial;

(3) the reason for the delay in bringing the defendant to trial;

(4) whether the defendant has asserted the right to a speedy trial or acquiesces in the delay; and

(5) the extent of prejudice, if any, to the parties from the delay.

D. **Procedure for extensions of time.** The party seeking an extension of time shall file with the clerk of the court a verified petition for extension concisely stating the facts petitioner deems to constitute good cause for an extension of time to commence the trial. The petition shall be filed within the applicable time limit prescribed by this rule, except that it may be filed within ten (10) days after the expiration of the applicable time limit if it is based on exceptional circumstances beyond the control of the parties or trial court which justify the failure to file the petition within the applicable time limit. A party seeking an extension of time shall forthwith serve a copy thereof on opposing counsel. Within five (5) days after service of the petition, opposing counsel may file an objection to the extension setting forth the reasons for such objection. No hearing shall be held except upon order of the court. If the court finds that there is good cause for the granting of an extension beyond the applicable time limit, it shall fix the time limit within which the trial must commence.

E. **Effect of noncompliance with time limits.**

(1) The court may deny an untimely petition for extension of time or may grant it and impose other sanctions or remedial measures, as the court may deem appropriate in the circumstances.

(2) In the event the trial of any person does not commence within the time limits provided in this rule, including any court-ordered extensions, the case shall be dismissed with prejudice.

F. **Applicability.** This rule shall not apply to cases on appeal from the metropolitan, magistrate or municipal court.

[As amended, effective September 1, 1998; May 1, 2000; as amended by Supreme Court Order 07-8300-18, effective August 13, 2007; by Supreme Court Order No. 08-8300-052, effective November 24, 2008; by Supreme Court Order No. 09-8300-032, approved provisionally for one year, effective September 1, 2009, for all petitions for extension of time pending in the district court or Supreme Court.]

Committee commentary. — Paragraph A of this rule requires arraignment within fifteen (15) days after the filing of the information or indictment or the date of arrest on the district court charges, whichever is later. *State v. Dominguez*, 91 N.M. 296, 573 P.2d 230 (1977). A failure of the state to arraign the defendant within the time limitation will not result in a dismissal of the charge unless the defendant can show some prejudice due to the delay. *State v. Budau*, 86 N.M. 21, 518 P.2d 1225 (Ct. App. 1973), cert. denied, 86 N.M. 5, 518 P.2d 1209 (1974).

Paragraph B of this rule requires that the trial of a criminal case commence within six (6) months after the latest of any of eight enumerated events occurs. An extension of time must be obtained if the delay is caused by an event which is not listed in Paragraph B of this rule. For example, an extension of time will be necessary if the six (6) months will expire while a defendant who was arrested in New Mexico for a criminal offense committed in this state is in another state for trial for an offense committed in that state or while the criminal proceedings are stayed under a writ granted by either a federal or state court. For a further time limitation of the trial of a defendant also charged with crimes in another state, *see* Section 31-5-12 NMSA 1978 and *State v. Duncan*, 95 N.M. 215, 619 P.2d 1259 (Ct. App. 1980).

A violation of Paragraph B of this rule can result in a dismissal with prejudice of criminal proceedings, including habitual criminal proceedings. *See State v. Lopez*, 89 N.M. 82, 547 P.2d 565 (1976). However, the rules do not create a jurisdictional barrier to prosecution. The defendant must raise the issue and seek dismissal. *State v. Vigil*, 85 N.M. 328, 512 P.2d 88 (Ct. App. 1973). Where the state in good faith files a nolle prosequi and later files the same charge, the time under Paragraph B of this rule begins to run from the information, indictment or date of arrest, whichever is later, on the second charge. This interpretation would not apply if it is clear that the state is attempting to circumvent the purpose of Paragraph B of this rule. *State ex rel. Delgado v. Stanley*, 83 N.M. 626, 495 P.2d 1073 (1972); *see also, State v. Lucero*, 91 N.M. 26, 569 P.2d 952 (Ct. App. 1977). Where a case is transferred from children's court to the district court, the time begins to run when the criminal information is filed in the district court, not when a petition is filed in children's court. A judgment in any proceedings on a

petition in children's court is not to be deemed a conviction of a crime. *State v. Howell*, 89 N.M. 10, 546 P.2d 858 (Ct. App. 1976).

Subparagraph (3) of Paragraph B of this rule includes new trials which result from a mistrial declared pursuant to Rule 5-611 NMRA, newly discovered evidence pursuant to Rule 5-614 NMRA or the granting of motion to vacate or set aside a judgment pursuant to Rule 5-802 NMRA.

Paragraph B of this rule does not apply to appeals from the magistrate or municipal court. *State v. DeBaca*, 90 N.M. 806, 568 P.2d 1252 (Ct. App. 1977); *City of Farmington v. Joseph*, 91 N.M. 414, 575 P.2d 104 (Ct. App. 1978).

The granting of an extension of time under Paragraph C of this rule is final and may not be challenged on the appeal after conviction. *State v. Sedillo*, 86 N.M. 382, 524 P.2d 998 (Ct. App. 1974) (decided under former version of the rule providing for extensions of time granted by the Supreme Court); *see also State v. Jaramillo*, 88 N.M. 60, 537 P.2d 55 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

The rule requires that a motion for extension of time beyond the six-month trial limit be filed within the six-month period; however, an exception allows a petition to be filed within ten (10) days after the expiration of the six-month trial period if there were exceptional circumstances beyond the control of the parties or the judge for the failure to file the petition within the six-month period. It is believed that exceptional circumstances would include the death or illness of the judge, prosecutor or defense attorney immediately preceding the commencement of the trial which was to commence the day prior to the expiration of the six-month trial requirement. Time is computed pursuant to Paragraph A of Rule 5-104 NMRA.

The 2007 amendments to Paragraph C of the rule expanded the district court's aggregate authority to grant extensions under the rule from three (3) months to six (6) months. In 2009, Paragraph C was again amended to remove the six-month limitation on the district court's aggregate authority to grant extensions under the rule. In addition, the 2009 amendments to the rule no longer permit the filing of petitions for extensions of time to commence trial with the Supreme Court. Although the district court is now the sole entity responsible for deciding whether to extend the time limits under the rule, good cause for an extension still must be shown, and the 2009 amendments require that the district court consider a number of factors when deciding whether to grant an extension of the time greater than six (6) months. The factors are patterned after guidelines and factors set forth in state and federal case law for determining whether a defendant's right to a speedy trial has been violated. *See State v. Garza*, 2009-NMSC-045, ¶ 048, ___ N.M. ___, ___ P.3d ___ (revising benchmarks for determining when delay triggers application of the *Barker v. Wingo* four-factor balancing test, which is twelve (12) months for simple cases, fifteen (15) months for cases of intermediate complexity, and eighteen (18) months for complex cases). Although Garza emphasizes the need for a showing of actual prejudice in most cases to establish a speedy trial violation, the district court retains discretion to deny a request to extend the time for

commencement of trial under this rule even if there is no showing of actual prejudice from the delay.

[Amended by Supreme Court Order No. 09-8300-032, approved provisionally for one year, effective September 1, 2009, for all petitions for extension of time pending in the district court or Supreme Court.]

ANNOTATIONS

The 1998 amendment, effective for extension petitions filed on and after September 1, 1998, added present Paragraph C; designated the provisions of former Paragraph C as present Paragraphs D and E; in Paragraph D, inserted "For good cause shown" at the beginning, and deleted "or a judge designated by the Supreme Court, for good cause shown" at the end; in Paragraph E, added the heading, substituted "court" for "Supreme Court" in the first sentence, substituted "applicable time limits prescribed by this rule" and "applicable time limits", twice, for "six (6) month period" in the second sentence, substituted "court" for "Supreme Court" in the fifth sentence, and, in the sixth sentence, substituted "court" for "Supreme Court", "applicable time limit" for "six (6) month period", and "trial must commence" for "defendant must be tried"; redesignated former Paragraph D as Paragraph F, inserted "the" preceding "event" near the beginning; and redesignated former Paragraph E as Paragraph G, deleted "children's court proceedings or to" preceding "cases" and "metropolitan" preceding "magistrate"; and made minor stylistic changes throughout the section.

The 2000 amendment, effective for extension petitions filed on and after May 1, 2000, substituted "to determine the competency of the defendant" for "on a finding of incompetency" in Paragraph B(2), substituted "if the defendant is arrested or surrenders in this state for failure to appear, the date of arrest or surrender of the defendant" for "the date of arrest of the defendant for failure to appear", redesignated former Paragraphs B(6) and B(7) as present Paragraphs B(7) and B(8) and added Paragraph B(6).

Commentary for 2007 Amendments to Rule 5-604 NMRA.

The 2007 amendments to Paragraph C of the rule expand the district court's aggregate authority to grant extensions under the rule from three (3) months to six (6) months. Under Paragraph D of the rule, further extensions of time still must be sought from the Supreme Court. However, in the rare instance when an extension of time is sought from the Supreme Court beyond the six (6) month period authorized by Paragraph C of the rule, the statement of good cause in the petition filed with the Supreme Court must specify the extreme circumstances justifying the extension request. The statement of good cause also must include a statement informing the Supreme Court of the definite trial date that the petitioner has already obtained from the district court, which must be within the time period of the extension request.

The 2008 amendment, approved by Supreme Court Order No. 08-8300-52, effective November 24, 2008, in Paragraph F, changed the phrase "the information or indictment filed against such person shall be dismissed" to the phrase "the information or indictment filed against such person may be dismissed" and added the provision at the end of the sentence that the court may consider other sanctions as appropriate.

The 2009 amendment, approved provisionally for one year by Supreme Court Order No. 09-8300-032, effective September 1, 2009, for all petitions for extension of time pending in the district court or Supreme Court, in Paragraph C, at the end of the first sentence, added "for six (6) months"; added the second sentence, including Subparagraphs (1) through (5); and deleted the phrase which stated that the aggregate of all extensions granted by the district court may not exceed six (6) months; deleted former Paragraph D which provided that for good cause shown, the time for extension of trial may be extended by the Supreme Court or a justice of the Supreme Court; re-lettered former Paragraphs E through G as Paragraphs D through F; in re-lettered Paragraph D, deleted the former second and third sentences which provided that if the petition is filed in the Supreme Court, the statement for good cause shall include a statement of a definite trial date and that upon request, the district court shall provide the parties with a trial date; in Paragraph E, deleted the former first sentence which provided that if the trial did not commence within six (6) months or within the period of any extension, the information or indictment may be dismissed with prejudice or the court may impose other appropriate sanctions; and added Subparagraphs (1) and (2).

Refiling to avoid discovery sanction. — Where the magistrate court suppressed the results of the breath test administered to the defendant because the state had failed to timely disclose the appropriate machine certification, the failure to produce the certification was prima facie evidence of the state's lack of preparedness and does not entitle the state to the benefit of a new six-month rule period. State v. Rayburns, 2008-NMCA-050, 143 N.M. 803, 182 P. 3d 786.

Forfeiture of right to seek an extension of time. — Where the state failed to request an extension of time to commence trial from the Supreme Court until twenty-eight days after the expiration of the prior extension of time granted by the district court and failed to establish exceptional circumstances justifying its untimely petition, the state forfeited its right to seek an extension of time from the Supreme Court and dismissal of the charges against the defendant with prejudice was mandatory. Duran v. Eichwald, 2009-NMSC-030, 146 N.M. 341, 210 P.3d 238.

Withdrawal of plea. — Where the district court orally allowed the defendant to withdraw the defendant's plea, the six month period commenced to run on the date of the court's oral ruling, not on the date a written order allowing the defendant to withdraw the plea was filed. State v. Enlow, 2009-NMCA-038, ____ N.M. ____, ____ P.3d ____.

Refiling early in the six month period. — Where the district attorney investigated the possibility of disposing of the case in magistrate court at or before the pretrial conference, early in the six-month period, and the district attorney's policy of refilling

cases that could not be resolved quickly in the magistrate court was intended to resolve the cases as quickly as possible, the dismissal of the case in magistrate court and refilling in district court was not done for bad reasons or to circumvent the six-month rule. State v. Lozano, 2008-NMCA-082, 144 N.M. 250, 185 P.3d 1100.

Exceptional circumstances did not exist to justify the granting of the state's petition for an extension to commence trial that was filed one day after the six-month time period expired where the state did not seek the extension earlier because of its heavy caseload, defense counsel failed to respond to the prosecutor's phone call with a position on the extension until after the district court closed on the last day of the rule period, and the docket of the district court necessitated rescheduling the trial. State v. Dominguez, 2007-NMCA-132, 142 N.M. 631, 168 P.3d 761.

For the six-month rule to apply to a new, identical case, the district court must enter an order of dismissal, or the state must file a nolle prosequi, to properly close the original case. State v. Lucero, 2007-NMCA-096, 142 N.M. 315, 164 P.3d 1014

Application to consecutive, identical criminal information. — Where the district court rejected a plea agreement and ordered the remand of the case to magistrate court for a preliminary hearing, the case was not closed by the order for remand, and the state subsequently filed an identical criminal information in district court, the district court correctly applied the six-month rule to the first case. State v. Lucero, 2007-NMCA-096, 142 N.M. 315, 164 P.3d 1014

Delay due to state being unaware of defendant's location. — Where the state claims that the delay in bringing the defendant to trial was because the state was unaware of the defendant's location, the state must do more than merely claim that it was unaware of the defendant's location, the state must affirmatively explain why it could not reasonably have been expected to bring the defendant to trial during that time. State v. Maddox, 2007-NMCA-102, 142 N.M. 400, 166 P.3d 461, cert. granted, 2007-NMCERT-008.

Delay due to plea negotiations. — Absent an agreement by the defendant to suspend proceedings or waive his speedy trial right, plea negotiations do not obviate the state's duty to bring the defendant to trial in a timely fashion and does not alone constitute a valid reason for a delay. State v. Maddox, 2007-NMCA-102, 142 N.M. 400, 166 P.3d 461, cert. granted, 2007-NMCERT-008.

Waiver. — Where the defendant filed a motion for a continuance of his trial and then stipulated to a second extension, the defendant waived the six-month rule. State v. Collins, 2007-NMCA-106, 142 N.M. 419, 166 P.3d 480, cert. denied, 2007-NMCERT-008.

Twenty-six month delay. — Defendant's right to a speedy trial was violated where the defendant's trial was delayed for twenty-six months because the state failed to make its witnesses available for pretrial interviews, despite repeated promises that it would do so

and despite repeated extensions from the district court and the Supreme Court to permit the state to do so. State v. Johnson, 2007-NMCA-107, 142 N.M. 377, 165 P.3d 1153, cert. denied, 2007-NMCERT-008.

Right to speedy trial violated. - Where defendant's trial was delayed for nearly three and one-half years because defense counsel failed to pursue the issue of defendant's competency and the state failed to ascertain what was happening in the case or to move it forward, defendant was incarcerated during the delay, defendant's diminished intellectual capacity prevented him from asserting the right to a speedy trial and defense counsel was not in a position to make a speedy trail claim on defendant's behalf because of defense counsel's unmanageable caseload, and five years had passed since the crime was committed and the state offered no evidence to rebut defendant's allegation that the child victim's memory and therapy during the five-year period would make it difficult to determine what really happened in the case, defendant's right to a speedy trial was violated. State v. Stock, 2006-NMCA-140, 140 N.M. 676, 147 P.3d 885, cert. granted, 2006-NMCERT-011.

State duty. — The state has a duty to monitor a case and ensure that steps are being taken to bring defendant to trial in a timely manner. State v. Stock, 2006-NMCA-140, 140 N.M. 676, 147 P.3d 885, cert. granted, 2006-NMCERT-011.

Neglect of defense counsel. — Although the general rule is that a defendant must be held accountable for actions of his or her attorney, delays caused by the neglect of court-appointed counsel cannot be held against a defendant for speedy trial purposes. State v. Stock, 2006-NMCA-140, 140 N.M. 676, 147 P.3d 885, cert. granted, 2006-NMCERT-011.

Rule compared regarding noncompliance with time limits. — Despite notable similarities of their provisions, this rule, Rule 10-226 NMRA and Rule 10-320 NMRA, each has an additional provision that Rule 10-229 NMRA does not have. These rules all provide that noncompliance with the time limits of the rules or with the time limits of any extensions granted shall result in dismissal with prejudice of the charges against the accused, and Rule 10-229 NMRA has no such provision. State v. Stephen F., 2005-NMCA-048, 137 N.M. 409, 112 P.3d 270, cert. granted, 2005-NMCERT-004.

Defendant had right to prompt trial under this rule. State v. Guzman, 2004-NMCA-097, 136 N.M. 253, 96 P.3d 1173, cert. denied, 2004-NMCERT-008.

Purpose of rule. — This rule was adopted to assure the prompt trial and disposition of criminal cases, not to effect dismissals by a technical application. This rule is to be read with common sense. State v. Flores, 99 N.M. 44, 653 P.2d 875 (1982); State v. Eden, 108 N.M. 737, 779 P.2d 114 (Ct. App. 1989).

The rule accomplishes its purpose by requiring trial to commence within six months of various events, failing which dismissal of the charges is required unless an extension of

time has been properly obtained. State v. Jaramillo, 2004-NMCA-041, 135 N.M. 322, 88 P.3d 264, cert. denied, 2004-NMCERT-004.

Effect of common sense. — Court has refused to read the six-month rule or view the facts relating to issues arising under it in such a manner that would require a dismissal when common sense would indicate otherwise. State v. Jaramillo, 2004-NMCA-041, 135 N.M. 322, 88 P.3d 264, cert. denied, 2004-NMCERT-004.

State law requires that criminal cases be tried within six months. LaVoy v. Snedeker, ____F.Supp.___(D.N.M. 2004).

Cases before magistrate. — District court erred in reversing defendant's convictions on grounds that this rule was violated; because the case was heard before a magistrate, this rule was inapplicable and Rule 6-703 NMRA should have been applied. State v. Wilson, 1998-NMCA-084, 125 N.M. 390, 962 P.2d 636.

When the state dismisses a case in magistrate court in order to preserve its right to appeal an order suppressing evidence and refiles in district court, a new six-month period, measured as provided in the rule, applies to the charges in district court. State v. Heinsen, 2005-NMSC-035, 138 N.M. 441, 121 P.3d 1040.

Right arises upon initiation of formal proceedings. — Constitutional right to a speedy trial arises, or becomes applicable, only upon the initiation of formal prosecution proceedings. State v. Crump, 82 N.M. 487, 484 P.2d 329 (1971)(decided under former law).

Where a defendant was first "accused" of criminal damage to property under an indictment in February 1988 and he was tried in May, three months later, such a delay cannot give rise to a speedy trial claim in view of the six-month time limit on commencement of criminal trials. State v. Haar, 110 N.M. 517, 797 P.2d 306 (Ct. App.), cert. denied, 110 N.M. 330, 795 P.2d 1022 (1990).

Verified petition required by rule ensures that the judge has the information necessary to determine if an extension is proper. State v. Guzman, 2004-NMCA-097, 136 N.M. 253, 96 P.3d 1173, cert. denied, 2004-NMCERT-008.

Filing of charging papers does not begin six-month period. — This rule provides that the time at which the six-month rule starts to run begins with the latest of several events. None of them is the filing of the charging papers. State v. Larson, 107 N.M. 85, 752 P.2d 1101 (Ct. App. 1988).

Filing of amended complaint. — The filing of an amended complaint is not an event that triggers the running of the six-month period regarding the trial of a criminal case or an habitual criminal proceeding. State v. Jacquez, 119 N.M. 127, 888 P.2d 1009 (Ct. App. 1994).

Period prior to filing of indictment is not to be considered in determining whether there was a violation of defendant's constitutional right to a speedy trial. State v. Crump, 82 N.M. 487, 484 P.2d 329 (1971)(decided under former law).

Defendant may waive requirements of this rule. State v. Guzman, 2004-NMCA-097, 136 N.M. 253, 96 P.3d 1173, cert. denied, 2004-NMCERT-008.

The six-month time limit applies to youthful offender proceedings in which probable cause is found, notwithstanding the language in the rule stating that it does not apply to children's court proceedings. State v. Michael S., 1998-NMCA-041, 124 N.M. 732, 955 P.2d 201.

Six-month period starts when defendant waives arraignment. — Since the defendant was originally indicted for numerous offenses, was diverted into a preprosecution diversion program (PDP), after which the state dismissed the indictment, was later terminated from the program because she had violated the terms of PDP contract, was reindicted on the same charges for which she had previously been indicted, and waived her arraignment on the charges in the second indictment, the six-month time period for commencement of trial pursuant to Paragraph B was calculated from the date the defendant waived arraignment on the second complaint, and not from the date the defendant was terminated from the PDP, because there was no evidence that the dismissal of the initial indictment and the defendant's later reindictment were carried out for purposes of delay or an attempt to circumvent Paragraph B(6). State v. Altherr, 117 N.M. 403, 872 P.2d 376 (Ct. App. 1994).

Commencement of trial. — For purposes of the six-month time limit of Paragraph B of this rule, a trial commences on the date that a petit jury is selected. State v. Rackley, 2000-NMCA-027, 128 N.M. 761, 998 P.2d 1212, cert. denied, 128 N.M. 689, 997 P.2d 821 (2000).

Time for ruling on timely motion filed under Paragraph E. — Because this rule does not provide a time within which the applicable court must rule on a timely-filed motion for extending the time for commencement of trial, this rule must be construed according to other rules of criminal procedure. Specifically, Rule 5-601(F) NMRA establishes a general rule that all motions shall be disposed of within a reasonable time after filing and Rule 5-104(B)(1) NMRA recognizes the discretion of the district court to enlarge a time limitation contained in the Rules of Criminal Procedure if requested before the applicable time limitation expires. Under those rules, the district court has reasonable time after filing to rule on a timely-filed petition under Paragraph E of this rule, regardless of the expiration of the six-month period of Paragraph B of this rule. State v. Sandoval, 2003-NMSC-027, 133 N.M. 399, 62 P.3d 1281.

Extension of trial date by agreement of parties. — Where an extension of the trial date was obtained within six months of the defendant’s arraignment and through agreement of the parties, the timing of the defendant’s trial did not violate Paragraph B

of this rule. State v. Gutierrez, 2003-NMCA-077, 133 N.M. 797, 70 P.3d 787, cert. denied, 133 N.M. 771, 70 P.3d 761 (2003).

Plea negotiation period. — Subparagraph (7) of Paragraph B does not apply to suspend the six-month rule for plea negotiations, as such; the appropriate inquiry is whether, before the rule expired, an oral or written agreement was reached or there was a clear understanding that the action against the defendant was being held in abeyance. State v. Eskridge, 1997-NMCA-106, 124 N.M. 227, 947 P.2d 502.

Defendant affirmatively waived right to timely trial under this rule where he apparently made a strategic decision that he needed more time for discovery and filed a stipulated motion for continuance of his trial; defendant did not challenge that there was good cause shown for the continuance nor did he state how the temporary inability to locate the victim caused him prejudice. State v. Bennett, 2003-NMCA-147, 134 N.M. 705, 82 P.3d 72, cert. denied, 2003-NMCERT-003.

Where, although defendant did not agree to an extension under this rule, she stipulated to a joint motion for continuance which, as she conceded set forth good cause for an extension, and when the time came for her to take action to assert her rights under this rule, she did not do so and she did not even act within a reasonable time after the prosecutor and the judge took action to correct the oversight that resulted in the passing of the rule date, defendant waived her rights under this rule by her actions. State v. Guzman, 2004-NMCA-097, 136 N.M. 253, 96 P.3d 1173, cert. denied, 2004-NMCERT-008.

Defendant waived six-month limit for plea hearing. — Evidence that the defendant's attorney orally agreed to a plea, and affirmatively represented to the state that setting the plea hearing after the six-month rule expired was "no problem," was sufficient to show that the defendant waived the rule. State v. Eskridge, 1997-NMCA-106, 124 N.M. 227, 947 P.2d 502.

Acquiescence in delay. — Where defendant participated in at least four pretrial conferences and hearings without making any objection to the delay in his trial, defendant acquiesced in the delay. State v. Lobato, 2006-NMCA-051, 139 N.M. 431, 134 P.3d 122, cert. denied, 2006-NMCERT-004.

Entry of voluntary plea of guilty constitutes waiver of whatever right a defendant may have had to a speedy trial. Salazar v. State, 85 N.M. 372, 512 P.2d 700 (Ct. App. 1973).

Delay arising prior to grant of extension of time. — The court of appeals may consider a speedy trial claim where the alleged delay arose prior to, and was not the result of, the supreme court's grant of an extension of time within which to proceed to trial. State v. Garcia, 110 N.M. 419, 796 P.2d 1115 (Ct. App. 1990) (overruling State v. Apodaca, 105 N.M. 650, 735 P.2d 1156 (Ct. App. 1987) to the extent it holds otherwise).

Conclusion of trial within extension period. — An extension extends the time for trial to commence; it does not require that the trial be concluded within the extension period. State v. Higgins, 107 N.M. 617, 762 P.2d 904 (Ct. App. 1988).

When period begins to run where there is improper delay between filing and arrest. — Although six-month period would not normally begin until defendant's arrest, the period began to run when information was filed in situation where defendant had sought dismissal after a 10 and one-half month delay between filing of information and arrest on grounds that a course of procedure had been followed to circumvent this rule. Under such circumstances the state was required by proof to demonstrate that such course had not been followed to delay defendant's trial beyond the six-month period, and where it failed to meet that burden, defendant's motion to dismiss was properly granted. State v. Lucero, 91 N.M. 26, 569 P.2d 952 (Ct. App. 1977).

Delay in arraignment not caused intentionally by state. — Since the late arraignment was due to the district court's arraignment schedule and the reassignment of the case to a different judge within the district, and the defendant did not allege that the state intentionally sought to have the arraignment delayed, the provision requiring commencement of the trial within six months was literally applied. State v. Coburn, 120 N.M. 214, 900 P.2d 963 (Ct. App. 1995).

Trial commenced within six months of denial of interlocutory appeal. — Trial commenced within six months of the issuance of an appellate court's mandate denying an application for interlocutory appeal was commenced within the time provided for by the rule. State v. Eden, 108 N.M. 737, 779 P.2d 114 (Ct. App. 1989).

The filing of an interlocutory appeal by defendant interrupted the running of the six-month rule, and the six-month time period was triggered anew on the date when the appellate court's mandate disposing of the interlocutory appeal was filed in the district court. State v. Mayfield, 1996-NMCA-093, 122 N.M. 298, 923 P.2d 1183.

Trial after mistrial. — This rule clearly contemplates permitting an additional six months to try a case after declaration of a mistrial and, although it states that the six-month period commences when the "order is filed," it does not require that the order be entered contemporaneously with the discharge of the jury. State v. Reyes-Arreola, 1999-NMCA-086, 127 N.M. 528, 984 P.2d 775, cert. denied, 127 N.M. 390, 981 P.2d 1208 (1999).

Declaration of mistrial. — The rule does not make a distinction between those orders declaring mistrial that are later found to be proper and those that are not. An order declaring mistrial operates to restart the six-month rule even if the order of mistrial is erroneous. State v. Lobato, 2006-NMCA-051, 139 N.M. 431, 134 P.3d 122, cert. denied, 2006-NMCERT-004.

Where there is transfer from children's court to district court and information is filed there, the six-month rule of Subsection (b) (see now Paragraph B) begins with the

filing in the district court of the information or indictment or the date of arrest, whichever is later. State v. Howell, 89 N.M. 10, 546 P.2d 858 (Ct. App. 1976).

Failure to sever multiple counts not error where defendant not prejudiced. — Where the strength and quality of the evidence on the various counts convinces the appellate court that a defendant was not prejudiced by the failure to sever multiple counts submitted to the jury, the trial court did not err in refusing to sever. State v. Montano, 93 N.M. 436, 601 P.2d 69 (Ct. App.), cert. denied, 93 N.M. 683, 604 P.2d 821 (1979).

Second indictment after termination of first cause. — Under the previous rule, Rule 95, N.M.R. Civ. P. (see now Rule 1-095 NMRA), where the indictments were obtained following the termination of the first cause as a result of newly obtained evidence which presumably came to light after the filing of the nolle prosequi, the six-month time limitation began to run with the second indictment. State ex rel. Delgado v. Stanley, 83 N.M. 626, 495 P.2d 1073 (1972).

When the defendants alleged without contradiction by the state that the first charges against them were dismissed on the eve of trial as the six-month rule was about to run, this put the burden on the state to demonstrate its good faith and show that it did not take its actions to circumvent the six-month rule or for other bad reasons. State v. Bolton, 1997-NMCA-007, 122 N.M. 831, 932 P.2d 1075.

Second indictment after termination of first cause. — Because the state filed a nolle prosequi and then re-indicted defendant with additional charges following a mistrial, the six-month time limit for his second trial did not begin to run until after he was arraigned on the second indictment. State v. Foster, 1999-NMSC-007, 126 N.M. 646, 974 P.2d 140.

Where wrong person arrested. — Where the police mistakenly arrested an innocent man whose name and description were similar to those of a fugitive defendant, the trial court erred in dismissing the indictment against the fugitive defendant based on a finding that the innocent man had been arrested and not brought to trial within the time period required by the six-month rule. The wrongful arrest of an innocent man cannot inure to the benefit of a fugitive who has not had his rights abridged and who is not before the court. State v. Portillo, 110 N.M. 135, 793 P.2d 265 (1990).

Amended information charging a new and different offense supersedes the abandoned original information, and the six-month rule commences running on the date the amended information is filed. State v. Benally, 99 N.M. 415, 658 P.2d 1142 (Ct. App. 1983).

Amended information may start six-month period. — An amended supplemental criminal information, charging the defendant with being an habitual offender, was sufficiently different from the original supplemental information to start a new six-month period within which the habitual criminal proceeding had to be commenced, since a

different subsection of 31-18-17 NMSA 1978, the habitual offender statute, was involved, an additional prior conviction was alleged, and the defendant was arraigned for a second time. State v. Chacon, 103 N.M. 288, 706 P.2d 152 (1985).

Recommencement of the six-month period following a stay to determine competency is consistent with the intent of this rule. State v. Mendoza, 108 N.M. 446, 774 P.2d 440 (1989).

The time during which a defendant's competency to enter into a plea agreement is being assessed suspends the proceedings and the six-month period begins anew after the plea is assessed; when the plea is rejected, the period begins from that date. State v. Lucas, 110 N.M. 272, 794 P.2d 1201 (Ct. App. 1990).

Diversion program notification recommenced six month period. — The district court improperly determined that the state had failed to comply with paragraph B, because the six-month period recommenced when the district attorney's office notified defendant that he was not acceptable for its preprosecution diversion program. State v. Hastings, 116 N.M. 344, 862 P.2d 452 (Ct. App. 1993).

Motion seeking a dismissal under this rule for a violation of the right to a speedy trial is not governed by the requirements of Rule 33(e) (see now Rule 5-601 NMRA), which specifies that motions shall be raised at arraignment or within 20 days thereafter unless upon good cause the court waives the time requirement. State v. Aragon, 99 N.M. 190, 656 P.2d 240 (Ct. App. 1982).

Factors considered in determining denial of right to speedy trial. — Whenever there is a delay of more than six months between the time of arraignment and the date of the trial, four factors are to be considered in determining whether a defendant has been denied the right to a speedy trial. These are length of delay, reason for delay, defendant's assertion of his right, and ensuing prejudice to the defendant. State v. Mendoza, 108 N.M. 446, 774 P.2d 440 (1989).

Eighteen-month delay between arrest and trial did not violate right to speedy trial in a case where (1) the state charged defendants with first-degree murder in contravention of the magistrate's bind-over order, (2) defendants prevailed on interlocutory appeal, and (3) the state dropped charges, released defendants and subsequently obtained a grand jury indictment for first-degree murder. State v. McCrary, 100 N.M. 671, 675 P.2d 120 (1984).

Eighteen-month delay between arraignment and trial did not violate right to a speedy trial, where the defendant acquiesced to a stay in the proceedings during determination of his competence and did not assert his right to a speedy trial until the day the trial began, six months after the trial court lifted the stay. State v. Mendoza, 108 N.M. 446, 774 P.2d 440 (1989).

Arraignment prior to preliminary examination request did not begin six-month period. — Since an arraignment cannot occur until after preliminary examination is held, arraignment prior to preliminary examination request was not effective to start operation of six-month period in which trial must be commenced, so that six-month time limit did not start to run until defendant waived his arraignment. State v. Sanchez, 101 N.M. 509, 684 P.2d 1174 (Ct. App. 1984).

Paragraph B six-month rule does not commence during pendency of case in children's court. State v. Sanchez, 101 N.M. 509, 684 P.2d 1174 (Ct. App. 1984).

Paragraph B(5) did not toll six-month period where defendant had never been released from custody. — Subdivision (b)(5) (see now Subparagraph (5) of Paragraph B) was inapplicable to toll six-month requirement where, although conditions of release had been revoked for failure to appear, defendant had never actually been released from state's custody. State v. Romero, 101 N.M. 661, 687 P.2d 96 (Ct. App. 1984).

Court of appeals is without authority to review supreme court orders granting extensions of time to commence trial, where defendant's cause, challenging the validity of the supreme court's ex parte order granting the state an extension of time in which to try him, was certified to that court. State v. Carter, 87 N.M. 41, 528 P.2d 1281 (Ct. App. 1974).

The court of appeals has no power to review a supreme court order granting an extension of time under this rule as such an order is final. State v. Sedillo, 86 N.M. 382, 524 P.2d 998 (Ct. App.), cert. denied, 86 N.M. 372, 524 P.2d 988, 419 U.S. 1072, 95 S. Ct. 662, 42 L. Ed. 2d 669 (1974).

Allegation of a denial of the defendant's right to a speedy trial based upon an extension granted to the prosecution by the supreme court under this rule is beyond review. State v. Mazurek, 88 N.M. 56, 537 P.2d 51 (Ct. App. 1975).

The court of appeals is without authority to review supreme court orders granting extensions of time to commence trial. State v. Jaramillo, 88 N.M. 60, 537 P.2d 55 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

The court of appeals has no authority to review actions of the supreme court in granting the extension of a trial. State v. Williams, 91 N.M. 795, 581 P.2d 1290 (Ct. App. 1978).

Court of appeals could not review the propriety of the supreme court's grant of extensions of time. State v. Gallegos, 109 N.M. 55, 781 P.2d 783 (Ct. App. 1989).

Although the court of appeals cannot review a decision of the Supreme Court extending the time for trial under Paragraph D, the court can review the trial court's decision under Paragraph C. State v. Sanchez, 2000-NMCA-061, 129 N.M. 301, 6 P.3d 503, cert. denied, 129 N.M. 249, 4 P.3d 1240 (2000).

Technical violation of Paragraph A. — Where defendant makes no showing that his defense was prejudiced in any way by the delay, nor is there any question as to his identity or whether he understands the charge against him, a technical violation of Subdivision (a) (see now Paragraph A) will not result in a dismissal of the charges. State v. Budau, 86 N.M. 21, 518 P.2d 1225 (Ct. App. 1973), cert. denied, 86 N.M. 5, 518 P.2d 1209 (1974); State v. Coburn, 120 N.M. 214, 900 P.2d 963 (Ct. App. 1995).

Although there was a delay of more than fifteen days, the defendant made no showing that his defense was prejudiced in any way by the delay, and without such a showing, a technical violation will not result in a dismissal of the charges. State v. Jacquez, 119 N.M. 127, 888 P.2d 1009 (Ct. App. 1994).

Arraignment under New Mexico law is not an indispensable stage in a criminal proceeding. State v. Budau, 86 N.M. 21, 518 P.2d 1225 (Ct. App. 1973), cert. denied, 86 N.M. 5, 518 P.2d 1209 (1974).

Right to file plea in abatement. — When the defendant appears for arraignment, he has the right to file a plea in abatement, if he has been denied a preliminary hearing. State ex rel. Hanagan v. Armijo, 72 N.M. 50, 380 P.2d 196 (1963)(decided under former law).

Where charge against defendant was filed and then dismissed under writ of habeas corpus, prosecution and conviction three years later under information containing same charge did not violate defendant's constitutional right to a speedy public trial under N.M. Const., art. II, § 14, nor his statutory right to be tried at first term of court after filing of information under 41-11-4, 1953 Comp., (since repealed). State v. Rhodes, 77 N.M. 536, 425 P.2d 47 (1967)(decided under former law).

Where a plea agreement is approved by the court, its conditions are applicable to determine timeliness of the filing of habitual criminal charges, as well as the judgment and sentence. State v. Santillanes, 98 N.M. 448, 649 P.2d 516 (Ct. App. 1982).

Applicability of six-month rule to habitual criminal proceeding. — Where more than six months had passed since the filing of an information charging defendant under 31-18-5 (now 31-18-17) NMSA 1978 with being an habitual offender, the supreme court ordered that it be dismissed with prejudice in accordance with Subdivision (d) (see now Paragraph F) to the extent that the state was precluded only from filing another such information grounded upon all four of those felonies which were the basis for information dismissed. State v. Lopez, 89 N.M. 82, 547 P.2d 565 (1976).

Rule applies to habitual offender proceedings. State v. Padilla, 92 N.M. 19, 582 P.2d 396 (Ct. App.), cert. denied, 92 N.M. 180, 585 P.2d 324 (1978).

Delay in bringing habitual criminal charges. — Where trial is commenced within the time limitations imposed by this rule a defendant claiming to have been denied due process by a delay in the bringing of habitual criminal charges is required to make a

showing of actual prejudice caused by the delay; the delay in itself does not a fortiori establish prejudice. State v. Santillanes, 98 N.M. 448, 649 P.2d 516 (Ct. App. 1982).

"Arrest" means an arrest on charges that have been filed in the district court. State v. Dominguez, 91 N.M. 296, 573 P.2d 230 (Ct. App.), cert. denied, 91 N.M. 249, 572 P.2d 1257 (1977).

Out-of-state arrest. — Where defendant was arrested in another state on a New Mexico warrant for failure to appear, under Paragraph B(5), the six-month period began to run from the date of the out-of-state arrest, not the date when New Mexico authorities took custody of defendant. State v. Solano, 1999-NMCA-019, 126 N.M. 662, 974 P.2d 156, cert. denied, 126 N.M. 533, 972 P.2d 352 (1998).

Tolling of time limitation while bench warrant outstanding. — Where the defendant was serving a sentence at the penitentiary at the time of an arraignment on separate charges and the court ordered the defendant returned to custody until further order but did not set bond nor order any specific "conditions of release," and where the defendant was later discharged from the penitentiary without the court's permission and the court ordered a bench warrant for the defendant's arrest because he did not appear at his pretrial conference, there was a tolling of the time limit within which the trial was to be commenced (which time limit began to run on the date of arraignment) during the time that the bench warrant was outstanding. State v. Flores, 99 N.M. 44, 653 P.2d 875 (1982)(decided prior to 1983 amendment).

Supreme court does not intend six-month provision to apply to delay resulting from appellate proceedings. State v. Padilla, 92 N.M. 19, 582 P.2d 396 (Ct. App.), cert. denied, 92 N.M. 180, 585 P.2d 324 (1978).

Time limit inapplicable once trial court dismissed supplemental information in habitual offender proceeding. — Once the trial court dismissed a supplemental information in an habitual offender proceeding, there was no case to be tried in the district court and thus no case to which the time limitation of this rule applied. Only upon reversal of the trial court's dismissal and issuance of a mandate returning the case to the district court would there be a case in the district court to which a time limitation was applicable. State v. Padilla, 92 N.M. 19, 582 P.2d 396 (Ct. App.), cert. denied, 92 N.M. 180, 585 P.2d 324 (1978).

Implied consent to continue date for trial. — By his and his attorney's actions in signing a plea agreement, knowing that a hearing on the plea was scheduled on a subsequent date, defendant expressed his implied consent to continue the date for trial past the date on which the state's extension of time ended, thereby suspending the running of the six-month requirement of the rule. State v. Sanchez, 109 N.M. 313, 785 P.2d 224 (1989).

Basis for continuance held sufficient. — Where the judge was newly appointed and failed to schedule the trial for that reason, good cause existed under Paragraph C to

support the trial court's grant of a three-month extension. State v. Sanchez, 2000-NMCA-061, 129 N.M. 301, 6 P.3d 503, cert. denied, 129 N.M. 249, 4 P.3d 1240 (2000).

Basis for continuance held insufficient. — Where defendant never indicated what particular facts witnesses would prove, or that he knew of no other witnesses by which such facts could be proved, defendant simply did not present a basis for a continuance, either on the question of a "sanity hearing" or on the merits of the cause. State v. Hollowell, 80 N.M. 756, 461 P.2d 238 (Ct. App. 1969).

Defendant's request for time to attempt to retain his own counsel was denied as it presented no independent basis for a continuance. State v. Hollowell, 80 N.M. 756, 461 P.2d 238 (Ct. App. 1969).

Defendant-instigated objections to counsel held thwarting maneuver. — Trial court did not abuse its discretion in ruling that defendant instigated conflicts with his appointed counsel as a tactical maneuver to thwart the proceedings, where he did not raise any objections to his counsel until just before trial, at which time the six-month deadline for commencing trial had almost elapsed. State v. Lucero, 104 N.M. 587, 725 P.2d 266 (Ct. App. 1986).

Rule inapplicable to sentencing. — The existence of Paragraph B of Rule 5-701 NMRA that establishes time limits for sentencing suggests that Paragraph B of this rule was not intended to apply to sentencing but was intended to apply only to trials and habitual criminal proceedings, as the plain meaning of the rule suggests. State v. Todisco, 2000-NMCA-064, 129 N.M. 310, 6 P.3d 1032, cert. quashed, 132 N.M. 484, 51 P.3d 527 (2002).

Delay in probation revocation proceedings. — The time constraints of the speedy trial rule and the constitutional right under the state and federal constitutions to a speedy trial are inapplicable to probation revocation proceedings. However, delay in the institution and prosecution of probation revocation proceedings, along with a showing of prejudice to the probationer, may constitute a denial of due process, thereby requiring the state to waive any right to revoke defendant's probation. State v. Chavez, 102 N.M. 279, 694 P.2d 927 (Ct. App. 1985).

Delaying the initiation and hearing of the defendant's probation violation until after the trial by federal authorities for the charges that were the basis of the alleged parole violation did not result in a showing of prejudice or oppression to the defendant, where defendant made no showing that he demanded an earlier hearing, was unable to call necessary witnesses on his behalf, or that any of the witnesses had trouble remembering any of the critical events surrounding the events relevant to the revocation proceedings. State v. Chavez, 102 N.M. 279, 694 P.2d 927 (Ct. App. 1985).

State's petition for alternative writ constituted appeal. — State's petition to the supreme court for an alternative writ of prohibition or an alternative writ of

superintending control constituted an appeal within the meaning of Paragraph B(4). State v. Valdez, 109 N.M. 759, 790 P.2d 1040 (Ct. App. 1990).

Review of order granting extension of time. — A presiding judge had no authority to review or withdraw the order of a designated judge granting the state's petition for an extension of time to try the defendant because that authority rests solely with the Supreme Court. State v. Remaly, 120 N.M. 492, 903 P.2d 234 (1995).

Grant of extension does not preclude speedy trial review. — The grant of an extension of time for trial beyond the six-month limit of this rule by the Supreme Court does not preclude a lower court's review of a violation of the right to speedy trial. State v. Manzanares, 1996-NMSC-028, 121 N.M. 798, 918 P.2d 714.

A Supreme Court ruling on a motion pursuant to this rule is not determinative of a subsequent speedy-trial motion except in the unlikely event the record specifically reflects the Supreme Court's analysis and decision on the issue being raised again below. State v. Manzanares, 1996-NMSC-028, 121 N.M. 798, 918 P.2d 714.

Six month rule not violated. — See State v. Fernandez, 117 N.M. 673, 875 P.2d 1104 (Ct. App. 1994).

In late August, 2000, trial was set for September 26, 2000. Based on the later April 3, 2000 arraignment date, the trial setting thus fell within the state’s six-month rule for trial, because that period would have expired on October 3, 2000. LaVoy v. Snedeker, ____F.Supp.____(D.N.M. 2004).

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

Am. Jur. 2d, A.L.R. and C.J.S. references. — Intoxication as ground for police postponing arrestee's appearance before magistrate, 3 A.L.R.4th 1057.

Adequacy of defense counsel's representation of criminal client regarding speedy trial and related matters, 6 A.L.R.4th 1208.

Continuances at instances of state public defender or appointed counsel over defendant's objections as excuse for denial of speedy trial, 16 A.L.R.4th 1283.

Waiver of right to counsel by insistence upon speedy trial in state criminal case, 19 A.L.R.4th 1299.

What constitutes bringing an action to trial or other activity in case sufficient to avoid dismissal under state statute or court rule requiring such activity within stated time, 32 A.L.R.4th 840.

22A C.J.S. Criminal Law § 578 et seq.

5-605. Jury trial.

A. **Trial by jury; waiver.** Criminal cases required to be tried by jury shall be so tried unless the defendant waives a jury trial with the approval of the court and the consent of the state.

B. **Alternate jurors.** In any criminal case, the district court may direct that not more than six jurors, in addition to the regular jury, be called and impanelled to sit as alternate jurors. Alternate jurors, in the order in which they are called, shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, have the same qualifications, be subject to a like examination and challenges for cause, take the same oath, and have the same functions, powers, facilities and privileges as the regular jurors.

C. **Discharge; general rule.** Except in felony cases in which the death penalty may be imposed an alternate juror who does not replace a regular juror shall be discharged before the jury retires to consider its verdict.

D. **Findings and conclusions; when required.** In a case tried without a jury, the court shall make a general finding and shall, in addition, make specific findings of fact and conclusions of law on all ultimate facts and conclusions of law upon which written requested findings and conclusions have been filed within ten (10) days after the making of the general finding by the court, or within such time as the court may designate.

Committee commentary. — Although titled "Jury trial", this rule does not deal exclusively with the right to a jury trial but with procedure for both jury and nonjury cases. For comments on the right to a jury trial, see the commentary to Rule 5-301. For the procedure governing the selection of jurors, see Rule 5-606 and 38-5-13 and 38-5-14 NMSA 1978.

Under prior law, the defendant could waive a jury trial for a "high court" misdemeanor by proceeding to trial before the court without a jury and without making any objections. State v. Marrujo, 79 N.M. 363, 443 P.2d 856 (1968). Under Paragraph A of this rule, all trials in the district court, except for petty misdemeanors, are by jury unless the defendant waives the jury. The state may refuse to consent to a waiver by the defendant and thereby require the matter to be tried by a jury. See State ex rel. Gutierrez v. First Judicial Dist. Ct., 52 N.M. 28, 191 P.2d 334 (1948).

Paragraph B of this rule was added in 1979. The contents of this paragraph were formerly found in Paragraph E of Rule 5-606. This paragraph is derived from Paragraph B of Rule 1-047 and is consistent with American Bar Association Standards Relating to Trial by Jury, Section 2.7 (Approved Draft 1968).

Paragraph C of this rule was added in 1979 to clarify when alternate jurors are to be discharged.

Paragraph D of this rule covers the procedure for judgment in a nonjury case. The court must make a finding of guilty or not guilty. If the finding is guilty, requested findings of fact and conclusions of law may be submitted by the parties within ten (10) days or such time as the court designates. The court is then required to file a decision containing findings of fact and conclusions of law, presumably before announcing the judgment and sentence. Cf. Paragraph C of Rule 5-614 and Paragraph A of Rule 5-701. Compare, Rule 1-052.

ANNOTATIONS

Cross references. — For right to trial by jury, see N.M. Const., art. II, § 12.

For drawing and empaneling jurors, see 38-5-1 NMSA 1978 et seq.

For forms on waiver of trial by jury - misdemeanor offense and certification and waiver, see Rule 9-502 NMRA.

Waiver of jury must be consented to by state. — A defendant or defendants may waive trial by jury but said waiver cannot be accepted unless it is consented to by the state. 1953-54 Op. Att'y Gen. No. 5686 (opinion rendered under former law).

Waiver of right to jury trial requires consent of prosecutor and the approval of the trial court. State v. Mares, 92 N.M. 687, 594 P.2d 347 (Ct. App.), cert. denied, 92 N.M. 675, 593 P.2d 1078 (1979).

Complaining witness not entitled to jury trial. — A complaining witness in a criminal case where the charge is assault and battery cannot demand a jury trial and is not entitled to same. The defendant is an interested party and also the state. There is no statutory law or provision in the constitution that provides that a complaining witness is entitled to a trial by jury. 1953-54 Op. Att'y Gen. No. 5686 (opinion rendered under former law).

Waiver of jury trial valid despite defendant's claim of duress. — Defendant's waiver of a jury trial, after the jury was excused and her trial was rescheduled because she had arrived late in court, was valid, notwithstanding her argument that she was under duress to waive a jury trial because the court had set bail she would not be able to meet and would therefore be incarcerated prior to trial. State v. Dean, 105 N.M. 5, 727 P.2d 944 (Ct. App. 1986).

Claim that written waiver required not reviewable for first time on appeal. — Where the defendant does not claim in his motion for a new trial that his waiver of a 12-person jury was ineffective because not in writing, and where his claim that a written waiver was required is asserted for the first time on appeal, the claim is not entitled to

appellate review because the claim that the waiver be in writing is not a question which can be raised for the first time on appeal. State v. Pendley, 92 N.M. 658, 593 P.2d 755 (Ct. App. 1979).

Replacing juror with alternate. — When a seated juror is excused and replaced by an alternate juror prior to deliberations, the verdict is not affected, and the defendant is considered to have been tried by the same jury. State v. Pettigrew, 116 N.M. 135, 860 P.2d 777 (Ct. App. 1993).

Post-submission substitution of an alternate is error that creates a presumption of prejudice; the state must show under the circumstances of a particular case that the trial court took adequate steps to ensure the integrity of the jury process. State v. Sanchez, 2000-NMSC-021, 129 N.M. 284, 6 P.3d 486.

An alternate juror's presence in the jury room during deliberations creates a presumption of prejudice which the state may attempt to overcome. State v. Coulter, 98 N.M. 768, 652 P.2d 1219 (Ct. App. 1982).

Waiver of objection to juror's participation in trial. — Since the defendants' failed to question a juror during voir dire after she revealed that her sister worked for one of the prosecutors, it was not an abuse of discretion for the court to refuse the defendants' request to replace the juror with an alternate after the jury had retired to deliberate, or to deny their motion for a new trial. State v. Sanchez, 120 N.M. 247, 901 P.2d 178 (1995).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 1056, 1070 to 1075, 1078 to 1080.

Waiver, after not guilty plea, of jury trial in felony case, 9 A.L.R.4th 695.

Presence of alternate juror in jury room as ground for reversal of state criminal conviction, 15 A.L.R.4th 1127.

Paternity proceedings: right to jury trial, 51 A.L.R.4th 565.

Threats of violence against juror in criminal trial as ground for mistrial or dismissal of juror, 3 A.L.R.5th 963.

Stranger's alleged communication with juror, other than threat of violence, as prejudicial in federal criminal prosecution, 131 A.L.R. Fed. 465.

50A C.J.S. Juries §§ 7 to 80, 95 to 222.

5-606. Jurors.

A. **Examination of jurors.** The court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination. In

the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper, or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as it deems proper.

B. **Challenges; procedure.** Challenges for good cause and peremptory challenges shall be made outside the hearing of the jury. The party making a challenge will not be disclosed to the jury panel, but each challenge will be recorded by the clerk. The state shall accept or make any peremptory challenge as to each juror before the defense is called upon to accept or make a peremptory challenge as to the juror.

C. **Challenges for cause.** The court shall permit the parties to a case to express in the record of the trial any challenge to a juror for good cause. The court shall rule upon the challenge and may excuse any juror for good cause.

D. **Peremptory challenges.**

(1) The state and the defense in each criminal case tried to a jury in the district court shall be entitled to peremptory challenges of jurors as follows:

(a) if the offense charged is punishable by death, the defense shall be allowed twenty-four challenges and the state shall be allowed sixteen challenges;

(b) if the offense charged is punishable by life imprisonment, the defense shall be allowed twelve challenges and the state shall be allowed eight challenges; and

(c) in all other cases, the defense shall be allowed five challenges and the state shall be allowed three challenges.

(2) When two or more persons are jointly tried, two additional challenges shall be allowed to the defense and to the state for each additional defendant. When two or more defendants are jointly tried and cannot agree by whom the peremptory challenges shall be exercised, they shall be exercised in the manner prescribed by the court.

(3) The state and the defense are each entitled to one peremptory challenge in addition to those otherwise allowed by this rule if one or two alternate jurors are to be impanelled, two peremptory challenges if three or four alternate jurors are to be impanelled, and three peremptory challenges if five or six alternate jurors are to be impanelled. The additional peremptory challenges provided by this paragraph may be used against an alternate juror only, and the other peremptory challenges allowed by law shall not be used against an alternate juror. The procedure for the exercise of peremptory challenges for alternate jurors shall be the same as that for regular jurors.

[As amended, effective April 19, 2004.]

Committee commentary. — Paragraph A of this rule was derived from Paragraph A of Rule 1-047 NMRA and is consistent with American Bar Association Standards Relating to Trial by Jury, Section 2.7 (Approved Draft 1968).

Paragraphs B and C of this rule encompass that portion of Section 38-5-14 NMSA 1978 which relates to challenges of jurors in criminal cases.

There are a number of different procedures followed by state and federal courts in allowing the exercise of peremptory challenges. The commentary to the American Bar Association Standards Relating to Trial by Jury, Section 2.6 (Approved Draft 1968) states, that:

The details as to how peremptories are to be exercised in a given case must be left to the discretion of the trial judge, as different cases, particularly those with multiple defendants, pose unique problems . . . .

The New Mexico Supreme Court Committee, after considering a number of alternatives, concluded that the exercise of peremptory challenges in cases where there are multiple defendants probably should be left to the trial judge. One of the following methods should be chosen by the trial judge if, prior to the selection of any jurors, the defendants cannot agree who will exercise challenges for the defense:

(1)the judge may allow the challenges to be exercised alternately, beginning with the defendant whose name first appeared in the information or indictment. The problem with this method is that it is possible that one defendant will exercise all of the challenges allowed;

(2)the judge may divide the total number of defense challenges as equally as possible between all of the defendants beginning with the defendant whose name first appears on the information or indictment. The challenges would then be exercised alternately by the defendants; or

(3)the judge may require all defendants to agree on the exercise of a challenge before it is exercised on a juror.

See the commentary to the American Bar Association Standards Relating to Trial by Jury, Section 2.6 (Approved Draft 1968). See also State v. Boeglin, 90 N.M. 93, 559 P.2d 1220 (Ct. App. 1977), for an alternate method of exercising peremptory challenges.

ANNOTATIONS

Cross references. — For drawing and empaneling jurors, see Rule 5-605 NMRA and 38-5-1 NMSA 1978 et seq.

Compiler's notes. — This rule is similar to Rule 24 of the Federal Rules of Criminal Procedure.

The 2004 amendment, effective April 19, 2004, in Subparagraph (1) of Paragraph D, inserted present Sub-subparagraph (a), redesignated former Sub-subparagraphs (a) and (b) as present Sub-subparagraphs (b) and (c), and deleted “death or” preceding “life” in Sub-subparagraph (b).

Excusal for part of trial. — Paragraph C of this rule does not contemplate the excusal of prospective jurors for only one part of a trial if they have an inability to follow the court's instructions on a limited issue. State v. Fry, 2006-NMSC-001, 138 N.M. 700, 126 P.3d 516.

Rights of an accused in respect to panel and final jury are (1) that there be no systematic, intentional exclusion of any section of the community and (2) that there be left as fitted for service no biased or prejudiced person. State v. Ortiz, 88 N.M. 370, 540 P.2d 850 (Ct. App. 1975).

There is no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to a jury of any particular composition. State v. Ortiz, 88 N.M. 370, 540 P.2d 850 (Ct. App. 1975).

But distinctive community groups may not be systematically excluded from the jury wheels, pools of names, panels or venires from which juries are drawn, which jury pools should be reasonably representative of the community. State v. Ortiz, 88 N.M. 370, 540 P.2d 850 (Ct. App. 1975).

One is not entitled to relief simply because there isn't a member of his race on the jury unless he shows that the absence resulted from purposeful discrimination; however, one is entitled to relief regardless of palpable guilt if he shows actual exclusion resulting from purposeful discrimination based on race or economic status. State v. Tapia, 81 N.M. 365, 467 P.2d 31 (Ct. App. 1970) (decided under former law).

Defendant has right to be present for jury challenges. — The trial court erred in denying defendant the right to be present when challenges to the jury were made, and the error mandated reversal and remand for a new trial. State v. Garcia, 95 N.M. 246, 620 P.2d 1271 (1980).

Court's discretion to excuse juror for cause. — The trial court has the duty of seeing that there is a fair and impartial jury and in doing so, it must exercise discretion. The trial court's decision not to excuse a juror will not be disturbed unless there is a manifest error or a clear abuse of discretion. State v. Valdez, 83 N.M. 632, 495 P.2d 1079 (Ct. App.), aff'd, 83 N.M. 720, 497 P.2d 231, cert. denied, 409 U.S. 1077, 93 S. Ct. 694, 34 L. Ed. 2d 666 (1972) (decided under former law).

It is within the trial court's discretion as to whether a prospective juror should be excused. The trial court's decision will not be disturbed unless there is a manifest error or a clear abuse of discretion. State v. Cutnose, 87 N.M. 300, 532 P.2d 889 (Ct. App. 1975), overruled on other grounds State v. McCormack, 100 N.M. 657, 674 P.2d 1117 (1984).

It is for the trial court to determine whether a juror should be replaced because disqualified to perform the duties of a juror. The trial court's ruling will be reversed only for abuse of discretion. State v. Padilla, 91 N.M. 451, 575 P.2d 960 (Ct. App. 1978).

Excusing juror prejudiced in defendant's favor. — The trial court committed no error in excusing a prospective juror who indicated that he might be favorably prejudiced by the fact that defendants were members of the American Indian movement. Defendants were entitled to an impartial jury. They were not entitled to a juror prejudiced in their favor. State v. Cutnose, 87 N.M. 300, 532 P.2d 889 (Ct. App. 1975), overruled on other grounds State v. McCormack, 100 N.M. 657, 674 P.2d 1117 (1984).

Excluding jurors opposed to capital punishment. — Allowing the prosecutor in a first-degree murder trial to voir dire prospective jurors on their feelings regarding capital punishment and excusing for cause those jurors who were opposed to capital punishment did not deprive defendant of his right to trial by a cross-section of the community. State v. Ortiz, 88 N.M. 370, 540 P.2d 850 (Ct. App. 1975).

Since data about the public's attitude towards the death penalty is still in a tentative and fragmentary condition the appeals court was unable to conclude that the defendant was denied a jury that was impartial on the issue of guilt or innocence because those prospective jurors who were opposed to capital punishment were excused for cause. State v. Ortiz, 88 N.M. 370, 540 P.2d 850 (Ct. App. 1975).

Right to ask relevant questions on voir dire. — The right to an impartial jury carries with it the concomitant right to take reasonable steps to insure that the jury is impartial. One of the most important methods of securing this right is the right to challenge, yet the right to challenge has little meaning if it is unaccompanied by the right to ask relevant questions on voir dire upon which the challenge for cause can be predicated. State v. Ortiz, 88 N.M. 370, 540 P.2d 850 (Ct. App. 1975).

Individual voir dire of prospective jurors. — There are times when individual voir dire of prospective jurors is not only helpful but also essential in providing a fair trial, and the determination of whether to allow individual voir dire lies within the discretion of the trial court. State v. Frank, 92 N.M. 456, 589 P.2d 1047 (1979).

Judge's control over voir dire is not judicial bias. — Restrictions on a party's voir dire by the court does not amount to reversible error absent a showing by defendant of some prejudice. Indeed, a judge's express desire to expedite resolution of a matter is not generally an indication of bias against either party. State v. Fernandez, 117 N.M. 673, 875 P.2d 1104 (Ct. App. 1994).

Exercise of right of challenge requires knowledge of all relevant matters. — Full knowledge of all relevant and material matters that might bear on possible disqualification of a juror is essential to a fair and intelligent exercise of the right of counsel to challenge either for cause or peremptorily. Mares v. State, 83 N.M. 225, 490 P.2d 667 (1971) (decided under former law).

Where trial court required parties to exercise their peremptory challenges alternately, this violated the rule and is reversible error if defendant has been harmed by the error. Where defendant asserts he was harmed because he exercised all of his peremptory challenges, but makes no claim that he has been harmed by use of the alternate method in exercising peremptory challenges and does not claim that the jurors who tried the case were other than fair or impartial or that his peremptory challenges would have been exercised differently if the trial court had complied with the rule, the error did not amount to reversible error. State v. Boeglin, 90 N.M. 93, 559 P.2d 1220 (Ct. App. 1977).

Challenge of juror because she had heard officer testify in prior trial was without merit as no adequate factual basis was laid for consideration of a legal rule. State v. Herrera, 82 N.M. 432, 483 P.2d 313 (Ct. App.), cert. denied, 404 U.S. 880, 92 S. Ct. 217, 30 L. Ed. 2d 161 (1971) (decided under former law).

Peremptory challenges for multiple defendants. — In a prosecution for first-degree murder, the defendant was not denied due process of law because the trial court failed to permit him to exercise 12 peremptory challenges for himself, but instead allowed the defendant and codefendant a total of 14 challenges. Multiple defendants have no constitutional right to more peremptory challenges than given them by rule, provided they are given a fair trial by an impartial jury. State v. Sutphin, 107 N.M. 126, 753 P.2d 1314 (1988).

Several counts in indictment do not give additional peremptory challenges. — The fact that an indictment contains several counts does not entitle accused to any additional peremptory challenges, even though the different counts charge separate and distinct offenses which may be joined in the same indictment. This is also true where several indictments charging similar offenses, which might have been charged in separate counts of the same indictment, are consolidated. State v. Compton, 57 N.M. 227, 257 P.2d 915 (1953) (decided under former law).

No additional challenges where two felonies charged. — Where defendant has exercised all of his peremptory challenges of right, the court does not err in denying defendant additional challenges, sought on the ground that there are two felonies charged, and this does not require a severance. State v. Salazar, 58 N.M. 489, 272 P.2d 688 (1954) (decided under former law).

Peremptory challenges by habitual offender subject to life imprisonment. — Where defendant sought 12 peremptory challenges because, if convicted, the conviction would be his fourth felony conviction, punishable by life imprisonment

pursuant to the habitual offender statute, his claim was premature. Once defendant is charged as an habitual offender, and that charge alleges a sufficient number of prior felony convictions so that his sentence could be enhanced to life imprisonment, defendant might be entitled to 12 peremptories in selecting the jury to try the habitual offender charge. State v. McKelvy, 91 N.M. 384, 574 P.2d 603 (Ct. App. 1978).

It is the duty of a juror to make full and truthful answers to such questions as are asked, neither falsely stating any fact nor concealing any material matter. Mares v. State, 83 N.M. 225, 490 P.2d 667 (1971) (decided under former law).

New trial based on juror's false answers. — If a juror falsely represents his interest or situation or conceals a material fact relevant to the controversy and such matters, if truthfully answered, might establish prejudice or work a disqualification of the juror, the party misled or deceived thereby, upon discovering the fact of the juror's incompetency or disqualification after trial, may assert that fact as ground for and obtain a new trial, upon a proper showing of such facts, even though the bias or prejudice is not shown to have caused an unjust verdict, it being sufficient that a party, through no fault of his own, has been deprived of his constitutional guarantee of a trial of his case before a fair and impartial jury. Mares v. State, 83 N.M. 225, 490 P.2d 667 (1971).

Silence of prospective juror can be relied upon the same as negative answer. — Where the only fact disclosed by the juror was that he had been a good friend of victim and her late husband for 22 years and the juror did not indicate his further involvement to such an extent as would have put counsel on further inquiry, his silence can be the same as a negative answer upon which a party has a right to rely. Mares v. State, 83 N.M. 225, 490 P.2d 667 (1971) (decided under former law).

No basis found for holding that jurors failed to respond fully. — Where defendant moved for new trial, alleging that upon voir dire none of the jurors stated that they knew a certain defense witness or had sat as jurors in his trial, but there was no record of the voir dire proceedings so that the appellate court did not know what questions were asked on voir dire, nor did defendant allege that prospective jurors were asked about the witness, it was held that there was no basis for holding that any juror failed to respond fully and truthfully to an asserted question not supported by the record. State v. Carrillo, 88 N.M. 236, 539 P.2d 626 (Ct. App. 1975).

Challenge of black jury member not necessarily improper. — Challenge of the one black member of the jury venire is insufficient to raise the inference of improper use of the peremptory challenge by the state. State v. Crespin, 94 N.M. 486, 612 P.2d 716 (Ct. App. 1980).

The prosecution's exercise of a peremptory challenge against the sole black member of the jury panel does not violate the defendant's right to an impartial jury, absent a showing of the prosecution's systematic exclusion of black jurors. State v. Davis, 99 N.M. 522, 660 P.2d 612 (Ct. App. 1983).

Challenge jury selection before jury sworn. — Generally, a challenge to jury selection must be made before the jury is sworn. State v. Wilson, 117 N.M. 11, 868 P.2d 656 (Ct. App. 1993).

Challenge of jury array because of earlier dismissal of panel members. — Defendant's challenge of the jury array because the trial judge, in a previous case, had dismissed 12 members of the petit jury panel was without merit. State v. Herrera, 82 N.M. 432, 483 P.2d 313 (Ct. App.), cert. denied, 404 U.S. 880, 92 S. Ct. 217, 30 L. Ed. 2d 161 (1971) (decided under former law).

Alternate jurors. — When a seated juror is excused and replaced by an alternate juror prior to deliberations, the verdict is not affected, and the defendant is considered to have been tried by the same jury. State v. Pettigrew, 116 N.M. 135, 860 P.2d 777 (Ct. App. 1993).

Where defendant fails to exercise available peremptory challenges, he cannot claim prejudice for failure to dismiss prospective jurors. State v. Smith, 92 N.M. 533, 591 P.2d 664 (1979).

Effect of defendant's refusal to have juror replaced by alternate. — Defendant's argument that he was deprived of his right to excuse a juror for cause or by invocation of peremptory challenge after disclosure on the second day of trial of her failure to reveal possibly relevant information in response to his questions during voir dire was without merit; where defendant refused the trial court's offer to substitute an alternate juror, he waived his right to challenge the first juror on appeal. Furthermore, the prerequisite for dismissing an empanelled juror and substitution of an alternate juror therefor, that is, a showing of inability to perform the duties of a juror and consequent prejudice to the defendant arising therefrom, was not established. State v. Bojorquez, 88 N.M. 154, 538 P.2d 796 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

Voir dire on death penalty where penalty mandatory. — It is not improper to voir dire potential jurors on the death penalty merely because they will not have any discretion in imposing it. State v. Ortiz, 88 N.M. 370, 540 P.2d 850 (Ct. App. 1975).

Any unauthorized contact with juror is presumptively prejudicial to a criminal defendant. Mares v. State, 83 N.M. 225, 490 P.2d 667 (1971) (decided under former law).

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

For note, "Criminal Law - Discriminatory Use of Peremptory Challenges in Jury Selection: State of New Mexico v. Sandoval," see 19 N.M.L. Rev. 563 (1989).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 1112, 1116 to 1125, 1254.

Right of defense in criminal prosecution to disclosure of prosecution information regarding prospective jurors, 86 A.L.R.3d 571.

Validity and construction of statute or court rule prescribing number of peremptory challenges in criminal cases according to nature of offense or extent of punishment, 8 A.L.R.4th 149.

Validity of jury selection as affected by accused's absence from conducting of procedures for selection and impaneling of final jury panel for specific case, 33 A.L.R.4th 429.

Propriety of use of multiple juries at joint trial of multiple defendants in state criminal prosecution, 41 A.L.R.4th 1189.

Cure of prejudice resulting from statement by prospective juror during voir dire, in presence of other prospective jurors, as to defendant's guilt, 50 A.L.R.4th 969.

Fact that juror in criminal case, or juror's relative or friend, has previously been victim of criminal incident as ground of disqualification, 65 A.L.R.4th 743.

Propriety of substituting juror in bifurcated state trial after end of first phase and before second phase is given to jury, 89 A.L.R.4th 423.

Threats of violence against juror in criminal trial as ground for mistrial or dismissal of juror, 3 A.L.R.5th 963.

Prospective juror's connection with insurance company as ground for challenge for cause, 9 A.L.R.5th 102.

Use of peremptory challenges to exclude ethnic and racial groups, other than Black Americans, from criminal jury - post-*Batson* state cases, 20 A.L.R.5th 398.

Use of preemptory challenges to exclude caucasian persons, as a racial group, from criminal jury-post-batson state cases, 47 A.L.R.5th 259.

Examination and challenge of federal case jurors on basis of attitudes toward homosexuality, 85 A.L.R. Fed. 864.

Selection and impaneling of alternate jurors under Rule 24(c) of Federal Rules of Criminal Procedure, 119 A.L.R. Fed. 589.

Stranger's alleged communication with juror, other than threat of violence, as prejudicial in federal criminal prosecution, 131 A.L.R. Fed. 465.

50A C.J.S. Juries § 244 et seq.

5-607. Order of trial.

The order of trial shall be as follows:

A. a qualified jury shall be selected and sworn to try the case;

B. initial instructions as provided in UJI Criminal shall be given by the court;

C. the state may make an opening statement. The defense may then make an opening statement or may reserve such opening statement until after the conclusion of the state's case;

D. the state shall submit its evidence;

E. out of the presence of the jury, the court shall determine the sufficiency of the evidence, whether or not a motion for directed verdict is made;

F. the defense may then make an opening statement, if reserved;

G. the defense may submit its evidence;

H. the state may submit evidence in rebuttal;

I. the defense may submit evidence in surrebuttal;

J. at any time before submission of the case to the jury, the court may for good cause shown permit the state or defense to submit additional evidence;

K. out of the presence of the jury, the court shall determine the sufficiency of the evidence, whether or not a motion for directed verdict is made;

L. the instructions to be given shall be determined in accordance with Rule 5-608. The court shall then instruct the jury;

M. the state may make the opening argument;

N. the defense may make its argument;

O. the state may make rebuttal argument only.

Committee commentary. — The New Mexico Court of Appeals has held that Paragraph D of this rule did not change the law holding that a defendant waives a claim that the evidence presented by the state is insufficient by proceeding to introduce evidence on his own behalf. State v. Lard, 86 N.M. 71, 519 P.2d 307 (Ct. App. 1974). However, under Paragraph J of this rule the defendant need no longer move for a

directed verdict at the close of all of the evidence to preserve a claim that the evidence was insufficient to allow the case to go to the jury. State v. Lard, supra.

The 1975 amendments to this rule inserted a new Paragraph B of this rule to allow for instructions at the outset of the trial as provided in UJI Criminal. In addition, a new Paragraph L of this rule alerts the court and counsel that the procedure for settling instructions at the close of the evidence is provided for in Rule 5-608.

ANNOTATIONS

The word "shall" in this rule is mandatory. State v. Davis, 97 N.M. 745, 643 P.2d 614 (Ct. App. 1982).

Order of trial when insanity defense raised. — Until these rules are amended to accommodate for a bifurcated trial, separating the issues of insanity and guilt when the insanity defense is raised, the order prescribed by this rule should be followed. State v. Luna, 93 N.M. 773, 606 P.2d 183 (1980).

It is trial court's duty to see that no improper statements are made which are likely to influence the jury in their verdict, and that the cause is tried upon the sworn testimony of the witnesses. State v. Herrera, 90 N.M. 306, 563 P.2d 100 (Ct. App.), cert. denied, 90 N.M. 636, 567 P.2d 485 (1977).

This rule does not provide for motions for a directed verdict to be taken under advisement. State v. Davis, 97 N.M. 745, 643 P.2d 614 (Ct. App. 1982).

Under Subdivision (k) (see now Paragraph K), the issue is whether there is sufficient evidence to justify a rational trier of fact to find guilt beyond a reasonable doubt. State v. Sheets, 96 N.M. 75, 628 P.2d 320 (Ct. App. 1981).

Determination of sufficiency of evidence for submission to jury. — The trial court's proper function is limited; it should only determine whether the evidence is sufficient for the submission of the case to the jury; in doing so, the trial court is to view the evidence in the light most favorable to the state. State v. Davis, 643 P.2d 614 (Ct. App. 1982).

The trial court's failure to rule on the sufficiency of the evidence must be considered as a denial of the defendant's challenge to the sufficiency of the evidence. State v. Davis, 97 N.M. 745, 643 P.2d 614 (Ct. App. 1982).

Failure of the trial court to rule on the sufficiency of the evidence before presentation of the case to the jury did not merit reversal, but merely preserved the issue of sufficiency of the evidence for appellate review. State v. Hernandez, 115 N.M. 6, 846 P.2d 312 (1993).

Legal conclusion, upon review, considered in light favorable to prosecution. — Once a defendant has been found guilty of the crime charged, the factfinder's role as

weigher of the evidence is preserved through a legal conclusion, that, upon judicial review, all of the evidence is to be considered in the light most favorable to the prosecution. State v. Sheets, 96 N.M. 75, 628 P.2d 320 (Ct. App. 1981).

Attempted murder conviction dependent upon conspiracy not sustained where conspiracy evidence insufficient. — Where a conviction for attempted first-degree murder is a derivative liability which depends on a conviction for conspiracy to commit first-degree murder and there is insufficient evidence to sustain the conspiracy conviction, the evidence is insufficient to sustain the attempt conviction. State v. Sheets, 96 N.M. 75, 628 P.2d 320 (Ct. App. 1981).

Determining sufficiency of evidence in absence of motion for directed verdict. — The issue of the sufficiency of the evidence was before the appellate court even though no motion for a directed verdict was made at the close of the evidence. State v. Herrera, 90 N.M. 306, 563 P.2d 100 (Ct. App.), cert. denied, 90 N.M. 636, 567 P.2d 485 (1977).

State's contention that defendant who did not move for a directed verdict at the close of all the evidence waived any claim that the evidence was insufficient was correct under prior law, but under this rule, absence of a motion for a directed verdict at the close of all the evidence did not waive the claim that the evidence was insufficient at that point because the trial court was required to make that determination in the absence of a motion. State v. Lard, 86 N.M. 71, 519 P.2d 307 (Ct. App. 1974).

On motion to dismiss, evidence viewed in light most favorable to state. — The trial court, in passing upon a motion to dismiss the charges, is to view the evidence in the light most favorable to the state. State v. Rodriguez, 81 N.M. 503, 469 P.2d 148 (1970).

Counsel is entitled to reasonable measure of latitude in closing remarks to a jury and statements having their basis in the evidence, together with reasonable inferences to be drawn therefrom, are permissible and do not warrant reversal. State v. Herrera, 84 N.M. 46, 499 P.2d 364 (Ct. App.), cert. denied, 84 N.M. 37, 499 P.2d 355 (1972).

Rebuttal argument found not to assert state's theory of case for first time. — Where the state's rebuttal argument, even when taken out of context as defendant did, was fairly within the evidence and consistent with the state's theory of first-degree murder presented throughout the trial, including its opening argument, defendant's contention that the state asserted its theory of the case for the first time during its rebuttal argument and that defendant was prejudiced because unable to respond to the new theory was frivolous. State v. King, 90 N.M. 377, 563 P.2d 1170 (Ct. App. 1977).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75A Am. Jur. 2d Trial §§ 495, 496, 535 to 538, 540.

Adequacy of defense counsel's representation of criminal client regarding argument, 6 A.L.R.4th 16.

Prosecutor's reference in opening statement to matters not provable or which he does not attempt to prove as ground for relief, 16 A.L.R.4th 810.

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

Propriety of trial court order limiting time for opening or closing argument in criminal case - state cases, 71 A.L.R.4th 200.

Negative characterization or description of defendant, by prosecutor during summation of criminal trial, as ground for reversal, new trial, or mistrial - modern cases, 88 A.L.R.4th 8.

Propriety and prejudicial effect of counsel's negative characterization or description of witness during summation of criminal trial - modern cases, 88 A.L.R.4th 209.

88 C.J.S. Trial §§ 31 to 35.

5-608. Instructions to juries.

A. **Required instructions.** The court must instruct the jury upon all questions of law essential for a conviction of any crime submitted to the jury.

B. **Requested instructions.** At the close of the defendant's case, or earlier if ordered by the court, the parties shall tender requested instructions in writing. The original and such copies as may be required by the court shall be given the court, and a copy shall be served on opposing counsel. The original shall have a place for the court to insert a number (No. . . . . .) but shall contain no title or other notations. The copies shall indicate the following information:

(1) [Plaintiff's] [Defendant's] Requested Instruction No. . . . . .;

(2) UJI Criminal No. . . . . .;

(3) If not in UJI Criminal, authority for tendered instruction should be indicated.

C. **Advisement of parties; filing.** The court shall advise the parties of the instructions to be given and:

(1) number the originals of the instructions to be given;

(2) mark one (1) copy of each instruction tendered as either given or refused and initial the copies;

(3) file such marked copies with the district court clerk.

D. **Objections.** Except as provided in Paragraph A of this rule, for the preservation of error in the charge, objection to any instruction given must be sufficient to alert the mind of the court to the claimed vice therein, or, in case of failure to instruct on any issue, a correct written instruction must be tendered before the jury is instructed. Before the jury is instructed, reasonable opportunity shall be afforded counsel so to object or tender instructions, on the record and in the presence of the court.

E. **Use in jury room.** Written instructions of the court shall go to the jury room, but no instruction which goes to the jury room shall contain any notation.

Committee commentary. — This rule was amended in 1975 in conjunction with the Uniform Jury Instructions project. The main purpose of the revision of the rule was to provide a procedure for instructions similar to that used after the adoption of UJI Civil. See Rule 1-051. As stated by the New Mexico Supreme Court in State v. Sherwood, 39 N.M. 518, 50 P.2d 968 (1935), "Prudence and justice would suggest that it would be safest and best, before submitting instructions to a jury, to call upon counsel for both sides to point out specifically what objections, if any, they may have to such instructions, and to request them to suggest such additional instructions as they may think are necessary".

Paragraph A of this rule, codifying prior court decisions, requires the district court to instruct the jury on the law essential for a conviction of the crimes submitted to the jury even if no requested instructions are presented by the parties. See Territory v. Baca, 11 N.M. 559, 71 P. 460 (1903). In State v. Gunzelman, 85 N.M. 295, 512 P.2d 55 (1973), the supreme court held that the failure of the district court to properly instruct on all of the essential elements of the crime charged was jurisdictional and could be raised for first time on appeal. See also, State v. Walsh, 81 N.M. 65, 463 P.2d 41 (Ct. App. 1969). Although this rule only requires the court to include instructions essential for conviction "on his own motion", the rule would not prevent the court from including other instructions supported by the evidence when no instruction is tendered.

Paragraph D of this rule retains the language of former Subdivision (g) of this rule. It requires a proper objection or tendering of a proper instruction for matters not covered by Paragraph A of this rule. See State v. Romero, 86 N.M. 99, 519 P.2d 1180 (Ct. App. 1974); State v. Urban, 86 N.M. 351, 524 P.2d 523 (Ct. App. 1974); State v. Romero, 87 N.M. 279, 532 P.2d 208 (Ct. App. 1975). The final sentence of the rule was added in 1975 to make it clear that the parties are entitled to have the district judge hear the objections. See Webb v. Webb, 87 N.M. 353, 533 P.2d 586 (1975).

ANNOTATIONS

Compiler's notes. — For reference to superseding of civil rules of procedure governing criminal proceedings by Rules of Criminal Procedure for the District Courts, see compiler's notes to Rule 5-101 NMRA.

Conviction of offense not presented to jury. — Where a jury acquitted a defendant of 44 out of 52 charges of violating the Water Quality Act, and defendant appealed his convictions of the remaining eight felony counts, and the appellate court found insufficient evidence to sustain the eight convictions but remanded to the district court to enter judgment and resentencing of eight counts of attempt to commit the offenses of which defendant was convicted, even though he was not charged with attempt and the jury was not instructed regarding the crime of attempt, a conviction of an offense not presented to the jury would deprive the defendant of notice and an opportunity to defend against that charge and would be inconsistent with New Mexico law regarding jury instructions and preservation of error. State v. Villa, 2004-NMSC-031, 136 N.M. 367, 98 P.3d 1017.

Rule requires trial court to instruct the jury on the law essential for a conviction of the crime submitted to the jury even if no requested instruction is tendered. State v. Bender, 91 N.M. 670, 579 P.2d 796 (1978).

This rule requires the court to instruct on all essential elements of a crime. State v. Osborne, 111 N.M. 654, 808 P.2d 624 (1991); State v. Acosta, 1997-NMCA-035, 123 N.M. 273, 939 P.2d 1081, cert. quashed, 124 N.M. 312, 950 P.2d 285 (1997).

Trial court's failure to instruct the jury in embezzlement prosecution on the essential element of fraudulent intent constituted reversible error under this rule. State v. Green, 116 N.M. 273, 861 P.2d 954 (1993).

Both the defendant and the state have a duty to tender correct instructions to the trial court. Jackson v. State, 100 N.M. 487, 672 P.2d 660 (1983).

Error to alter uniform jury instruction on elements of crime. — When a uniform jury instruction is provided for the elements of a crime, it is error to alter the instruction. State v. Jackson, 99 N.M. 478, 660 P.2d 120 (Ct. App.), rev'd on other grounds, 100 N.M. 487, 672 P.2d 660 (1983).

Where court rejects modified instruction proposed by defendant. — In case of a failure to instruct on an issue, the phrase "a correct written instruction must be tendered before the jury is instructed" is not applicable when refusal by the court of a proposed instruction on a lesser included offense depends upon a requested modification of the uniform jury instruction. If the court believes no modification is appropriate, the court should instruct in the exact language of the uniform jury instruction. The party requesting the modification can preserve error by alerting the mind of the court to any vice claimed to be present in the uniform jury instruction. Gallegos v. State, 113 N.M. 339, 825 P.2d 1249 (1992).

Failure of trial court to properly instruct on all essential elements of crime charged is jurisdictional and may be raised for the first time on appeal. State v. Bender, 91 N.M. 670, 579 P.2d 796 (1978).

The failure to give an instruction on the law essential for a conviction, required by supreme court mandate, is jurisdictional and reversible error, and the defendant need not tender a mandatory instruction nor object to its omission in order to preserve the error. State v. Otto, 98 N.M. 734, 652 P.2d 756 (Ct. App. 1982).

The failure to instruct the jury on the essential elements of an offense constitutes fundamental error. Where fundamental error is involved, it is irrelevant that the defendant was responsible for the error by failing to object to an inadequate instruction or by objecting to an instruction which might have cured the defect in the charge to the jury. State v. Osborne, 111 N.M. 654, 808 P.2d 624 (1991); State v. Acosta, 1997-NMCA-035, 123 N.M. 273, 939 P.2d 1081, cert. quashed, 124 N.M. 312, 950 P.2d 285 (1997).

Defendant is entitled to have his theory of case submitted to jury under proper instructions where the evidence supports it. State v. Montano, 95 N.M. 233, 620 P.2d 887 (Ct. App. 1980).

Right of accused to instructions is controlled by criminal procedure rules. State v. Najar, 94 N.M. 193, 608 P.2d 169 (1980).

Instruction with alternative intent requirements based on statutory language. — There is no difference between an indictment in the alternative in which the charge follows the language of 30-6-1C NMSA 1978, relating to child abuse, and the giving of an instruction which includes alternative intent requirements based on the language of the statute; if the alternative charging is not legally deficient, then the instruction is not legally deficient. State v. Utter, 92 N.M. 83, 582 P.2d 1296 (Ct. App. 1978).

Where there is basis in evidence for each self-defense instruction, UJI Crim. 41.41 and 41.51 (see now UJI 14-5171 and 14-5181), and each instruction states the basis for its factual application, the instructions are neither conflicting nor confusing; it would not be an error to refuse an additional instruction explaining how to apply the self-defense instructions, and it is not an error to fail to give such an additional instruction which is not requested. State v. Brown, 93 N.M. 236, 599 P.2d 389 (Ct. App.), cert. denied, 93 N.M. 172, 598 P.2d 215 (1979), cert. denied, 444 U.S. 1084, 100 S. Ct. 1041, 62 L. Ed. 2d 769 (1980).

Defendant must tender correct instruction before premising error on refusal to instruct. — In order to premise error on the refusal of the trial court to instruct, the defendant must tender a legally correct instruction on the law. State v. Jackson, 99 N.M. 478, 660 P.2d 120 (Ct. App.), rev'd on other grounds, 100 N.M. 487, 672 P.2d 660 (1983); State v. Garcia, 100 N.M. 120, 666 P.2d 1267 (Ct. App. 1983); State v. Crislip, 110 N.M. 412, 796 P.2d 1108 (Ct. App. 1990).

Defendant properly preserved the issue of failure to instruct on a lesser included offense where he tendered correct written instructions and brought the issue to the trial court's

attention as shown by the court's initializing of his denial of the instructions. State v. Curley, 1997-NMCA-038, 123 N.M. 295, 939 P.2d 1103.

Rationale for allowing flexibility regarding preservation is reinforced by the actual purpose of Paragraph D of this rule. State v. Jernigan, 2006-NMSC-003, 139 N.M. 1, 127 P.3d 537 139 N.M. 1, 127 P.3d 537.

Defendant's right to challenge defective instruction. — The rules of criminal procedure exempt from the normal requirements for preserving an issue on appeal errors involving the essential elements of an offense. Moreover, a defendant's offer of defective instructions and failure to object to the omission of an element in the instructions given by the court does not bar consideration of this issue on appeal. State v. Peterson, 1998-NMCA-049, 125 N.M. 55, 956 P.2d 854.

Defendant must submit a proper instruction to preserve error only if no instruction is given on the issue in question on appeal. Santillanes v. State, 115 N.M. 215, 849 P.2d 358 (1993).

Defendant may not complain of instruction given at his request. State v. Mills, 94 N.M. 17, 606 P.2d 1111 (Ct. App.), cert. denied, 94 N.M. 628, 614 P.2d 545 (1980).

As a general proposition, a defendant may not complain of an instruction given at his request. State v. Norush, 97 N.M. 660, 642 P.2d 1119 (Ct. App. 1982).

Waiver of error based on failure to instruct. — The defendant in a murder trial waived any error based on the failure to instruct on voluntary manslaughter by taking the position that no such instruction should be given. State v. Najar, 94 N.M. 193, 608 P.2d 169 (1980).

A defendant neither tendered a written instruction nor orally dictated one to the trial court regarding a modification of jury instructions, the purpose of this rule requiring a tendered written instruction was not met, and the issue was not preserved for review. State v. Badoni, 2003-NMCA-009, 133 N.M. 257, 62 P.3d 348, cert. denied, 133 N.M. 126, 61 P.3d 835 (2003).

Where there was no objection in trial court to definition of negligence, that issue may not be raised for the first time on appeal. State v. Robinson, 93 N.M. 340, 600 P.2d 286 (Ct. App.), cert. denied, 92 N.M. 532, 591 P.2d 286 (1979), overruled on other grounds, Santillanes v. State, 115 N.M. 215, 849 P.2d 358 (1993).

Trial court's failure to offer defense counsel an opportunity to object on the record to the court's rejection of a tendered instruction on aiding and abetting, before the jury began its deliberations, deprived defendant of a fair trial. State v. Wilson, 109 N.M. 541, 787 P.2d 821 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Instructions in state criminal case in which defendant pleads insanity as to hospital confinement in event of acquittal, 81 A.L.R.4th 659.

Court's duty to inform counsel of proposed action on requested instructions under Rule 30 of Federal Rules of Criminal Procedure, 40 A.L.R. Fed. 495.

When does trial court's noncompliance with requirement of Rule 30, Federal Rules of Criminal Procedure, that opportunity shall be given to make objection to instructions upon request, out of presence of jury, constitute prejudicial error, 55 A.L.R. Fed. 726.

Propriety of lesser-included-offense charge to jury in federal criminal case - general principles, 100 A.L.R. Fed. 481.

5-609. Submission to jury.

A. **Foreman.** The court shall direct the jury to select one of its members as foreman to preside over its deliberations.

B. **Forms of verdict.** Before the jury retires the court shall submit to it written forms of verdict for its use in returning a verdict.

C. **Exhibits.** Upon its request to review any exhibit during its deliberations, the jury shall be furnished all exhibits received in evidence.

Committee commentary. — Paragraph C of this rule, allowing the exhibits to go to the jury room upon the request of the jury, modifies the holding in State v. Valles, 83 N.M. 541, 494 P.2d 619 (Ct. App. 1972). In that case, the court of appeals held that there was no abuse of discretion by the trial court in refusing to allow exhibits to go to the jury room. Under Paragraph C of this rule, if the jury requests any one exhibit, all exhibits should go in as a way of preventing undue emphasis being placed on one of the exhibits. Because the submission to the jury is automatic upon request under this rule, it is not error for such submission to take place when the defendant and his attorney are not present. State v. Riordan, 86 N.M. 92, 519 P.2d 1029 (Ct. App. 1974). See also, State v. Chavez, 86 N.M. 199, 521 P.2d 1040 (Ct. App.), cert. denied, 86 N.M. 189, 521 P.2d 1030 (1974).

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Amount of time to be spent in deliberation is a matter for the jury to determine and there is nothing in the nature of things to prevent a jury from being so overwhelmed by the evidence that they need not leave the jury box to reach a verdict. State v. Mosier, 83 N.M. 213, 490 P.2d 471 (Ct. App. 1971) (decided under former law).

All exhibits received in evidence are to be furnished to the jury if the jury requests any exhibit. State v. Chavez, 86 N.M. 199, 521 P.2d 1040 (Ct. App.), cert. denied, 86 N.M. 189, 521 P.2d 1030 (1974).

Subdivision (c) (see now Paragraph C) permitting jury to review any exhibits during deliberations does not exclude recorded exhibits. State v. Fried, 92 N.M. 202, 585 P.2d 647 (Ct. App.), cert. denied, 92 N.M. 260, 586 P.2d 1089 (1978).

Jury listening to tape recording during deliberations not prejudicial. — See State v. Fried, 92 N.M. 202, 585 P.2d 647 (Ct. App.), cert. denied, 92 N.M. 260, 586 P.2d 1089 (1978).

Magnifying glass in jury room proper. — Enhancement of the jury's visual acuity through use of a magnifying glass is not experimentation unless there is some indication that the magnification produced additional evidence. State v. Griffin, 116 N.M. 689, 866 P.2d 1156 (1993).

Defendant's presence when exhibits requested or delivered. — This does not require that the defendant and his attorney be present when jury's request to review exhibits is received nor when the exhibits are delivered. State v. Riordan, 86 N.M. 92, 519 P.2d 1029 (Ct. App. 1974).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 23A C.J.S. Criminal Law § 1365 et seq.

5-610. Additional instructions to jury following retirement; communications between court and jury.

A. **Upon jurors' request.** After the jurors have retired to consider their verdict, if they desire additional instructions or to have any testimony read to them, they may in the discretion of the court be returned to the courtroom and the court may give them such additional instructions if authorized by UJI Criminal or may order such testimony read to them. Such instruction shall be given and such testimony read only after notice to, and in the presence of, the attorneys and the defendants.

B. **Recall of jurors by court.** The court may recall the jurors after they have retired to consider their verdict to give them additional instructions if authorized by UJI Criminal, or to correct any erroneous instructions it has given them. Such additional or corrective instructions may be given only after notice to and in the presence of the attorneys and the defendants.

C. **Additional evidence prohibited.** After the jurors have retired to consider their verdict, the court shall not recall the jurors to hear additional evidence.

D. **Communications; judge and jury.** The defendant shall be present during all communications between the court and the jury unless the defendant has signed a written waiver of the right to be personally present. All communications between the

court and the jury must be in open court in the presence of the defendant and counsel for the parties unless the defendant waives on the record the right to be present or unless the communication involves only a ministerial matter. Unless requested by counsel for the defendant, communications between the court and the jury on a ministerial matter may be made in writing after notice to all counsel without recalling the defendant.

[As amended, effective September 1, 2005.]

Committee commentary. — This rule incorporated the holding in *State v. Lindwood*, 79 N.M. 439, 444 P.2d 766 (Ct. App. 1968), that it was not prejudicial error for the court to recall the jury and give it an instruction previously overlooked after the charge had been given and arguments of counsel made.

In addition to authorizing additional instructions, Paragraph A of this rule specifically allows the reading of testimony to the jury. *State v. Montoya*, 86 N.M. 316, 523 P.2d 814 (Ct. App. 1974).

Paragraph D of this rule has been added to clarify the procedure for communications between the judge and the jury, after the jury has retired to consider the verdict, without recalling the jury. *See State v. McClure*, 94 N.M. 440, 612 P.2d 232 (Ct. App. 1980); *State v. Hinojos*, 95 N.M. 659, 625 P.2d 588 (Ct. App. 1980); *State v. Saavedra*, 93 N.M. 242, 599 P.2d 395 (Ct. App. 1979); *State v. Orona*, 92 N.M. 450, 589 P.2d 1041 (1979); *State v. Brugger*, 84 N.M. 135, 500 P.2d 420 (Ct. App. 1972); *State v. Beal*, 48 N.M. 84, 146 P.2d 175 (1944). In addition, provision has been made for those communications which do not relate to issues in the case at trial to be made without having the defendant present, provided the defendant's presence has not been requested by his attorney. Rule 43 of the Federal Rules of Criminal Procedure, regarding the presence of the defendant, has been interpreted to allow such communications without the presence of the defendant. *United States v. Mesteth*, 528 F.2d 333 (8th Cir. 1976); *United States v. Reynolds*, 489 F.2d 4 (6th Cir. 1973), *cert. denied*, 416 U.S. 988, 40 L. Ed. 2d 766, 94 S. Ct. 2395 (1974); *United States v. Dellinger*, 472 F.2d 340 (7th Cir. 1972), *cert. denied*, 410 U.S. 970, 35 L. Ed. 2d 706, 93 S. Ct. 1443 (1973); *United States v. Alper*, 449 F.2d 1223 (3d Cir. 1971), *cert. denied*, 405 U.S. 988, 31 L. Ed. 2d 453, 92 S. Ct. 1248, *reh. denied*, 406 U.S. 911, 31 L. Ed. 2d 822, 92 S. Ct. 1605 (1972); and *United States v. Stone*, 452 F.2d 42 (8th Cir. 1971).

All communications between the judge and jury should be made a part of the record, whether made in the presence of defense counsel and defendant or not.

While a case is pending, a judge may not entertain any ex parte communications from any party, from counsel for any party, from any advocacy group on behalf of any party, or with any member of the probation department except as allowed by law. Any authorized ex parte communication between the court and the probation department must be in writing.

ANNOTATIONS

The 2005 amendment, approved by Supreme Court order 05-8300-11, effective September 1, 2005, rewrote Paragraph D relating to presence of the defendant during communications between the court and jury.

Communication between court and jury. — Where the jury, through the foreperson or a note, in the presence of the defendant and all counsel, but not in the presence of the jury, informs the court of its numerical split with a minority favoring a not guilty verdict, and the court's instruction to the jury in regard to further deliberations is not in open court, is oral, and is carried out through the foreperson who returns to the jury room and orally relays the court's instruction to the jury, the communication constitutes fundamental error. State v. Cortez, 2007-NMCA-054, 141 N.M. 623, 159 P.3d 1108, cert. granted, 2007-NMCERT-005.

Improper communication. — Where a juror approached the trial judge in chambers to complain that another juror had announced that she did not believe the state's expert testimony and that she would not change her mind about defendant's innocence and the judge instructed the juror to "just report that you are hung" and to "do whatever you have to do", the conversation related to the case and was an improper communication that raised a presumption of prejudice. State v. Jojola, 2006-NMSC-048, 140 N.M. 660, 146 P.3d 305.

Juror's request of bailiff not prejudicial where no response given. — Where juror, during course of deliberations, requested definition of a phrase from a bailiff, but no definition was given, and since none would have been given in any event, the trial court did not err in finding that the presumption of prejudice had been overcome. State v. Mankiller, 104 N.M. 461, 722 P.2d 1183 (Ct. App. 1986).

Rule does not require that requested instructions be given. — Although this rule allows the trial court the discretion to give the jury additional or corrected instructions after it retires, it does not require that the requested instructions be given. State v. Montano, 95 N.M. 233, 620 P.2d 887 (Ct. App. 1980).

Court may give additional instruction without permitting more argument. — Where an additional instruction correctly stated the law and was supported by the evidence, it was not an abuse of discretion for the trial court to give the instruction without permitting more argument or giving defendant's requested instruction. State v. Wall, 94 N.M. 169, 608 P.2d 145 (1980).

Additional jury instructions should be limited to offenses within indictment, because the indictment is the means by which a defendant learns of the charges he is expected to meet. State v. Wall, 94 N.M. 169, 608 P.2d 145 (1980).

And instruction regarding culpability of accessory does not go beyond indictment. — Where the distinction between a principal and an accessory has been

abolished, and defendant has been charged as a principal, an additional instruction given in response to a question from the jury regarding the culpability of an accessory does not go beyond the indictment or allege a new theory of liability. State v. Wall, 94 N.M. 169, 608 P.2d 145 (1980).

Defendant's recall for issue-related communications clearly implied. — The second sentence of Paragraph D clearly implies that the defendant must be recalled when a communication relating to issues of the case at trial is made. This distinction reflects the well-settled law of New Mexico that it is improper for the trial court to have any communication with the jury concerning the subject matter of the court proceedings except in open court and in the presence of the accused and his counsel. Hovey v. State, 104 N.M. 667, 726 P.2d 344 (1986).

Presumption of prejudice arises whenever an improper communication with the jury as to the subject matter of the proceedings in the defendant's absence occurs, and the state bears the burden of rebutting that presumption by making an affirmative showing on the record that the communication did not affect that jury's verdict. Hovey v. State, 104 N.M. 667, 726 P.2d 344 (1986).

Rule as to inquiry as to numerical division given prospective application. — Prospective application is given to rule that inquiry into the numerical division of jurors is reversible error. Inquiries into numerical division occurring prior to the date of this decision will be reviewed under the approach taken in State v. Nelson, 63 N.M. 428, 321 P.2d 202 (1958); Pirch v. Firestone Tire & Rubber Co., 80 N.M. 323, 455 P.2d 189 (Ct. App.), cert. denied, 80 N.M. 316, 454 P.2d 973 (1969).

Instructions related to jury's inability to reach verdict. — When a statement is submitted to the court by the jury during deliberations concerning the inability of the jury to arrive at a verdict, together with a disclosure of the numerical division, the judge not only can, but should, communicate with the jury and can do so if the communication leaves with the jury the discretion whether or not it should deliberate further. The court can inform the jury that it may consider further deliberations, but not that it must consider further deliberations. State v. McCarter, 93 N.M. 708, 604 P.2d 1242 (1980).

Giving of additional instructions is within the trial court's discretion. State v. Burk, 82 N.M. 466, 483 P.2d 940 (Ct. App.), cert. denied, 404 U.S. 955, 92 S. Ct. 309, 30 L. Ed. 2d 271 (1971) (decided under former law).

That instructions were given four hours and 15 minutes and four hours and 45 minutes respectively after deliberation does not in and of itself give rise to error. State v. Cruz, 86 N.M. 341, 524 P.2d 204 (Ct. App. 1974).

Use of "we" in requesting jury to arrive at verdict. — It cannot be said, as a matter of law, that the inadvertent use of "we" in requesting the jury to arrive at a verdict ("So, would you go on back and we'll see if we can't arrive at a verdict") had the effect of

coercing and hastening the jury in its deliberation and invaded the province of the jury. State v. Cruz, 86 N.M. 341, 524 P.2d 204 (Ct. App. 1974).

Rehearing portion of witness' testimony. — Where there is a doubt in the minds of jurors as to what a witness said, it cannot be prejudicial, absent some unusual circumstance, to have that doubt removed by a rehearing of his testimony. Therefore, where jury was unclear as to whether witness said defendant ran through a door, or from a door, trial court did not abuse its discretion by allowing jury to rehear a portion of the witness' testimony. State v. Montoya, 86 N.M. 316, 523 P.2d 814 (Ct. App. 1974).

Jury listening to tape recording during deliberations not prejudicial. — See State v. Fried, 92 N.M. 202, 585 P.2d 647 (Ct. App.), cert. denied, 92 N.M. 260, 586 P.2d 1089 (1978).

Communications regarding juror's inability to speak English. — A case was remanded for the trial court to certify the record as to the details of any communications between the court and jury as to a jury member not understanding English, and to conduct an evidentiary hearing into whether the state could overcome a presumption of prejudice from the defendant's absence during these communications, and to determine whether the defendant was accorded his right to a jury of 12. Irrespective of the proper preservation of error by the defendant, it was the duty of the trial court to make a record and rule upon any possible miscarriage of justice that could have constituted fundamental error. State v. Escamilla, 107 N.M. 510, 760 P.2d 1276 (1988).

Fact trial court calls jury's attention to time and expense involved in the trial does not in and of itself give rise to error. State v. Cruz, 86 N.M. 341, 524 P.2d 204 (Ct. App. 1974).

Additional instruction found not erroneous. — The fact that the additional language stating: "If you reach a verdict on one of the counts you should return a verdict on that count" is not part of UJI Crim. 16.2 (now withdrawn) and the possibility that the trial court may have been anxious to reach a verdict, does not make use of the additional language erroneous. State v. Burk, 82 N.M. 466, 483 P.2d 940 (Ct. App.), cert. denied, 404 U.S. 955, 92 S. Ct. 309, 30 L. Ed. 2d 271 (1971) (decided under former law).

Defendant need not be present in court in order to waive his right to be present. Hovey v. State, 104 N.M. 667, 726 P.2d 344 (1986).

But where defendant is in custody, waiver of presence by voluntary absence cannot be inferred. — Where defendant is in custody at the time of the communications between the judge and the jury, the trial court cannot properly infer that he had waived his presence by voluntary absence under Crim. P. Rule 47(b)(1) (now Rule 5-612). Hovey v. State, 104 N.M. 667, 726 P.2d 344 (1986).

Evidence insufficient to show valid waiver of right to be present during jury communications. — Where the record indicates that the trial court accepted defense

counsel's statement that "I would waive his defendant's presence at this time" without determining whether defense counsel was waiving the right or whether defendant (who was in custody) voluntarily was doing so through his attorney, the record is insufficient to show a valid waiver of the right to be present during jury communications, defendant's conviction will be reversed and the case remanded for a new trial. Hovey v. State, 104 N.M. 667, 726 P.2d 344 (1986).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law § 1117.

Additional instruction to jury after submission of felony case, in accused's absence, 94 A.L.R.2d 270.

Postretirement out-of-court communications between jurors and trial judge as grounds for new trial or reversal in criminal case, 43 A.L.R.4th 410.

Prejudicial effect, in civil case, of communications between judges and jurors, 33 A.L.R.5th 205.

Court's duty to inform counsel of proposed action on requested instructions under Rule 30 of Federal Rules of Criminal Procedure, 40 A.L.R. Fed. 495.

Modern status of rule that court may instruct dissenting jurors in federal criminal case to give due consideration to opinion of majority (Allen charge), 44 A.L.R. Fed. 468.

23A C.J.S. Criminal Law § 1365 et seq.

5-611. Return of verdict; mistrial; discharge of jurors.

A. **Return.** The verdict shall be unanimous and signed by the foreman. It shall be returned by the jury to the judge in open court.

B. **Several defendants.** If there are two or more defendants, the jury at any time during its deliberations may return a verdict with respect to any defendant as to whom it has agreed.

C. **Several counts.** If there are two or more counts, the jury may at any time during its deliberations return a verdict with respect to any count upon which it has agreed.

D. **Conviction of lesser offense.** If so instructed, the jury may find the defendant guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein. If the jury has been instructed on one or more lesser included offenses, and the jury cannot unanimously agree upon any of the offenses submitted, the court shall poll the jury by inquiring as to each degree of the offense upon which the jury has been instructed beginning with the highest degree and, in descending order, inquiring as to each lesser degree until the court has determined at what level of the offense the jury has

disagreed. If upon a poll of the jury it is determined that the jury has unanimously voted not guilty as to any degree of an offense, a verdict of not guilty shall be entered for that degree and for each greater degree of the offense.

E. **Poll of jury.** When a verdict is returned and before it is recorded, the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations.

F. **Irregularity of verdict.** No irregularity in the rendition or reception of verdict of which the parties have been made aware may be raised unless it is raised before the jury is discharged. No irregularity in the recording of a verdict shall affect its validity unless the defendant was in fact prejudiced by such irregularity.

G. **Discharge of jury.** After the jury has retired to consider their verdict the court shall discharge the jury from the cause when:

(1) their verdict has been received;

(2) the court finds there is no reasonable probability that the jury can agree upon a verdict; or

(3) some other necessity exists for their discharge. The court may in any event discharge the jury if the parties consent to its discharge.

H. **Mistrial; jury disagreement.** An order declaring a mistrial for jury disagreement shall be in writing and shall expressly reserve the right to retry the defendant. Orders declaring mistrial for jury disagreement shall be substantially in the form approved by the supreme court.

Committee commentary. — Paragraphs A, B, D and E of this rule were derived from Rule 31 of the Federal Rules of Criminal Procedure and Rule 32 of the Colorado Rules of Criminal Procedure.

Paragraph D of this rule provides that, when instructed, the jury may find the defendant guilty of a necessarily included offense. For a lesser offense to be necessarily included, the greater offense cannot be committed without also committing the lesser. State v. Medina, 87 N.M. 394, 534 P.2d 486 (Ct. App. 1975). See also, State v. Everitt, 80 N.M. 41, 450 P.2d 927 (Ct. App. 1969).

Paragraph C of this rule allows the jury at any time during its deliberation to return a verdict on counts upon which it has agreed. In United States v. Conti, 361 F.2d 153 (2d Cir. 1966), the court held that a similar procedure does not result in prejudice to the defendant.

Paragraph D and H of this rule set out the procedure that should be followed in the declaration of a mistrial due to jury disagreement, in cases involving lesser included offenses.

In State v. Spillmon, 89 N.M. 406, 553 P.2d 686 (1976), it was held that retrial of the defendant on murder charges would constitute double jeopardy. The trial was to a jury, which returned verdicts of guilty as to attempted robbery and not guilty as to burglary, but which declared that they were dead-locked on the charges of first degree murder and second degree murder. The judge did not formally declare a mistrial, did not expressly state that he was reserving the power to retry the murder charge, did not inquire as to whether the jury had unanimously voted to acquit of either degree of murder, and merely set the murder charges for another trial. The supreme court held that the judge was wrong in concluding the proceedings without formally declaring a mistrial, in concluding the proceedings without expressly reserving the power to retry the charges on which the jury was hung, and in failing to ascertain whether the jury had acquitted of any degree of the murder charge.

In State v. Castrillo, 90 N.M. 608, 566 P.2d 1146 (1977), the trial on the charge of murder and manslaughter ended in a hung jury, and the declaration of a mistrial. The court held that the trial judge should have ascertained whether the jury had acquitted of any degree of unlawful homicide. The failure to do so resulted in the bar of the prosecution of all degrees other than the lowest (voluntary manslaughter). In the court of appeals decision, State v. Castrillo, N.M. Ct. App. No. 2499, decided December 12, 1976, the court ruled that an oral pronouncement by the judge, that he is declaring a mistrial, is not a proper declaration of a mistrial, and that a formal order is essential. The court also stated that the trial judge must reserve the power to retry any portion of the case.

The Spillmon case and the two Castrillo cases lay down several rules: (a) a formal written order is required in the declaration of a mistrial because of jury disagreement; (b) an express reservation of the power to retry the charges is essential; and (c) in case lesser included offenses are submitted, no mistrial for jury disagreement should be declared until the judge ascertains whether the jury has acquitted on any of the degrees of the offense. This rule and the court-approved form implement these rules.

The trial judge should not accept an announcement as to the jury vote on any included offense until the jury has carried its deliberations as far as possible. The inquiry concerning a unanimous vote on any degree of the offense does not come until the jury is about to be discharged as deadlocked. The inquiry of the jury is not as to what the jury can do, but what the jury has done. The jury is not sent back for further deliberations, but in a proper case may be sent back to sign a verdict which the judge finds that the jury has already reached. State v. Castrillo, 90 N.M. 608, 566 P.2d 1146 (1977). See UJI 14-250 and 14-6012 and their commentaries.

In polling the jury pursuant to Paragraph E of this rule, the judge begins by inquiring as to the highest degree of the offense charged. If the jury is unable to agree as to the

highest degree of the offense submitted to the jury, the court may enter an order declaring a mistrial thereby automatically reserving the power to retry the offense and all lesser degrees of the offense. If the judge finds that the jury agreed that the defendant was not guilty as to the highest degree of the offense, the judge then inquires as to the next highest degree submitted and continues until he reaches the degree of the offense upon which the jury could not agree.

ANNOTATIONS

Compiler's notes. — Paragraph D is deemed to have superseded 11-13-1, 1953 Comp.

Lesser-included offense. – Where the victim of criminal sexual contact of a minor specifically stated that defendant tried to penetrate her, there was no ambiguity in the victim's testimony that could lead a rational juror to acquit defendant of the crime of criminal sexual penetration and defendant's request for a lesser-included offense instruction was properly denied. State v. Paiz, 2006-NMCA-144, 140 N.M. 815, 149 P.3d 579, cert. denied, 2006-NMCERT-011.

Paragraph D was likely drafted, for the most part, based on the committee's reading of State v. Castrillo, 90 N.M. 608, 566 P.2d 1146 (1977). State v. Garcia, 2005-NMCA-042, 137 N.M. 315, 110 P.3d 531, cert. denied, 2005-NMCERT-004.

Court inquiry to deadlocked jury. — When the jury states that it is deadlocked on a count including first degree murder and the jury has been instructed on the lesser included offense of second degree murder, the court need inquire no further than first degree murder if that is the highest level of the offense at which the jury has disagreed. State v. Garcia, 2005-NMCA-042, 137 N.M. 315, 110 P.3d 531, cert. denied, 2005-NMCERT-004.

Rule does not apply where there is only one degree of offense and a single charge to the jury. O'Kelly v. State, 94 N.M. 74, 607 P.2d 612 (1980).

Failure of jury to reach unanimous agreement is not "verdict returned". O'Kelly v. State, 94 N.M. 74, 607 P.2d 612 (1980).

Court's power to dismiss criminal charge. — Absent a statute the court has no power to dismiss a valid criminal charge on its own motion. State v. Raburn, 76 N.M. 681, 417 P.2d 813 (1966)(decided under former law).

Instruction that jury should disregard first of two counts if guilty verdict returned on second count. — Where two counts are charged in an indictment, one for illegal possession of marijuana and the other for possession with intent to sell, an instruction by the court that the jury should disregard the former count if it finds defendant guilty under the latter operates as an acquittal of the former count and prevents retrial of this

issue when the verdict on the latter is overturned. State v. Moreno, 69 N.M. 113, 364 P.2d 594 (1961)(decided under former law).

Silence of jury verdict as to one of two offenses. — Where the two counts of an information charge separate offenses, the silence of the jury verdict as to the first count is equivalent to an acquittal as to the offense charged therein. State v. Moreno, 69 N.M. 113, 364 P.2d 594 (1961)(decided under former law).

Defendant has right to have instructions on lesser included offenses submitted to the jury; however, this right depends on there being some evidence tending to establish the lesser included offenses. State v. Duran, 80 N.M. 406, 456 P.2d 880 (Ct. App. 1969)(decided under former law).

Common law entitlement to lesser-included offense is carried forward under Paragraph D of this rule. State v. Munoz, 2004-NMCA-103, 136 N.M. 235, 96 P.3d 796.

Interchangeable terms in Paragraph D. — For purposes of Paragraph D of this rule, the terms “lesser-included” and “necessarily-included” are used interchangeably. State v. Munoz, 2004-NMCA-103, 136 N.M. 235, 96 P.3d 796.

For lesser offense to be included within the greater, it must be necessarily included. State v. Patterson, 90 N.M. 735, 568 P.2d 261 (Ct. App. 1977); State v. Kraul, 90 N.M. 314, 563 P.2d 108 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

In order for a lesser offense to be included within a greater offense, the lesser offense must be necessarily included in the greater offense charged in the indictment. For the offense to be necessarily included, the greater offense cannot be committed without also committing the lesser offense. State v. DeMary, 99 N.M. 177, 655 P.2d 1021 (1982).

For lesser offense to be "necessarily included", the greater offense cannot be committed without also committing the lesser. State v. Medina, 87 N.M. 394, 534 P.2d 486 (Ct. App. 1975); State v. Kraul, 90 N.M. 314, 563 P.2d 108 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

To be necessarily included, the greater offense cannot be committed without also committing the lesser. State v. Patterson, 90 N.M. 735, 568 P.2d 261 (Ct. App. 1977).

State's request for a lesser included offense instruction was properly granted since the elements of the lesser crime were a subset of the elements of the charged crime, the defendant could not have committed the greater offense in the manner charged in the indictment without also committing the lesser offense, and therefore notice of the greater offense also incorporated notice of the lesser offense, evidence at the trial was sufficient to sustain a conviction on the lesser offense, and the elements that distinguished the lesser and greater offenses were sufficiently in dispute so that the jury

rationally could acquit on the greater offense and convict on the lesser. State v. Meadors, 121 N.M. 38, 908 P.2d 731 (1995).

Manslaughter included in charge of murder under certain circumstances. — Under appropriate circumstances, where there is evidence that the defendant acted as a result of sufficient provocation, a charge of manslaughter could properly be said to be included in a charge of murder, and, accordingly, it would not be error to submit UJI Crim. 2.20 (see now UJI 14-220) to the jury; however, it cannot seriously be maintained that manslaughter is invariably "necessarily included" in murder, since different kinds of proof are required to establish the distinct offenses. Smith v. State, 89 N.M. 770, 558 P.2d 39 (1976).

Larceny necessarily included within offense of robbery. — Because robbery is an aggravated larceny, larceny is necessarily included within the offense of robbery and defendant had the right to have instructions on the lesser included offenses of larceny submitted to the jury, since there was evidence from several defense witnesses which tended to establish larceny. State v. Wingate, 87 N.M. 397, 534 P.2d 776 (Ct. App. 1975).

Battery upon a peace officer is a charge included within the charge of aggravated battery upon a peace officer. State v. Kraul, 90 N.M. 314, 563 P.2d 108 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

Possession of marijuana is a lesser offense included within the greater offense of distribution. State v. Medina, 87 N.M. 394, 534 P.2d 486 (Ct. App. 1975).

Aggravated assault by use of a threat with a deadly weapon is a lesser included offense of aggravated battery. State v. DeMary, 99 N.M. 177, 655 P.2d 1021 (1982).

"Same transaction" test is rejected and disapproved of in New Mexico. This test is concerned with whether offenses were committed at the same time, were part of a continuous criminal act and inspired by the same criminal intent. State v. Tanton, 88 N.M. 333, 540 P.2d 813 (1975).

Error in instructions as to degree of crime not necessarily prejudicial. — Even if there be error in an instruction as to the degree of the crime committed, it is not prejudicial to a defendant where he is convicted of a degree of crime which is properly submitted to the jury under the charge made and the evidence adduced upon the trial. State v. Horton, 57 N.M. 257, 258 P.2d 371 (1953)(decided under former law).

Demand for jury poll before return of verdict is premature and impermissible. O'Kelly v. State, 94 N.M. 74, 607 P.2d 612 (1980).

Refusal to poll jury after discharge not abuse of discretion. — Where defense counsel waited until after the jury had been discharged to make his request for a jury

poll, the refusal of the court to recall the jury and poll the jury was not an abuse of discretion. State v. Perez, 95 N.M. 262, 620 P.2d 1287 (1980).

There is some justification for inquiries into the numerical division of the jury as to probability of agreement among the jury when done pursuant to the court's duty to assure that a verdict is reached, and in determining whether further deliberations are needed or if the jury should be discharged. Such an inquiry may also be necessary to protect the defendant from double jeopardy consequences when more than one count is presented to the jury. State v. Rickerson, 95 N.M. 666, 625 P.2d 1183, cert. denied, 454 U.S. 845, 102 S. Ct. 161, 70 L. Ed. 2d 132 (1981).

And inquiries reversible error only when jury coerced. — While inquiry into the numerical division of the jury is not to be encouraged, it is not error per se. Such inquiries are reversible error only when shown to have a coercive effect on the jury. State v. Rickerson, 95 N.M. 666, 625 P.2d 1183, cert. denied, 454 U.S. 845, 102 S. Ct. 161, 70 L. Ed. 2d 132 (1981).

Duty of court regarding equivocating juror. — Where the trial court, in polling the jury, receives a response from a juror indicating equivocation, it must then question further to give the juror full opportunity to indicate his present state of mind, and that polling or questioning must be carried out so as to avoid influencing or coercing a juror's verdict. State v. Holloway, 106 N.M. 161, 740 P.2d 711 (Ct. App. 1987).

Where the record shows that a juror has voiced an uncertainty about the guilt of an accused, or has evidenced lack of full consent to the verdict, the verdict cannot stand. State v. Holloway, 106 N.M. 161, 740 P.2d 711 (Ct. App. 1987).

Paragraph F applies only to irregularities of which parties have been made aware; defendant may seek new trial based on possibility that extraneous prejudicial evidence reached the jury where defense counsel was not aware of issues raised until after jury was discharged. State v. Doe, 101 N.M. 363, 683 P.2d 45 (Ct. App. 1983).

Mistrial declared where jury cannot agree on offense. — Where a jury has determined that a lesser included offense is inappropriate but cannot agree between conviction and acquittal on the greater offense, the trial court must declare a mistrial and discharge the jury. Under these circumstances, jeopardy does not attach and a new trial may be had. State v. Wardlow, 95 N.M. 585, 624 P.2d 527 (1981).

Alternative theories of same offense presented. — Trial court correctly instructed the jury that unanimity was not required as to one theory of first degree murder where alternative theories were presented; the jury's general verdict would not be disturbed where there was substantial evidence supporting one of the theories of the crime presented to the jury. State v. Salazar, 1997-NMSC-044, 123 N.M. 778, 945 P.2d 996.

And no requirement that magistrate court expressly reserve jurisdiction. — There is no requirement in the Rules of Criminal Procedure for the Magistrate Courts or in the

supreme court approved forms for the magistrate courts which requires a magistrate court to expressly reserve jurisdiction, as required by Subdivision (h) (see now Paragraph H) of this rule. Cowan v. Davis, 96 N.M. 69, 628 P.2d 314 (1981).

Contemporaneous written order declaring mistrial not required. — A written order need not be entered contemporaneously with the oral declaration of mistrial in order to comply with this rule. State v. Reyes-Arreola, 1999-NMCA-086, 127 N.M. 528, 984 P.2d 775, cert. denied, 127 N.M. 390, 981 P.2d 1208 (1999).

Nunc pro tunc order declaring mistrial. — A successor judge had the power to enter a nunc pro tunc order declaring a mistrial four months after the trial court's declaration. State v. Reyes-Arreola, 1999-NMCA-086, 127 N.M. 528, 984 P.2d 775, cert. denied, 127 N.M. 390, 981 P.2d 1208 (1999).

Defendant's objection immaterial where mistrial declared. — When a court declares a mistrial and discharges the jury, it is immaterial whether the defendant objects. O'Kelly v. State, 94 N.M. 74, 607 P.2d 612 (1980).

Multiple verdicts on same charge. — Defendant was not acquitted of a charge even though the jury foreman first announced unanimity for acquittal but then created uncertainty as to the vote by later comments and the trial court directed the jury to take the vote again, resulting in a vote for conviction and declaration of a mistrial. State v. Apodaca, 1997-NMCA-051, 123 N.M. 372, 940 P.2d 478.

And no double jeopardy by defendant being brought to trial second time. — A defendant is not placed in double jeopardy by being brought to trial for the same offense the second time, after the jury in the first trial has been unable to reach a verdict as to guilt or innocence and a mistrial has been properly declared. Cowan v. Davis, 96 N.M. 69, 628 P.2d 314 (1981).

Double jeopardy rights violated. — Although defendant's conviction of third degree criminal sexual penetration must be set aside because a first trial ended in an implied acquittal of second degree criminal sexual penetration and defendant's double jeopardy rights were violated when he was tried for second degree criminal sexual penetration at a second trial, the proper remedy is to order a retrial, at which the highest degree that defendant can be tried for is second degree criminal sexual penetration. State v. Fielder, 2005-NMCA-108, 138 N.M. 244, 118 P.3d 752, cert. granted, 2005-NMCERT-008.

Law reviews. — For annual survey of New Mexico law relating to constitutional law, see 12 N.M.L. Rev. 191 (1982).

For note, "Jury - Trial Judge's Inquiry into Numerical Division of Jury: State v. Rickerson," see 13 N.M.L. Rev. 205 (1983).

For annual survey of New Mexico criminal law and procedure, 19 N.M.L. Rev. 655 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75B Am. Jur. 2d Trial §§ 1761, 1762.

Inconsistency of criminal verdict with verdict on another indictment or information tried at same time, 16 A.L.R.3d 866.

Inconsistency of criminal verdict as between different counts of indictment or information, 18 A.L.R.3d 259.

Inconsistency of criminal verdicts as between two or more defendants tried together, 22 A.L.R.3d 717.

Juror's reading of newspaper account of trial in state criminal case during its progress as ground for mistrial, new trial or reversal, 46 A.L.R.4th 11.

Requirement of jury unanimity as to mode of committing crime under statute setting forth the various modes by which offense may be committed, 75 A.L.R.4th 91.

When should jury's deliberation proceed from charged offense to lesser-included offense, 26 A.L.R.5th 603.

Modern status of rule that court may instruct dissenting jurors in federal criminal case to give due consideration to opinion of majority (Allen charge), 44 A.L.R. Fed. 468.

23A C.J.S. Criminal Law § 1395 et seq.

5-612. Presence of the defendant; appearance of counsel.

A. **Presence required.** Except as otherwise provided by these rules, the defendant shall be present at all proceedings, including the arraignment, all hearings and conferences, argument, the jury trial and during all communications between the court and the trial jury.

B. **Waiver of personal presence.** The defendant may waive the right to be personally present:

(1) for a specific hearing or proceeding, by an oral waiver on the record; or

(2) by executing a written waiver substantially in the form approved by the Supreme Court. The waiver must be approved by the defendant's counsel and the court prior to the hearing.

C. **Continued presence not required.** The further progress of the trial, including the return of the verdict, and the imposition of sentence shall not be prevented if the

defendant waives the right to be personally present or whenever a defendant who was initially present:

(1) is voluntarily absent after the trial has commenced (whether or not he has been informed by the court of his obligation to remain during the trial); or

(2) engages in conduct which the court determines, by clear and convincing evidence, to be so disruptive as to justify the exclusion of the defendant from further proceedings. If a defendant is excluded from the proceedings under this subparagraph, the court shall provide the defendant with a timely opportunity to regain the right to be personally present so long as the defendant agrees to refrain from any further disruptive conduct.

D. **Presence not required.** A defendant need not be present in the following situations:

(1) a defendant other than a person may appear by counsel for all purposes;

(2) when the offense is punishable by fine or by imprisonment for a term of less than one (1) year, or both, the court, with the written consent of the defendant, permits arraignment, plea, trial and imposition of sentence in the defendant's absence;

(3) when the proceeding involves only a conference or hearing upon a question of law.

[As amended by Supreme Court Order 06-8300-010, effective April 15, 2006.]

Committee commentary. — This rule is similar to Rule 43 of the Federal Rules of Criminal Procedure. See Fed. R. Crim. P. 43.

Prior to the 1974 amendment, Paragraph B of this rule excluded capital cases from the scope of this rule. The 1974 amendment, expanding the scope of the rule to include capital cases, follows the decision in State v. Corriz, 86 N.M. 246, 522 P.2d 793 (1974).

ANNOTATIONS

Cross references. — See Criminal Form 9-104 NMRA for the Waiver of Appearance form approved by the Supreme Court for use with this rule.

The 2006 amendment, approved by Supreme Court Order 06-8300-10 effective April 15, 2006, revised Paragraph A to specify each stage of the criminal proceedings during which the defendant shall be present, added a new Paragraph B providing for the waiver of personal appearance by the defendant, relettered former Paragraph B as Paragraph C and revised Paragragh C to require the court find by clear and convincing evidence that the defendant is disruptive prior to excluding the defendant from the

courtroom and to permit the defendant to subsequently regain the right to personally be present upon agreement to refrain from disruptive conduct.

Presence not required during compiling of jury panels. — This rules does not require, nor expressly or impliedly permit, a defendant's presence at the computerized selection of the jury panel from which the jury will eventually be selected. Because this stage is purely ministerial, there is no reason for the defendant to be present. State v. Huff, 1998-NMCA-075, 125 N.M. 254, 960 P.2d 342, cert. denied, 125 N.M. 146, 958 P.2d 104 (1998).

Constitutional right to be present. — A defendant's right to be present at every stage of the trial is grounded in the sixth amendment to the United States Constitution and made applicable to the states through the fourteenth amendment. State v. Garcia, 95 N.M. 246, 620 P.2d 1271 (1980).

Right may be waived. — A trial court may accept a knowing, intelligent, and voluntary waiver of a defendant's presence at jury selection either as an express waiver or as an implied waiver when a defendant has forfeited that right to be present by conduct. State v. Padilla, 2002-NMSC-016, 132 N.M. 247, 46 P.3d 1247.

Right to be present for challenges to jurors. — Subsection (a) (see now Paragraph A) of this rule gives the defendant a right to be present when challenges are being made to jurors. State v. Garcia, 95 N.M. 246, 620 P.2d 1271 (1980).

And reversal mandated for denial of right. — The trial court erred in denying the defendant the right to be present when challenges to the jury were made, and such error mandated reversal and remand for a new trial. State v. Garcia, 95 N.M. 246, 620 P.2d 1271 (1980).

Waiver in general. — The right of presence is not absolute and may be waived if the court determines the waiver to have been voluntarily, knowingly, and intelligently made. Waiver may be occasioned by the voluntary absence of an accused, or by his disruptive conduct. State v. Clements, 108 N.M. 13, 765 P.2d 1195 (Ct. App. 1988).

Where defendant is in custody, waiver of presence by voluntary absence cannot be inferred. — Where defendant is in custody at the time of the communications between the judge and the jury, the trial court cannot properly infer that he had waived his presence by voluntary absence under this rule. Hovey v. State, 104 N.M. 667, 726 P.2d 344 (1986).

Defendant voluntarily absented himself from the trial when he went to another city to locate a witness; however, after he was placed in custody, he was no longer voluntarily absent, and the state then had the burden of demonstrating beyond a reasonable doubt that conducting the trial during defendant's absence would be harmless. State v. Clements, 108 N.M. 13, 765 P.2d 1195 (Ct. App. 1988).

Waiver of right of presence in capital case. — As the capital versus noncapital distinction is not one mandated by the constitution, and since the rule does not preclude a waiver in capital cases, a defendant in New Mexico may waive the right of presence in a capital case. State v. Corriz, 86 N.M. 246, 522 P.2d 793 (1974).

Waiver of presence at suppression hearing. — Where defense counsel had not spoken with defendant and it was probable that defendant had yet to receive notice of a suppression hearing, defendant could not voluntarily, knowingly, and intelligently waive his presence, and counsel's waiver was ineffective. Since the suppression hearing was critical to defendant's case, he had a right to be present, and it was error to proceed with the hearing in defendant's absence. State v. McDuffie, 106 N.M. 120, 739 P.2d 989 (Ct. App. 1987).

Removal of defendant for misconduct in case where insanity pleaded. — That defendant pleaded insanity and was being tried for a capital case did not preclude the trial court from excluding him for misconduct as the trial court must, in all cases, be granted the discretion to control the proper administration of criminal justice and should be able to remove a defendant whenever the circumstances so dictate. State v. Corriz, 86 N.M. 246, 522 P.2d 793 (1974).

Criminal contempt proceedings. — Defendant's criminal contempt conviction in a divorce proceeding was invalid because the court improperly commenced and completed the criminal contempt hearing though defendant was not present. Beverly v. Beverly, 2000-NMCA-097, 129 N.M. 719, 13 P.3d 77.

Presence of counsel only at contempt hearing. — Where plaintiff property owner brought suit against adjoining property owner to restrain him from certain actions and court issued order restraining both parties, whereupon defendant had the court issue an order requiring plaintiff to show cause why he should not be held in contempt for violation of restraining order, plaintiff failed to appear within the meaning of Rule 15(b) (see now Paragraph B of Rule 5-209) when he sent his counsel to respond to the show cause order for him, as appearance by counsel was not a permitted response under the present rule. Trial court was therefore authorized to issue an arrest warrant under Rule 15(b) (see now Paragraph B of Rule 5-209), but was not authorized to try and sentence the plaintiff under the present rule. Lindsey v. Martinez, 90 N.M. 737, 568 P.2d 263 (Ct. App. 1977).

Presence not required at post-conviction hearing. — It is implicit from the language of 39-1-1 NMSA 1978 that it is within the sound discretion of the trial court whether to direct a defendant be physically present before the court at a hearing to reconsider or modify a prior sentence. Construing the pertinent rules and statutes together, a defendant need not be present at a hearing to reconsider a sentence, except where the hearing results in the terms of the sentence being made more onerous. State v. Sommer, 118 N.M. 58, 878 P.2d 1007 (Ct. App. 1994).

Private conversation between judge and individual juror held not reversible error. — No reversible error exists where the judge privately confers with prospective individual jurors if the conversation was invited by defense counsel and did not prejudice defendant. State v. Henry, 101 N.M. 277, 681 P.2d 62 (Ct. App.), rev'd on other grounds, 101 N.M. 266, 681 P.2d 51 (1984).

Although there is a presumption of prejudice when there is ex parte communication between the trial court and a juror, this presumption does not apply if the ex parte communication takes place with the knowledge and consent of the defendant prior to the ex parte communication. State v. Pettigrew, 116 N.M. 135, 860 P.2d 777 (Ct. App. 1993).

Where the judge advised the prosecutor and defense counsel regarding his meeting with a juror and the subject matter was not relevant to the substance of the case, no improper communication occurred. State v. Baca, 1997-NMSC-059, 124 N.M. 333, 950 P.2d 776.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 1098 to 1136.

Giving, in accused's absence, additional instruction to jury after submission of felony case, 94 A.L.R.2d 270.

Right of accused to be present at suppression hearing or at other hearing or conference between court and attorneys concerning evidentiary questions, 23 A.L.R.4th 955.

Validity of jury selection as affected by accused's absence from conducting of procedures for selection and impaneling of final jury panel for specific case, 33 A.L.R.4th 429.

23A C.J.S. Criminal Law §§ 1165, 1395 et seq.

5-613. Conduct of trial.

A. **Oath of witnesses.** The judge shall administer the following oath to each witness: "Do you swear or affirm that the testimony you will give in this case will be the truth, the whole truth and nothing but the truth, under penalty of law?"

B. **Evidence.** The Rules of Evidence, so far as they are applicable and not in conflict with these rules, shall apply to and govern the trial of criminal cases.

[As amended, effective May 15, 2000.]

Committee commentary. — This rule was amended effective July 1, 1973 upon the adoption of the Rules of Evidence.

Prior to May 15, 2000 Paragraph A of this rule adopted by reference Rule 1-045 NMRA. A new subpoena rule for criminal cases was approved by the Supreme Court effective May 15, 2000 and Paragraph A of this rule was deleted. *See* Rule 5-511 NMRA for subpoenas in criminal proceedings.

ANNOTATIONS

The 2000 amendment, effective May 15, 2000, deleted former Paragraph A, and redesignated the remaining paragraphs accordingly, and rewrote the second paragraph of the committee commentary.

Recompilations. — Rule 5-613 NMRA, relating to conduct of trial, was recompiled as Rule 5-119 NMRA, effective December 1, 1998.

5-614. Motion for new trial.

A. **Motion.** When the defendant has been found guilty, the court on motion of the defendant, or on its own motion, may grant a new trial if required in the interest of justice.

B. **Evidence on motion.** When a motion for new trial calls for a decision on any question of fact, the court may consider evidence on such motion by affidavit or otherwise.

C. **Time for making motion for new trial.** A motion for new trial based on the ground of newly discovered evidence may be made only before final judgment, or within two (2) years thereafter, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for new trial based on any other grounds shall be made within ten (10) days after verdict or finding of guilty or within such further time as the court may fix during the ten (10) day period.

D. **Procedure; hearing.** When the defendant has been found guilty by a jury or by the court, a motion for new trial may be dictated into the record, if a court reporter is present, and may be argued immediately after the return of the verdict or the finding of the court. Such motion may be in writing and filed with the clerk. Such motion, written or oral, shall fully set forth the grounds upon which it is based.

E. **Waiver.** Failure to make a motion for a new trial shall not constitute a waiver of any error which has been properly brought to the attention of the court.

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

Committee commentary. — Paragraphs A and D of this rule were derived from Rules 3.580 and 3.590 of the Florida Rules of Criminal Procedure. Paragraph C of this rule was derived from Rule 33 of the Federal Rules of Criminal Procedure.

A motion for a new trial on grounds other than newly discovered evidence must be made within ten (10) days after the verdict and before the judgment is entered. State v. Wilson, 86 N.M. 348, 524 P.2d 520 (Ct. App. 1974).

For the test used for granting a new trial on newly discovered evidence, see State v. Chavez, 87 N.M. 38, 528 P.2d 897 (Ct. App. 1974).

ANNOTATIONS

The 2009 amendment, approved by Supreme Court Order 09-8300-006, effective May 6, 2009, in Paragraph C, deleted the last sentence, which provided that if a motion for new trial is not granted within thirty days for the date it is filed, the motion is automatically denied.

Applicability. — This rule has not been preempted by Rule 5-802. State v. Peppers, 110 N.M. 393, 796 P.2d 614 (Ct. App. 1990).

Unusual circumstances causing delay in ruling on motion — Where the defendant claimed that he had a mental defect that was not discoverable prior to trial; defense counsel informed the trial court at the sentencing hearing that the defendant would file a motion for a new trial based on the evaluations of the state's psychologists and the defendant's psychologist; the court continued the sentencing hearing and ordered defense counsel to request a hearing upon receipt of the defendant's psychologist's report; the court set a hearing on the motion when the defendant received his psychologist's report; and the court decided the motion within ninety days after hearing the motion, the fourteen-month delay between the time the defendant filed his motion for a new trial and the time that it was granted was not unreasonable and the trial court did not abuse its discretion when it granted the motion for a new trial. State v. Moreland, 2008-NMSC-031, 144 N.M. 192, 185 P.3d 363.

Newly discovered evidence. — Where evidence that the defendant had a mental condition, which caused him to have a diminished capacity to reason on a day-to-day basis and which was greatly exacerbated by methamphetamine, was discovered from post-trial psychological reports; the evidence was discovered only because the trial court ordered a diagnostic evaluation of the defendant; and the evidence of the defendant's diminished mental capacity could not have been discovered by the exercise of due diligence because the defendant's mental defects typically had no outward manifestation and trained professionals would be unable to diagnose the defendant without formal psychological tests, the trial court did not abuse its discretion when it granted the defendant's motion for a new trial based on newly-discovered evidence. State v. Moreland, 2008-NMSC-031, 144 N.M. 192, 185 P.3d 363.

Determination of ineffective assistance of counsel without a hearing. — Where the trial court witnesses gross or obvious ineffective assistance of counsel, the court may on its own motion order a new trial without holding a hearing on the issue of ineffective assistance of counsel. State v. Grogan, 2007-NMSC-039, 142 N.M. 107, 163 P. 3d 494.

Motions for a new trial are not favored and will only be granted upon a showing of a clear abuse by the trial court. State v. Stephens, 99 N.M. 32, 653 P.2d 863 (1982).

Failure to enter order denying motion for new trial. — Where district court failed to enter an order denying defendant's motion for a new trial within thirty days, the motion was deemed automatically denied and defendant could challenge the denial of the motion on appeal even though a final, written order denying the motion had not been filed by the district court. State v. Huber, 2006-NMCA-087, 140 N.M. 147, 140 P.3d 1096, cert. denied, 2006-NMCERT-007.

An individual has a qualified right to release pending a motion for a new trial, even after appellate affirmance of a conviction. Such a right, however, can be invoked only by a timely motion for a new trial, and by a motion for release pending a motion for a new trial duly filed and served in the manner required by Rule 23, R. Crim. P. (Dist. Cts.) (see now Rule 5-402 NMRA). In re Martinez, 99 N.M. 198, 656 P.2d 861 (1982).

Judgment not required for finality. — Although Paragraph C requires that a motion for new trial be made and decided before the entry of judgment and sentence, the lack of a judgment and sentence does not make a difference for finality purposes and remains a final appealable order. State v. Danek, 117 N.M. 471, 872 P.2d 889 (Ct. App. 1993).

Evidence admissible at hearing for new trial. — The trial court did not err in not admitting into evidence at the hearing for a new trial the statement of a state eyewitness which purportedly contradicted previous trial testimony where, the statement did not contradict previous testimony, but was merely cumulative of the defense propounded. State v. Stephens, 99 N.M. 32, 653 P.2d 863 (1982).

It is improper for a trial court to consider a letter from one of the jurors which allegedly impeached the verdict. State v. Chavez, 98 N.M. 682, 652 P.2d 232 (1982).

Where counsel may later ascertain true facts, continuance properly denied. — Where nothing prohibits the defense counsel from attempting to ascertain the true facts after trial and moving for a new trial based on newly discovered evidence, the trial court does not abuse its discretion in refusing to grant a continuance. State v. Manus, 93 N.M. 95, 597 P.2d 280 (1979).

Conditions for granting new trial for newly discovered evidence. — A motion for a new trial upon the ground of newly discovered evidence calls for the exercise of the sound discretion of the trial court and is properly denied unless the newly discovered evidence is such that (1) it will probably change the result if a new trial is granted; (2) it must have been discovered since the trial; (3) it must be such that it could not have been discovered before trial by the exercise of due diligence; (4) it must be material to the issue; (5) it must not be merely cumulative; and (6) it must not be merely impeaching or contradictory. State v. Ramirez, 79 N.M. 475, 444 P.2d 986 (1968); State

v. Volpato, 102 N.M. 383, 696 P.2d 471 (1985); State v. Shirley, 103 N.M. 731, 713 P.2d 1 (Ct. App. 1985).

A motion for new trial will be permitted to be filed where it is done promptly, and there is no evidence connecting defendant to the crime excepting the testimony of an accomplice who has recanted, when the testimony is not merely cumulative or corroborative, where the evidence has become available since the trial and was not available during the trial, and where the recanting occurred under circumstances free from suspicion of undue influence or pressure from any source, so that it is as reasonable to believe one of the statements under oath as the other. State v. Fuentes, 66 N.M. 52, 342 P.2d 1080 (1959) (decided under former law).

Even if another person is prepared to testify, or has confessed that he, and not another, has committed a crime for which another was convicted, such evidence is not newly discovered evidence since such a person can add nothing to the testimony the defendant could have given at trial. State v. Stephens, 99 N.M. 32, 653 P.2d 863 (1982).

Defendant did not meet criteria for "newly discovered evidence". State v. Fero, 107 N.M. 369, 758 P.2d 783 (1988).

Movant for new trial must show prejudice. — Defendant contending that he should be granted a new trial because an excessive number of leading questions were allowed over defense attorney's objections had the burden of showing prejudice. State v. Gomez, 82 N.M. 333, 481 P.2d 412 (Ct. App. 1971) (decided under former law).

In arguing that he is entitled to a new trial, the defendant must show that he was prejudiced by the state's failure to disclose evidence material to the defense. State v. Garcia, 93 N.M. 51, 596 P.2d 264 (1979).

Prejudicial effect may be cured by prompt admonition. — A prompt admonition from the court to the jury to disregard and not consider inadmissible evidence sufficiently cures any prejudicial effect which otherwise might result, and an offer to admonish, even though declined, is sufficient to support a denial of a motion for mistrial. State v. Vialpando, 93 N.M. 289, 599 P.2d 1086 (Ct. App.), cert. denied, 93 N.M. 172, 598 P.2d 215 (1979).

Granting or denial of motion for new trial is within the court's discretion and is not reviewable except for an abuse of that discretion. Sierra Blanca Sales Co. v. Newco Indus., Inc., 84 N.M. 524, 505 P.2d 867 (Ct. App.), cert. denied, 84 N.M. 512, 505 P.2d 855 (1972); State v. Volpato, 102 N.M. 383, 696 P.2d 471 (1985).

Trial courts have broad discretion in granting or denying new trials. Mares v. State, 83 N.M. 225, 490 P.2d 667 (1971) (decided under former law).

A motion for mistrial is addressed to the trial court's discretion and is reviewable on the basis of an abuse of discretion. State v. Thurman, 84 N.M. 5, 498 P.2d 697 (Ct. App. 1972); State v. Garcia, 93 N.M. 51, 596 P.2d 264 (1979); State v. Perrin, 93 N.M. 73, 596 P.2d 516 (1979).

A motion for a new trial is addressed to the discretion of the trial court and will be reversed only for a clear abuse of discretion. State v. Wright, 84 N.M. 3, 498 P.2d 695 (Ct. App. 1972); State v. Smith, 92 N.M. 533, 591 P.2d 664 (1979); State v. Manus, 93 N.M. 95, 597 P.2d 280 (1979); State v. Perez, 95 N.M. 262, 620 P.2d 1287 (1980).

The discretion of a trial court is not to be lightly interfered with as to the granting of a motion for new trial. State v. Chavez, 87 N.M. 38, 528 P.2d 897 (Ct. App. 1974).

The trial court has broad discretion in granting or denying a motion for new trial, and such an order will not be reversed absent clear and manifest abuse of that discretion. State v. Chavez, 98 N.M. 682, 652 P.2d 232 (1982).

The trial court has broad discretion in granting or denying a motion for new trial, and such an order will not be reversed absent clear and manifest abuse of that discretion. State v. Chavez, 98 N.M. 682, 652 P.2d 232 (1982).

Trial court may not weigh evidence and credibility of witnesses when considering a new trial order based on erroneous jury verdict. State v. Chavez, 101 N.M. 136, 679 P.2d 804 (1984), overruled on other grounds, State v. Griffin, 117 N.M. 745, 877 P.2d 551 (1994).

Supreme court's power to remand case for filing of motion for new trial. — The supreme court has inherent power to prevent miscarriages of justice in a proper case by remanding the case to the trial court with instructions that the defendant be permitted to file a motion for a new trial upon the ground of newly discovered evidence. State v. Fuentes, 66 N.M. 52, 342 P.2d 1080 (1959) (decided under former law).

Newly discovered evidence must be presented or its absence explained. — To obtain a new trial on the grounds of newly discovered evidence, there must be a showing that there is in fact such evidence; movant must inform the court as to this evidence or satisfactorily explain why it is not presented to the court. State v. Lucero, 90 N.M. 342, 563 P.2d 605 (Ct. App.), cert. denied, 90 N.M. 636, 567 P.2d 485 (1977).

Showing that newly discovered evidence could not have been obtained earlier. — Even when newly discovered evidence is shown to exist, certain requirements must be met in order to obtain a new trial on the basis thereof, including the requirement that the newly discovered evidence must be such as by reasonable diligence on the part of the defendant could not have been secured at the former trial. State v. Lucero, 90 N.M. 342, 563 P.2d 605 (Ct. App.), cert. denied, 90 N.M. 636, 567 P.2d 485 (1977).

Where newly discovered evidence will not change result. — Where it does not appear that the newly discovered evidence would probably change the result if a new trial were granted, the trial judge has not abused his discretion in denying the motion for new trial. State v. Ramirez, 79 N.M. 475, 444 P.2d 986 (1968) (decided under former law) State v. Litteral, 110 N.M. 138, 793 P.2d 268 (1990).

Newly discovered, cumulative evidence insufficient basis for new trial. — Where the testimony which the defendant claimed was newly discovered would have been merely cumulative, the trial court did not abuse its discretion in denying the motion for a new trial. State v. Perez, 95 N.M. 262, 620 P.2d 1287 (1980).

Where the trial court grants a new trial in the "interest of justice", "in the interest of justice" is not the grounds upon which the motion for a new trial was based, but the standard used by the court in determining that a new trial is required. State v. Chavez, 98 N.M. 682, 652 P.2d 232 (1982).

Statement of grounds. — In order to preserve the opportunity for effective appellate review, it is necessary that the trial court comply with the requirement in Subdivision (d) (see now Paragraph D) that a motion for new trial "shall fully set forth the grounds upon which it is based" when granting a sua sponte motion. State v. Chavez, 98 N.M. 682, 652 P.2d 232 (1982).

If a new trial is properly granted because of insufficient evidence to sustain the jury's verdict, retrial is precluded. State v. Chavez, 98 N.M. 682, 652 P.2d 232 (1982).

Multiplicity of counts as not denying fair trial. — Where four of the eight counts against defendant were dismissed, and the jury acquitted on two counts and convicted on two counts, his argument that the multiplicity of counts and the evidence introduced in connection with those counts deprived him of a fair trial was not supported by the record. State v. Lucero, 90 N.M. 342, 563 P.2d 605 (Ct. App.), cert. denied, 90 N.M. 636, 567 P.2d 485 (1977).

New trial granted where state's rebuttal witnesses refuse to testify. — Where the prosecutor said that he would call six rebuttal witnesses, with the reasonable implication thereby conveyed to the jury that the witnesses would contradict defendant's testimony, and with the state's knowledge that the witnesses would refuse to talk, then where a witness refused to testify on the grounds the answer may tend to incriminate him, defendant has been prejudiced and a new trial should be granted. State v. Vega, 85 N.M. 269, 511 P.2d 755 (Ct. App. 1973).

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

But not where codefendant, who remained silent during trial, offers affidavit. — The trial court did not abuse its discretion in denying defendant's motion for a new trial on the basis of newly discovered evidence, where the evidence offered was the affidavit of a codefendant who had invoked her fifth amendment right not to testify at defendant's trial. State v. Smith, 104 N.M. 329, 721 P.2d 397 (1986).

Legal evidence only should reach jury. — It is the right of a defendant accused of crime to have nothing reach the mind of the jury concerning the case except strictly legal evidence admitted according to law, and if facts prejudicial to him reach the jury otherwise, it is the duty of the trial judge to withdraw a juror and grant a new trial. State v. Thayer, 80 N.M. 579, 458 P.2d 831 (Ct. App. 1969) (decided under former law).

Misrepresentation or concealment of fact by juror as basis for new trial. — If a juror falsely represents his interest or situation or conceals a material fact relevant to the controversy and such matters, if truthfully answered, might establish prejudice or work a disqualification of the juror, the party misled or deceived thereby, upon discovering the fact of the juror's incompetency or disqualification after trial, may assert that fact as ground for and obtain a new trial, upon a proper showing of such facts, even though the bias or prejudice is not shown to have caused an unjust verdict, it being sufficient that a party, through no fault of his own, has been deprived of his constitutional guarantee of a trial of his case before a fair and impartial jury. Mares v. State, 83 N.M. 225, 490 P.2d 667 (1971) (decided under former law).

Time limit for raising issue of disqualification of juror. — Where the motion for a new trial asserted that a juror gave false answers on voir dire regarding her acquaintance with defendant, such bore on the qualifications of the person to serve as a juror and involved the question of whether defendant was tried by an impartial jury. Such an issue could be raised upon discovering the fact of disqualification after trial and did not have to satisfy the time requirements of Subdivision (c) (see now Paragraph C). State v. Martinez, 90 N.M. 595, 566 P.2d 843 (Ct. App. 1977).

Perjury as basis for new trial. — A defendant should be granted a new trial if perjury of a material witness against him is later discovered. However, courts must act with great reluctance and with special care and caution before accepting the truth of a claim of perjury, and should properly require the evidence to affirmatively establish the perjury in such clear and convincing manner as to leave no room for reasonable doubt that perjury was committed. State v. Betsellie, 82 N.M. 782, 487 P.2d 484 (1971) (decided under former law).

When, in the face of what was later described by the defendant as known perjury by a key state witness at his trial, the defendant had ample opportunity to elicit the truth but failed to do so by calling other corroborating witnesses to testify, and elected to remain silent, a new trial would not be granted upon recantation of the allegedly false testimony. State v. Sena, 103 N.M. 312, 706 P.2d 854 (1985).

Misconduct of juror as grounds for new trial. — While misconduct on the part of a juror during a trial is censurable, it is not sufficient grounds for a new trial unless it appears, or is at least presumable, that the accused was thereby prejudiced. State v. Riggsbee, 85 N.M. 668, 515 P.2d 964 (1973).

A trial court's oral ruling granting a motion for new trial satisfies the requirement in Paragraph C that the court grant the motion within 30 days after the motion is filed to avoid the consequence of an automatic denial. State v. Ratchford, 115 N.M. 567, 855 P.2d 556 (1993).

Improperly admitted exhibits not warranting new trial. — Where the evidence, exclusive of improperly admitted exhibits, points so overwhelmingly to the guilt of defendant of the crime of which he was convicted, and there is no reasonable possibility that the admission into evidence of these improperly received exhibits contributed to his conviction, the defendant is not entitled to a new trial. State v. Lopez, 80 N.M. 599, 458 P.2d 851 (Ct. App.), cert. denied, 80 N.M. 607, 458 P.2d 859 (1969), and cert. denied, 398 U.S. 942, 90 S. Ct. 1860, 26 L. Ed. 2d 279 (1970) (decided under former law).

Denial of new trial though court not convinced of guilt. — A verdict of the jury will not be set aside because the trial court or the court of appeals is not satisfied beyond all reasonable doubt of the guilt of the defendant, as the guilt or innocence of a defendant is for the jury to determine, not the judge, and granting or denial of a new trial is within the trial court's discretion. State v. Garcia, 84 N.M. 519, 505 P.2d 862 (Ct. App.), cert. denied, 84 N.M. 512, 505 P.2d 855 (1972).

Denial of motion for new trial proper where logs not presented to court. — Assuming, but not deciding, that the withholding of certain logs was improper, they were never presented to the trial court so that it could determine whether they were material or whether the withholding prejudiced the defense, and consequently there was no error in denying the motion for a new trial on the grounds asserted by defendant. State v. Lucero, 90 N.M. 342, 563 P.2d 605 (Ct. App.), cert. denied, 90 N.M. 636, 567 P.2d 485 (1977).

Filing requirement jurisdictional. — The filing requirement in Paragraph C is jurisdictional. State v. Lucero, 2001-NMSC-024, 130 N.M. 256, 30 P.3d 365.

Motion for new trial filed 28 days after verdict was correctly ruled as not timely so the asserted error in the trial court's remarks not having been properly brought to the attention of the court was waived. State v. Wilson, 86 N.M. 348, 524 P.2d 520 (Ct. App. 1974).

Where record is ambiguous, the court of appeals cannot hold the trial court in error in failing to grant a mistrial on the basis of remarks allegedly made by the prosecutor. State v. Vigil, 86 N.M. 388, 524 P.2d 1004 (Ct. App.), cert. denied, 86 N.M. 372, 524 P.2d 988 (1974), cert. denied, 420 U.S. 955, 95 S. Ct. 1339, 43 L. Ed. 2d 432 (1975).

Motion for new trial improperly denied. — The trial judge abused his discretion in denying defendant's motion for a new trial on a charge of armed robbery where the store manager, one of three witnesses who identified defendant, later determined that he was not the robber, and another man confessed to being guilty of the crime. Reasonable diligence by defendant could not have secured this testimony for the trial, and it is material and goes to the merits of the case. State v. Chavez, 87 N.M. 38, 528 P.2d 897 (Ct. App. 1974).

The trial court erred in refusing to grant defendant a new trial on grounds that her attorney's stipulation to the prosecution's facts and waiver of the issue of competency were the result of a plea bargain with the result that the issue of defendant's competency was never clearly determined or considered. State v. Romero, 86 N.M. 244, 522 P.2d 579 (1974).

Where a juror was present in the dwelling in question with victim, the complaining witness, while two police officers (who testified at trial) were also present seeking latent fingerprints, and victim and juror were good friends, then refusal to grant defendant's motion for a new trial was reversible error. Mares v. State, 83 N.M. 225, 490 P.2d 667 (1971) (decided under former law).

Appeal from order granting new trial. — When the jury reaches a verdict after a trial which is fair and free from error, and such a verdict is set aside, the state is "aggrieved" within the meaning of N.M. Const., art. VI, § 2, and, thus, has authority to appeal an order granting a new trial. State v. Chavez, 98 N.M. 682, 652 P.2d 232 (1982).

Although the state may appeal an order granting a new trial in a criminal case, an immediate appeal is limited to an order in which it is claimed; the grant of a new trial was based on an erroneous conclusion; prejudicial legal error occurred during the trial; or newly-discovered evidence warrants a new trial. Thus, an immediate appeal by the state of an order granting a new criminal trial is limited to issues of law. State v. Griffin, 117 N.M. 745, 877 P.2d 551 (1994).

Two year time limit applied. — Where defendant’s motion for a new trial was based on his psychological and psychiatric condition that was not known and was not discoverable at the time of trial and where the district court had not sentenced defendant, the two year time limit applied to defendant’s motion. State v. Moreland, 2007-NMCA-047, 141 N.M. 549, 157 P.3d 728, cert. granted, 2007-NMCERT-004.

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

No abuse of discretion. — District court did not abuse its discretion in granting defendant a new trial on the basis of newly discovered evidence that would warrant an instruction on diminished capacity where defendant's psychological and psychiatric condition was not known and was not discoverable at the time of trial and was discovered only because the district court ordered a diagnostic evaluation of defendant. State v. Moreland, 2007-NMCA-047, 141 N.M. 549, 157 P.3d 728, cert. granted, 2007-NMCERT-004.

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

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law § 390.

Order denying motion for directed verdict or for judgment notwithstanding the verdict as appealable where movant has been granted a new trial, 57 A.L.R.2d 1198.

Absence of convicted defendant during hearing or argument of motion for new trial or in arrest of judgment, 69 A.L.R.2d 835.

Formal requirements of judgment or order as regards appealability, 73 A.L.R.2d 250.

Own motion of court: propriety of court's grant of new trial on own motion in criminal case, 85 A.L.R.2d 486.

Time for filing motion for new trial based on jury conduct occurring before, but discovered after, verdict, 97 A.L.R.2d 788.

Propriety and prejudicial effect of prosecutor's argument to jury indicating his belief or knowledge as to guilt of accused - modern state cases, 88 A.L.R.3d 449.

Propriety and prejudicial effect of prosecutor's argument giving jury impression that defense counsel believes accused guilty, 89 A.L.R.3d 263.

Jury's discussion of parole law as ground for reversal or new trial, 21 A.L.R.4th 420.

Emotional manifestations by victim or family of victim during criminal trial as ground for reversal, new trial, or mistrial, 31 A.L.R.4th 229.

Postretirement out-of-court communications between jurors and trial judge as grounds for new trial or reversal in criminal case, 43 A.L.R.4th 410.

Juror's reading of newspaper account of trial in state criminal case during its progress as ground for mistrial, new trial or reversal, 46 A.L.R.4th 11.

Unauthorized view of premises by juror or jury in criminal case as ground for reversal, new trial, or mistrial, 50 A.L.R.4th 995.

Court reporter's death or disability prior to transcribing notes as grounds for reversal or new trial, 57 A.L.R.4th 1049.

Prosecutor's appeal in criminal case to self-interest or prejudice of jurors as taxpayers as ground for reversal, new trial, or mistrial, 60 A.L.R.4th 1063.

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

Standard for granting or denying new trial in state criminal case on basis of recanted testimony - modern cases, 77 A.L.R.4th 1031.

Negative characterization or description of defendant, by prosecutor during summation of criminal trial, as ground for reversal, new trial, or mistrial - modern cases, 88 A.L.R.4th 8.

Inattention of juror from sleepiness or other cause as ground for reversal or new trial, 59 A.L.R.5th 1.

What constitutes "newly discovered evidence" within meaning of Rule 33 of Federal Rules of Criminal Procedure relating to motions for new trial, 44 A.L.R. Fed. 13.

Time limitation in connection with motions for new trial under Rule 33 of Federal Rules of Criminal Procedure, 51 A.L.R. Fed. 482.

What standard, regarding necessity for change of trial result, applies in granting new trial pursuant to Rule 33 of Federal Rules of Criminal Procedure for newly discovered evidence of false testimony by prosecution witness, 59 A.L.R. Fed. 657.

Juror's reading of newspaper account of trial in federal criminal case during its progress as ground for mistrial, new trial, or reversal, 85 A.L.R. Fed. 13.

Recantation of testimony of witness as grounds for new trial - federal criminal cases, 94 A.L.R. Fed. 60.

66 C.J.S. New Trial § 177 et seq.

ARTICLE 7
Judgment and Appeal

5-701. Judgment; costs.

A. **Judgment.** If the defendant is found guilty, a judgment of guilty shall be rendered. If the defendant has been acquitted, a judgment of not guilty shall be

rendered. The judgment and sentence shall be rendered in open court and thereafter a written judgment and sentence shall be signed by the judge and filed. The clerk shall give notice of entry of judgment and sentence.

B. **Sentencing hearing.** Except for good cause shown, the sentencing hearing shall begin within ninety (90) days from the date the trial was concluded or the date a plea was entered.

C. **Judgment and sentence.** Within thirty (30) days after the conclusion of the sentencing hearing, the court shall enter a judgment and sentence.

D. **Costs and fees.** In every case in which there is a conviction, costs and fees may be imposed as provided by law.

[As amended, effective December 1, 1998.]

ANNOTATIONS

The 1998 amendment, effective December 1, 1998, substituted "the defendant" for "he" in the second sentence in Paragraph A; added present Paragraphs B and C; redesignated former Paragraph B as present Paragraph D; and in Paragraph D substituted "costs and fees may be imposed as provided by law" for "the costs may be adjudged against the defendant".

Failure to enter judgment in accordance with verdict. — Once the jury returns a guilty verdict, this rule requires the trial court to enter judgment in accordance with the verdict. The trial court's noncompliance with this rule requires a reversal of its judgment of not guilty and a remand for an entry of judgment in compliance with this rule. State v. Davis, 97 N.M. 745, 643 P.2d 614 (Ct. App. 1982).

Orally pronounced sentence not final. — Since an orally pronounced sentence is not a final judgment and is subject to change until reduced to writing, the trial court had authority to change an orally pronounced sentence even though the defendant, pursuant to the oral sentence, had already reported to his probation officer, submitted a report, and paid the fee for probation costs. State v. Rushing, 103 N.M. 333, 706 P.2d 875 (Ct. App. 1985).

Suspension or deferment of sentence is not a matter of right but is an act of clemency within the trial court's discretion. State v. Follis, 81 N.M. 690, 472 P.2d 655 (Ct. App. 1970).

Right of state to appeal. — Where the trial court fails to comply, after the verdict is received, with a mandatory rule of criminal procedure, the state has a right to appeal. State v. Davis, 97 N.M. 745, 643 P.2d 614 (Ct. App. 1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 791 to 793.

24 C.J.S. Criminal Law §§ 1458 to 1592.

5-702. Advising defendant of a right to appeal.

A. **Advice by court.** At the time of imposing or deferring sentence in a case which has gone to trial on a plea of not guilty, the court shall advise the defendant of his right to appeal and of the right of a person who is unable to pay the cost of an appeal to proceed at state expense.

B. **Duties of defense counsel.** In addition to the advice given by the court, defense counsel shall, within the time provided in the Rules of Appellate Procedure, file with the court one of the following documents:

(1) a notice of appeal in compliance with Rule 12-201 of the Rules of Appellate Procedure; or

(2) an affidavit, substantially in the form approved by the supreme court, signed and sworn to by defendant and witnessed by counsel stating defendant's decision not to appeal.

[As amended, effective October 1, 1987.]

Committee commentary. — The original version of this rule was abrogated as a part of the adoption of the Rules of Appellate Procedure in 1975. Paragraph A of Rule 12-201 incorporates the appeal procedure formerly contained in this rule.

The new rule is derived from Rule 32(a)(2) of the Federal Rules of Criminal Procedure. This rule does not require the court to advise a defendant pleading guilty or no contest under Rule 5-503 of his right to appeal. See State v. Chavez, 80 N.M. 560, 458 P.2d 812 (Ct. App. 1969). See Federal Rules 32(a)(2) and commentary. 62 F.R.D. 271, 320, 322 (1974). Nevertheless, an appeal from a plea of guilty is permissible. See e.g., State v. Vigil, 85 N.M. 328, 512 P.2d 88 (Ct. App. 1973).

This rule was revised in 1983 to correct the growing number of petitions for postconviction relief arising from defendants who claim they were never advised of their right to appeal. Requiring both the defendant to certify that the defendant was, in fact, advised of the right to appeal, and counsel to witness the advice given, will preclude this problem.

ANNOTATIONS

Appeal is matter of right. — An appeal from a judgment and sentence in a criminal case is a matter of right. Barela v. State, 81 N.M. 433, 467 P.2d 1005 (Ct. App. 1970) (decided under former law).

Upon conviction defendant has an undoubted right to appeal his sentence. Rodriguez v. District Court, 83 N.M. 200, 490 P.2d 458 (1971).

Rule applied to show-cause proceeding involving indirect criminal contempt. — Since a hearing on an order to show cause why respondents should not be held in contempt was in effect a trial on a plea of not guilty to a contempt charge, and since the respondents were held in contempt, a felony, they should have been informed of their rights under Subdivision (a) (see now Paragraph A). State v. Wisniewski, 103 N.M. 430, 708 P.2d 1031 (1985).

Former provisions applied to show-cause proceeding involving indirect criminal contempt. — Subdivision (a) (see now Paragraph A), which tolled the time for taking an appeal where the court had failed to advise a defendant who had pled not guilty of his right to process an appeal at state expense, applied to a proceeding to show cause why the respondents, police officers, should not be held in indirect criminal contempt for their failure to disclose certain evidence to the defendant. State v. Wisniewski, 103 N.M. 430, 708 P.2d 1031 (1985) (decided under former law).

Refusal of counsel to appeal. — Court-appointed counsel has a duty to represent his client until relieved and if a defendant requests counsel to appeal and counsel refuses to do so, this is state action entitling a defendant to post-conviction relief. Maimona v. State, 82 N.M. 281, 480 P.2d 171 (Ct. App. 1971) (decided under former law).

If a defendant in a criminal action requests court-appointed counsel to appeal his conviction, and counsel refuses to do so, such a refusal is state action entitling the defendant to post-conviction relief. Barela v. State, 81 N.M. 433, 467 P.2d 1005 (Ct. App. 1970) (decided under former law).

That counsel did not advise defendant he could appeal as an indigent provides no basis for relief. Barela v. State, 81 N.M. 433, 467 P.2d 1005 (Ct. App. 1970) (decided under former law).

Hearing to determine right to court-appointed counsel for appeal. — Where the trial court failed to determine whether defendant was in fact indigent and entitled to court-appointed counsel for the appeal, defendant is to be given a hearing to determine whether, at the time of his notice of appeal, he in fact was indigent and if indigent, he is entitled to post-conviction relief and counsel is to be appointed to perfect the direct appeal. Barela v. State, 81 N.M. 433, 467 P.2d 1005 (Ct. App. 1970) (decided under former law).

Defendant's letter stating he can't pay costs is sufficient claim of indigency. Barela v. State, 81 N.M. 433, 467 P.2d 1005 (Ct. App. 1970).

Contempt proceeding which is at least partially criminal in nature is a "trial" within the meaning of this rule. State v. Echols, 99 N.M. 517, 660 P.2d 607 (Ct. App. 1983).

Ineffective assistance of counsel per se. — Failure to file a timely notice of appeal or an affidavit of waiver constitutes ineffective assistance of counsel per se, and the presumption thereof is conclusive rather than rebuttable, in accordance with the requirements of the Fifth and Sixth Amendments of the U.S. Constitution. State v. Duran, 105 N.M. 231, 731 P.2d 374 (Ct. App. 1986).

Trial counsel may be held in contempt for failing to take a timely appeal, and also for making inaccurate factual recitations in the docketing statement filed. State v. Fulton, 99 N.M. 348, 657 P.2d 1197 (Ct. App. 1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Validity and effect of criminal defendant's express waiver of right to appeal as part of negotiated plea agreement, 89 A.L.R.3d 864.

24 C.J.S. Criminal Law §§ 1680, 1681.

5-703. Predisposition report procedure.

A. **Ordering the report.** The court may order a predisposition report at any stage of the proceedings.

B. **Inspection.** The report shall be available for inspection by only the parties and attorneys by the date specified by the district court, and in any event, no later than ten (10) days prior to any hearing at which a sentence may be imposed by the court unless the parties agree to proceed with shorter notice.

C. **Hearing.** Before a sentence is imposed, the parties shall have an opportunity to be heard on any matter concerning the report. The court, in its discretion, may allow the parties to present evidence regarding the contents of the report.

[As amended by Supreme Court Order 06-8300-05, effective March 31, 2006.]

Committee commentary. — This rule is designed to regularize the sentencing process so that the basis of the judge's decision is made known and challenged at the time of sentencing if necessary. The principle expressed in this rule is consistent with the *American Bar Association Standards Relating to Sentencing Alternatives and Procedures, Part IV* (Approved Draft 1968), the *Model Sentencing Act,* Article II (Nat. Council on Crime and Delinquency, 2d Ed. 1972) and Rule 32(c) of the *Federal Rules of Criminal Procedure.* See 62 F.R.D. 271, 324-25 (1974).

This rule provides that counsel may advise the court of any plea negotiations and that the report may be requested at that time so as to be available for use during negotiations and at the plea hearing under Rule 5-303 NMRA.

ANNOTATIONS

Cross references. — For computation of time, see Rule 5-104 NMRA.

For statutory procedure probation revocations, see Section 31-21-15 NMSA 1978.

The 2006 amendment, effective March 31, 2006, amended Paragraph B to change the date for inspection of the predisposition order from two working days to 10 working days and to provide for agreement of the parties for shorter notice.

Probation report not required. Trial judge has authority to impose sentence immediately after trial, absent an abuse of discretion in so doing, since ordering a presentence report is not mandatory. State v. Vialpando, 93 N.M. 289, 599 P.2d 1086 (Ct. App.), cert. denied, 93 N.M. 172, 598 P.2d 215 (1979).

Record of arrests. Defendant is not deprived of due process if sentencing judge considers accurate arrest information relevant to the question of punishment. State v. Montoya, 91 N.M. 425, 575 P.2d 609 (Ct. App.), cert. denied, 91 N.M. 491, 576 P.2d 297 (1978).

Defendant's due process rights not violated by having probation officer collect data and prepare presentence report. State v. Lack, 98 N.M. 500, 650 P.2d 22 (Ct. App. 1982).

Presentence report. Trial court may withhold portions of probation department presentence report which contain its specific recommendations. State v. Haar, 94 N.M. 539, 612 P.2d 1350 (Ct. App.), cert. denied, 449 U.S. 1063, 101 S. Ct. 787, 66 L. Ed. 2d 606 (1980).

Trial judge has authority to impose sentence immediately after trial, absent an abuse of discretion in so doing, since ordering a presentence report is not mandatory. State v. Vialpando, 93 N.M. 289, 599 P.2d 1086 (Ct. App.), cert. denied, 93 N.M. 172, 598 P.2d 215 (1979).

Defendant is not deprived of due process if sentencing judge considers accurate arrest information relevant to the question of punishment. State v. Montoya, 91 N.M. 425, 575 P.2d 609 (Ct. App.), cert. denied, 91 N.M. 491, 576 P.2d 297 (1978).

A defendant's record of arrests, without convictions, may be highly relevant in determining the type and extent of punishment. Defendant is given the opportunity to be heard on the accuracy of the arrest record. State v. Montoya, 91 N.M. 425, 575 P.2d 609 (Ct. App.), cert. denied, 91 N.M. 491, 576 P.2d 297 (1978).

Defendant's due process rights not violated by having probation officer collect data and prepare presentence report. State v. Lack, 98 N.M. 500, 650 P.2d 22 (Ct. App. 1982).

Trial court may withhold portions of probation department presentence report which contain its specific recommendations. State v. Haar, 94 N.M. 539, 612 P.2d 1350 (Ct. App.), cert. denied, 449 U.S. 1063, 101 S. Ct. 787, 66 L. Ed. 2d 606 (1980).

Plan of restitution. — Where no plan of restitution was ever prepared by the defendant in cooperation with the probation or parole department as required by 31-17-1 NMSA 1978, the failure to comply with this requirement was not error where data was supplied by the defendant and supported the court's determination of the defendant's ability to pay restitution and where the presentence report gave the defendant prior notice concerning the amounts of restitution and he was accorded an opportunity to contest the amounts ordered by the court. State v. Lack, 98 N.M. 500, 650 P.2d 22 (Ct. App. 1982).

Law reviews. — For comment, "A Comment on State v. Montoya and the Use of Arrest Records in Sentencing," see 9 N.M.L. Rev. 443 (1979).

For annual survey of New Mexico law relating to constitutional law, see 12 N.M.L. Rev. 191 (1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Admissibility of expert testimony as to appropriate punishment for convicted defendant, 47 A.L.R.4th 1069.

Right of convicted defendant or prosecution to receive updated presentence report at sentencing proceedings, 22 A.L.R.5th 660.

Obtaining a presentence report is not a matter of right. State v. Vialpando, 93 N.M. 289, 599 P.2d 1086 (Ct. App.), cert. denied, 93 N.M. 172, 598 P.2d 215 (1979).

5-704. Death penalty; sentencing.

A. **Notice of intent.** In any case in which the state seeks the death penalty, the state shall file a notice of intent to seek the death penalty within ninety (90) days after arraignment. The notice of intent shall specify the elements of the statutory aggravating circumstances upon which the state will rely in seeking a sentence of death. Before the time for filing a notice of intent has expired, upon motion by the state with good cause shown, the district court may extend the time for filing a notice of intent.

B. **Pre-trial review of state penalty proceeding evidence.** No later than ninety (90) days prior to trial, the court shall hold a hearing to determine whether or not there is probable cause to believe that one or more aggravating circumstances exist. If the court finds that there is not probable cause on one or more aggravating circumstances, the court shall dismiss that aggravating circumstance.

C. **Capital defense counsel.** The defendant in a death penalty case must be represented by at least two (2) attorneys, one of whom meets the minimum standards set forth in this paragraph for first-chair capital defense attorneys and another who

meets the minimum standards set forth in this paragraph for first-chair or second-chair capital defense attorneys.

(1) The minimum standards for first-chair capital defense attorneys are:

(a) member in good standing of the New Mexico Bar;

(b) a minimum of five (5) years active criminal litigation experience as a licensed attorney immediately preceding appointment;

(c) prior experience as lead counsel or co-counsel in at least eight (8) felony jury trials that were tried to completion, at least two of which were murder prosecutions; and

(d) completion within two (2) years prior to entry of appearance in a death penalty case of at least twelve (12) hours of training in the defense of capital cases in a program approved by the New Mexico Department of the Public Defender and qualified for New Mexico MCLE credit.

(2) The minimum standards for second-chair capital defense attorneys are:

(a) member in good standing of the New Mexico Bar;

(b) a minimum of three (3) years active criminal litigation experience as a licensed attorney immediately preceding appointment;

(c) prior experience as lead counsel or co-counsel in at least eight (8) felony jury trials that were tried to completion; and

(d) completion within two (2) years prior to entry of appearance in a death penalty case of at least twelve (12) hours of training in the defense of capital cases in a program approved by the New Mexico Department of the Public Defender and qualified for New Mexico MCLE credit. This requirement may be met within one (1) year after appointment as second-chair counsel in a death penalty case.

The district court shall require any attorney who enters an appearance as trial counsel in a death penalty case to show that the attorney is a qualified capital defense attorney in accordance with the requirements of this paragraph. If the district court determines that the defendant is not represented by two (2) qualified capital defense attorneys, at least one of whom is qualified to act as first chair, the district court, in the case of indigent defendants, shall order the New Mexico Department of the Public Defender to appoint one or more qualified attorneys to ensure that the defendant is represented as required by this paragraph. In the case of a defendant who has retained private counsel, the district court shall order the New Mexico Department of the Public Defender to appoint an attorney who is qualified as a first-chair capital defense attorney to assist the privately retained defense attorney.

D. **Individual sequestered voir dire.** Voir dire shall be conducted by questioning individual prospective jurors on death penalty issues out of the presence of any other prospective juror. The court may also permit individual sequestered voir dire of prospective jurors on other issues.

E. **Alternate jurors.** If the defendant is charged with an offense which may be punished upon conviction by the penalty of death, alternate jurors shall not be discharged until the regular jurors are discharged. Such jurors may not attend or participate in the consideration of a verdict, but shall be treated in the same manner as other jurors and shall be called after a verdict is returned to act as alternate jurors to replace jurors who become or are found to be unable or disqualified to consider the sentence to be imposed.

F. **Jury deliberations**. In any case in which the state seeks the death penalty, if the jury convicts the defendant of first-degree murder, the court will proceed with the sentencing proceeding. The jury shall consider the aggravating and mitigating circumstances at the same time or separately.

G. **Bifurcated proceedings.** Upon request of a party, the court shall bifurcate the issues of aggravating circumstances and mitigating circumstances in the following order:

(1) aggravating circumstances determination. The sentencing jury will first determine if one or more of the statutory aggravating circumstances charged in the indictment or information exist. The aggravating circumstance evidence shall be presented to the jury as follows:

(a) the state shall submit evidence of aggravating circumstances;

(b) the defense may submit its evidence;

(c) the state may submit any evidence in rebuttal;

(d) the defense may submit evidence in surrebuttal.

(2) sentencing stage. If the jury returns a finding that the state has proven the existence of at least one aggravating circumstance beyond a reasonable doubt:

(a) the defense may submit evidence of mitigating circumstances;

(b) the state may submit its evidence;

(c) the defense may submit any evidence in rebuttal;

(d) the state may submit evidence in surrebuttal.

H. **Polling of jury.** If the jury returns a verdict that the defendant should be sentenced to death, the court shall poll each juror to assure that the juror agrees with sentence of death.

I. **Record of proceedings.** All proceedings under this rule, whether conducted in open court, at bench conferences or in chambers, shall be recorded verbatim.

J. **Disability of judge.** In any felony case in which the defendant may be punished by the penalty of death, if the judge, who has presided over the trial or accepted a guilty plea, is unable to preside over a sentencing proceeding to determine the sentence to be imposed by reason of absence, death, sickness or other disability, any other judge regularly sitting in or assigned to the court may conduct a sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. Prior to conducting a sentencing proceeding, a substitute judge shall file a certificate that he read or heard the evidence and examined the exhibits.

[As amended, effective April 19, 2004; as amended by Supreme Court Order No. 09-8300-009, effective May 6, 2009.]

Committee Commentary. — This rule was drafted to comply with the legislative directive that the Supreme Court promulgate rules to regulate the practice and procedure in capital felony cases for the selection and utilization of alternate jurors and substitute trial judges caused by the disability of any juror or trial judge before whom a capital felony sentencing proceeding has commenced. *See* note to Section 31-20A-6 NMSA 1978. *See* Laws 1979, Chapter 150, Section 11.

Paragraph E of this rule is the same as Rule 5-605 NMRA, except alternate jurors in certain felony cases will not be discharged at the time the regular jurors retire to deliberate, but rather will be kept under the same conditions as the regular jurors. Alternate jurors in capital felony cases may not participate in the deliberation of the verdict even if a regular juror is no longer able to participate. It is believed that alternate juror participation in the deliberation of the verdict may be unconstitutional in that the deliberation of the other eleven jurors may have progressed to a stage that the alternate juror would have little voice in the verdict. *See* commentary to American Bar Association Standard 2.7, Standard Relating to Trial by Jury.

Subsection B of Section 31-20A-1 NMSA 1978 requires that the sentencing proceeding be commenced as soon as practicable after the verdict. Paragraph B of this rule, requiring the court to commence the death penalty sentencing proceeding immediately after the guilt phase of the trial, was deleted as part of the 2004 amendments.

ANNOTATIONS

The 2004 amendment, effective April 19, 2004, added present Paragraphs A, B, C, and D, redesignated former Paragraph A as present Paragraph E, deleted former Paragraph B, inserted present Paragraphs F, G, H, and I, redesignated former Paragraph C as

present Paragraph J, and in the committee commentary, added the last sentence in the first paragraph, substituted “E” for “A” in the first sentence and “alternate juror participation in the deliberation of the verdict” for “this” in the third sentence of the second paragraph, and substituted the present last sentence for the former last two sentences in the third paragraph.

The 2009 amendment, approved by Supreme Court Order 09-8300-009, effective May 6, 2009, in Paragraph A, in the first sentence, deleted "may", replaced "seek" with "seeks", after "arraignment", deleted "unless good cause is shown", and added "Before the time for filing a notice of intent has expired, upon motion by the state with good cause shown, the district court may extend the time for filing a notice of intent."; in Paragraph C, deleted "Unless counsel is retained by the defendant, in any case in which the death penalty may be imposed, at least two attorneys shall be appointed to represent the defendant.", and inserted the new language.

Paragraph A is designed to effectuate the provisions of the Capital Felony Sentencing Act. State v. Fry, 2006-NMSC-001, 138 N.M. 700, 126 P.3d 516.

Legislative intent of Paragraph A. — Former Paragraph A (now Paragraph E) of this rule reflects the legislature's decision to have a single jury, composed of the same jurors, decide both the question of guilt or innocence and the appropriate sentence in a death penalty case. State v. Fry, 2006-NMSC-001, 138 N.M. 700, 126 P.3d 516.

Jurors excluded. — Former Paragraph A (now Paragraph E) of this rule does not allow jurors who in no case would vote for capital punishment and jurors who would automatically vote for the death penalty in all cases to sit on the guilt-innocence phase of a capital trial. State v. Fry, 2006-NMSC-001, 138 N.M. 700, 126 P.3d 516.

Law reviews. — For article, "The Capital Defendant's Right to Make a Personal Plea for Mercy: Common Law Allocution and Constitutional Mitigation," see 15 N.M.L. Rev. 41 (1985).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Propriety of imposition of death sentence by state court following jury's recommendation of life imprisonment or lesser sentence, 8 A.L.R.4th 1028.

ARTICLE 8
Special Proceedings

5-801. Modification of sentence.

A. **Correction of sentence.** The court may correct an illegal sentence at any time pursuant to Rule 5-802 NMRA and may correct a sentence imposed in an illegal manner within the time provided by this rule for the reduction of sentence.

B. **Modification of sentence.** A motion to reduce a sentence may be filed within ninety (90) days after the sentence is imposed, or within ninety (90) days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within ninety (90) days after entry of any order or judgment of the appellate court denying review of, or having the effect of upholding, a judgment of conviction. A motion to reduce a sentence may also be filed upon revocation of probation as provided by law. Changing a sentence from a sentence of incarceration to a sentence of probation shall constitute a permissible reduction of sentence under this paragraph.

C. **Mandatory sentence.** Paragraph B of this rule does not apply to the death penalty or a mandatory sentence.

[As amended, effective March 1, 1986; August 1, 1989; August 1, 1992; as amended by Supreme Court Order No. 09-8300-006, effective May 6, 2009.]

Committee commentary. — This rule was originally drafted to be substantially the same as Rule 35 of the Federal Rules of Criminal Procedure. Prior to the adoption of Rule 5-801 there was confusion as to when the district court could modify a sentence. The New Mexico rule was that the district court could modify a sentence of a prisoner during the same term of the conviction, even if the defendant had already commenced to serve his sentence. See State v. White, 71 N.M. 342, 378 P.2d 379 (1963). The district court, however, lost all power to modify a judgment after the filing of the notice of appeal. See State v. White, supra, at 346. The Rules of Criminal Procedure for the District Courts abolished the concept of terms of court and therefore it was desirable to have a specific rule setting forth the limits of power of the district court.

The rule, as originally drafted, limited the period of time that district court could modify a sentence to a period of thirty (30) days after imposition of sentence. Rule 5-801 was revised in 1988 to comply with the Supreme Court's decision in Hayes v. State, 106 N.M. 806, 751 P.2d 186 (1988). In Hayes, the Supreme Court held that if the motion to reduce a sentence is filed within thirty (30) days after the mandate on appeal, the trial court could reduce the sentence within a reasonable time after the filing of the motion. The Supreme Court suggested that 90 days from a timely filed motion was a reasonable time. See also Rule 35, Federal Rules of Criminal Procedure for the United States District Courts.

Under this rule, no modification of sentence can be considered by the trial court after the filing of notice of appeal. However, the trial court may modify the sentence within thirty (30) days after receipt of the mandate.

This rule is not to be construed as allowing the reduction, deferral or suspension of a sentence unless such modification of sentence is consistent with applicable New Mexico law.

ANNOTATIONS

The 1992 amendment, effective for cases filed in the district courts on or after August 1, 1992, substituted "ninety (90) days" for "thirty (30) days" in three places in the first sentence of Paragraph B.

The 2009 amendment, approved by Supreme Court Order 09-8300-006, effective May 6, 2009, in Paragraph B, deleted the last sentence, which provided that the court shall determine the motion within ninety days after the date it is filed or the motion is deemed to be denied.

Applicability. — This rule has not been preempted by Rule 5-802. State v. Peppers, 110 N.M. 393, 796 P.2d 614 (Ct. App. 1990).

The 1986 amendment of this rule has only prospective effect. Enright v. State, 104 N.M. 672, 726 P.2d 349 (1986).

Jurisdiction for motions. — Insofar as the filing of motions under this rule is concerned, this rule is jurisdictional, so that motions must be filed within 30 (now 90) days of the entry of the appellate judgment. As to the disposition of the motion, however, the court possesses discretion to hear and decide motions after 30 days. Hayes v. State, 106 N.M. 806, 751 P.2d 186 (1988).

Trial courts have subject matter jurisdiction to consider motions made pursuant to this rule and the denial of these motions is a final, appealable order. State v. Neely, 117 N.M. 707, 876 P.2d 222 (1994).

This rule permits alteration, but only to the extent of correcting an invalid sentence or reducing a valid sentence. State v. Sisneros, 98 N.M. 279, 648 P.2d 318 (Ct. App. 1981), aff'd in part, rev'd on other grounds, 98 N.M. 201, 647 P.2d 403 (1982), aff'd, 101 N.M. 679, 687 P.2d 736 (1984).

Deferred sentence modified to conditional discharge. — Modification from a deferred sentence to a conditional discharge was an authorized sentence reduction under this rule. State v. Herbstman, 1999-NMCA-014, 126 N.M. 683, 974 P.2d 177.

Defendant's presence not required. — It is implicit from the language of 39-1-1 NMSA 1978 that it is within the sound discretion of the trial court whether to direct a defendant be physically present before the court at a hearing to reconsider or modify a prior sentence. Construing the pertinent rules and statutes together, a defendant need not be present at a hearing to reconsider a sentence, except where the hearing results in the terms of the sentence being made more onerous. State v. Sommer, 118 N.M. 58, 878 P.2d 1007 (Ct. App. 1994).

Unambiguous, statutorily authorized sentence not "illegal". — Defendants who received unambiguous sentences within the limits authorized by sentencing statutes cannot seek correction of "illegal sentences" under this rule. State v. Aqui, 104 N.M.

345, 721 P.2d 771, cert. denied, 479 U.S. 917, 107 S. Ct. 321, 93 L. Ed. 2d 294 (1986) (decided prior to 1986 amendment).

Timing essential to modification of sentence. — Since the habeas corpus petition was not filed within ninety days of the rendition of the sentence, as required by Paragraph B, the district court did not have authority to modify the conditions of probation under this rule. State v. Trujillo, 117 N.M. 769, 877 P.2d 575 (1994).

Oral sentence subject to modification. — Since an orally pronounced sentence is not a final judgment and is subject to change until reduced to writing, a court has the authority to modify such sentence even though the defendant has taken actions to effect the probationary terms of the sentence. State v. Rushing, 103 N.M. 333, 706 P.2d 875 (Ct. App. 1985).

Court cannot give good time credits for presentence confinement. — A district court does not have jurisdiction under this rule to correct or modify sentences by ordering that defendants be given good time credits against their sentences for the periods they spent in presentence confinement. State v. Aqui, 104 N.M. 345, 721 P.2d 771, cert. denied, 479 U.S. 917, 107 S. Ct. 321, 93 L. Ed. 2d 294 (1986).

Limitation on modification of death sentence. — The district court does not have jurisdiction to modify a jury-imposed or a judge-imposed, at a nonjury trial, death sentence under the Capital Felony Sentencing Act, 31-20A-1 NMSA 1978 et seq. State v. Cheadle, 102 N.M. 743, 700 P.2d 646 (1985).

Once the jury has unanimously agreed on a sentence of death in conformance with the Capital Felony Sentencing Act, the district court has no discretion to impose a sentence of life imprisonment; it is the supreme court which automatically reviews the jury's judgment and sentence. State v. Guzman, 102 N.M. 558, 698 P.2d 428 (1985).

Modification of sentence based on restitution. — In a fraud case, the district court's order regarding payment of restitution within thirty days was not a proper method of achieving the district court's legitimate objective of determining whether the fraudulently obtained funds were recoverable. The district court must consider defendant's ability to pay restitution within thirty days before conditioning a portion of his term of imprisonment on payment of restitution within that time frame. State v. Whitaker, 110 N.M. 486, 797 P.2d 275 (Ct. App. 1990).

Revocation of parole on only one count where probation granted on multiple concurrent sentences. — When a defendant was sentenced to multiple concurrent sentences, and the trial court suspended the sentences and placed the defendant on probation which he subsequently violated, the trial court could not invoke the original sentence on one count only and provide that probation would continue on the other counts. The effect of applying revocation to one count only and reserving probation on the remaining counts for possible imposition of imprisonment on any or all of the remaining counts upon future violations is to change an original valid concurrent

sentence into consecutive sentences and creates an increase in penalty which violates the constitutional prohibition against double jeopardy. State v. Martinez, 99 N.M. 248, 656 P.2d 911 (Ct. App. 1982).

Plea agreement to serve concurrent sentences out-of-state. — Where, in accordance with a plea bargain, in exchange for the defendant's guilty plea and his agreement to waive extradition to another state, the time to be served on concurrent New Mexico sentences was to be served out of the state concurrently with any sentence imposed by the out-of-state court, the New Mexico court could not later order the out-of-state court to return the defendant to New Mexico to serve concurrent out-of-state and New Mexico sentences here. State v. Sykes, 98 N.M. 458, 649 P.2d 761 (Ct. App. 1982).

Upon the filing of notice of appeal from order, trial court loses jurisdiction of the case, except for the purpose of perfecting the appeal. State v. Garcia, 99 N.M. 466, 659 P.2d 918 (Ct. App. 1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Right of convicted defendant or prosecution to receive updated presentence report at sentencing proceedings, 22 A.L.R.5th 660.

5-802. Habeas corpus.

A. **Scope of rule.** This rule governs the procedure for filing a writ of habeas corpus by persons in custody or under restraint for a determination that such custody or restraint is, or will be, in violation of the constitution or laws of the State of New Mexico or of the United States; that the district court was without jurisdiction to impose such sentence; that the sentence was illegal or in excess of the maximum authorized by law or is otherwise subject to collateral attack.

B. **Petition.** A writ of habeas corpus will be issued only upon filing with the clerk of the court a petition on behalf of the party seeking the writ. If the petition is filed by a petitioner who is not represented by an attorney and who is confined to an institution, the petition is deemed to be filed with the clerk of the court on the day the petition is deposited in the institution’s internal mail system for forwarding to the court provided that the petitioner states within the petition, under penalty of perjury, the date on which the petition was deposited in the institution’s internal mail system. The petition shall contain the following:

(1) the respondent's name and title. The respondent shall be the petitioner's immediate custodian, who shall have the power to produce the body of the petitioner before the court and shall have the power to discharge the petitioner from custody if the petition is granted;

(2) a statement naming the place where the person is confined or restrained;

(3) a statement of the steps taken to exhaust all other available remedies, including a statement of the name of the case, the docket number of the case, the court, administrative agency or institutional grievance committee from which relief was sought and the result of each judicial or administrative proceeding;

(4) a statement of whether an appeal or prior petitions for habeas corpus or other relief have been filed, including a statement of the case name, the docket number of the case, the grounds upon which relief was sought, the court from which relief was sought, the result of each proceeding and, if appropriate, a statement of why the claim now being raised was not raised in such prior proceedings or how the claim now being raised differs from a claim raised in those proceedings;

(5) if the claim has been raised in prior proceedings, a statement explaining why the ends of justice require consideration of the petition;

(6) a statement as to whether:

(a) the petition seeks to vacate, set aside or correct the sentence or order of confinement; or

(b) the petition challenges confinement or matters other than Subparagraph (a) of this subparagraph;

(7) a concise statement of the facts and law upon which the application is based; and

(8) a concise statement of the relief sought.

C. **Papers attached to petition.** The following shall be attached to the petition:

(1) any opinion, order, transcript or other written material indicating any court's, agency's or institutional grievance committee's position or ruling on the petitioner's custody or restraint;

(2) if the petitioner is indigent, an affidavit attesting to the petitioner's indigency and containing a statement of the petitioner's available assets and a motion for permission to proceed in forma pauperis, provided that a petitioner who is incarcerated at the time of filing the petition need not file a motion for permission to proceed in forma pauperis and may file the petition without payment of the applicable filing fee; and

(3) a certificate of service showing service on the respondent and the district attorney in the district in which the application is filed.

D. **Venue.** If the petition:

(1) seeks to vacate, set aside or correct the sentence or order of confinement, correct the Department of Corrections' interpretation or application of the sentence or order of confinement, or challenge the conviction, it shall be filed in the county of the court in which the matter was adjudicated, or, if the matter has not been adjudicated, in the county of the court that ordered the contested confinement; or

(2) challenges confinement or matters other than those set forth in Subparagraph (1) of this paragraph, it shall be filed in the county where the petitioner is confined or restrained.

E. **Procedure in non-death penalty cases.** If a sentence of death has not been imposed, upon presentation of the petition the court shall:

(1) promptly examine the petition together with all attachments. If it plainly appears from the face of the motion, any annexed exhibits and the prior proceedings in the case that the movant is not entitled to relief as a matter of law, the court shall order a summary dismissal of the petition;

(2) if the court does not order a summary dismissal, unless the petitioner has filed a waiver of counsel or has retained counsel, the court shall appoint counsel to represent the petitioner. Within ninety (90) days after appointment, counsel for the petitioner may file an amended petition or if no amended petition is filed, the petition originally filed by the petitioner is deemed accepted. Within thirty (30) days after acceptance of the petition or the filing of an amended petition, the court shall order the respondent to file a response to the petition or shall dismiss the petition pursuant to Subparagraph (1) of this paragraph. If a response is ordered, a copy of the petition and a copy of the order to prepare a response to the petition shall be served on the respondent by the clerk of the court in accordance with Rule 5-103, 5-103.1 or 5-103.2 NMRA. Within ninety (90) days after service of the petition and order, the respondent shall file a response to the petition;

(3) if the court directs the respondent to file a response, after the response is filed, the court shall determine whether an evidentiary hearing is required. If it appears that an evidentiary hearing is not required, the court shall dispose of the petition without a hearing, but may ask for briefs and oral arguments;

(4) if an evidentiary hearing is required, the court shall conduct a hearing as promptly as practicable.

F. **Death penalty cases.** If a sentence of death has been imposed:

(1) upon issuance of the mandate of the Supreme Court affirming the sentence of death, the district court shall promptly appoint counsel to represent the defendant;

(2) following the issuance of the mandate the execution shall be stayed pending further proceedings under this paragraph;

(3) unless an extension of time is granted for good cause shown, within one hundred eighty (180) days after appointment, the defendant shall file a petition for writ of habeas corpus;

(4) unless an extension of time is granted for good cause shown, within one hundred eighty (180) days after service of a petition for writ of habeas corpus, the respondent shall file a response to the petition;

(5) within thirty (30) days after service of the response, the court shall schedule a hearing on the petition. In considering the petition, the court may hear evidence, require briefs or schedule arguments;

(6) within thirty (30) days after the filing of the district court's order on the petition:

(a) if the writ is granted, the state may appeal; or

(b) if the writ is denied, the petitioner may appeal;

(7) the Rules of Appellate Procedure shall govern the appeal to the Supreme Court.

G. **Procedure on petition remanded by the Supreme Court.** A petition originally filed in the Supreme Court may be remanded by the Supreme Court to the district court. If the petition is remanded by the Supreme Court, the district court shall proceed as if the petition had been filed in the district court in the first instance.

H. **Appeal; non-death penalty proceedings.** Within thirty (30) days after the district court's decision:

(1) if the writ is granted, the state may appeal as of right pursuant to the Rules of Appellate Procedure;

(2) if the writ is denied, a petition for certiorari may be filed with the Supreme Court.

[As amended, effective March 1, 1986: March 16, 1998; June 1, 2002; as amended by Supreme Court Order No. 09-8300-006, effective May 6, 2009.]

ANNOTATIONS

Committee Commentary for 2009 amendments. — The 2009 amendments to this rule make five changes to the procedures governing petitions for writs of habeas

corpus. First, Paragraph B is amended to provide that a petition filed by an unrepresented inmate is deemed to be filed on the date that the petition is deposited in the institution's internal mail system. The amendment further provides that the inmate must state in the petition, under penalty of perjury, the date on which the petition was deposited for mailing. A corresponding amendment to Form 9-701 NMRA includes this statement.

The purpose of the amendment to Paragraph B is to eliminate uncertainty regarding the date when the petition is filed in the district court. Although there is no time limit for filing a state petition for a writ of habeas corpus, the date of filing can have an impact on the deadline for filing a petition for a writ of habeas corpus in federal court. Currently, defendants convicted in state court have one (1) year to file a petition for a writ of habeas corpus in federal court, and the one (1) year period begins to run from the date of the final judgment on a guilty plea, or one (1) year from a final decision of the highest state court ruling on a direct appeal after trial. However, under federal law, the filing of a state habeas petition tolls the one (1) year limitations period for filing a habeas petition in federal court.

While a state petition can toll the federal limitations period, disputes often arise concerning when the state petition was actually filed in state court. In some instances, unforeseen mailing delays beyond the control of the inmate prevent the receipt of a state habeas petition to toll the one (1) year federal limitations period before it expires. Moreover, the practices among the various state judicial districts for processing state habeas petitions can vary greatly and, as a result, impact the application of the federal tolling provision. For example, some districts apparently refer habeas petitions to a district court judge for fairly swift review before actually filing, with filing by the clerk soon thereafter. In other districts, however, clerks sometimes hold petitions for sixty (60) days or more before they are reviewed by a judge and officially filed with the court. But in virtually none of these districts are the petitions actually file-stamped on the date of receipt by the clerk.

The uncertainties inherent in mailing documents from prison, and the existing inconsistent filing procedures in the district courts, have the potential to drastically affect an inmate's right to toll the federal limitations period while state post-conviction remedies are exhausted. *See Adams v. LeMaster,* 223 F.3d 1177 (10th Cir. 2000) (holding that New Mexico inmate's federal habeas petition was not timely filed because the one (1) year limitation period expired before state petition was file-stamped by state district court clerk). The amendments to Paragraph B are intended to eliminate confusion and avoid the unfair application of federal tolling provisions that may result from inconsistent filing practices in state district courts or unforeseen mailing delays beyond the control of an incarcerated petitioner.

Because there are no filing deadlines for filing state habeas petitions by unrepresented inmates in New Mexico, the changes to Paragraph B will not affect the substantive or procedural rights of the parties to a state post-conviction proceeding. State district courts, however, may want to revise their procedures so that the date file-stamped on a

petition filed under this rule reflects the date of mailing set forth in the petition. If the State has reason to believe that the mailing date set forth in the petition is not accurate, the State may file a motion with the district court asking for a correction to the filing date.

The amendments to Paragraph C are intended to eliminate the inordinate amount of paperwork necessary to prepare and process requests for free process in post-conviction proceedings, which seems particularly unnecessary given the undeniable right of access to the courts by persons, indigent or not, who seek to correct an unlawful confinement. Moreover, the processing of this paperwork appears to lead to many of the delays in the actual filing of habeas petitions discussed above. The amendment to Paragraph C therefore seeks to eliminate these problems by allowing an incarcerated petitioner to file a petition without payment of a filing fee.

The amendments to Paragraph D are intended to clarify the place of filing for habeas petitions. The first change to Subparagraph (1) of Paragraph D provides that petitions challenging the Department of Correction's interpretation of a sentence should be filed with the court that imposed the sentence. As Rule 5-802.D(1) is currently written, the Department's interpretation and application of a sentence fall within "matters other than [those set forth in] Subparagraph (1)," thereby requiring the petition to be filed in the judicial district where the petitioner is confined or restrained. The rationale for the proposed amendment is that, much like petitions that seek to correct a sentence, the court that sentenced the inmate is better qualified to interpret its own sentence than a court of the judicial district in which the institution is located. The second change to Subparagraph (1) of Paragraph D also clarifies that the petition should be filed with the court that adjudicated the petitioner's confinement rather than focusing on the county where the offense was committed.

The amendments to Subparagraph (2) of Paragraph E expands the filing deadlines for amended petitions and responses ordered by the district court. Currently, if counsel is appointed to represent a petitioner, the attorney has thirty (30) days to file an amended petition. In situations where counsel is appointed, the issues involved and the need for further investigation by counsel often make the 30-day filing deadline for an amended petition unrealistic. As a result, motions to extend the filing deadline are routinely made and granted. The amendment to the filing deadline seeks to recognize this reality and eliminate unnecessary motion practice by expanding the filing deadline to ninety (90) days. As a matter of fairness and consistency, the amendments also increase the filing deadline to ninety (90) days in those instances when the State is ordered to file a response to the amended petition.

Finally, the amendment to Paragraph H eliminates the deemed denied provision that previously governed the Supreme Court's review of the denial of habeas corpus petitions under Rule 12-501 NMRA. With this amendment, an express order by the Supreme Court is required to deny a petition for review filed under Rule 12-501 regardless of the length of time the petition for review is pending in the Supreme Court. The amendment is intended to conform to similar amendments to Rules 5-614, 5-801,

and 5-121 NMRA eliminating the application of other deemed denied provisions during other stages of a criminal proceeding.

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

The 2009 amendment, approved by Supreme Court Order 09-8300-006, effective May 6, 2009, in Paragraph B, added the second sentence; in Subparagraph (2) of Paragraph C, after "forma pauperis" added the proviso; in Subparagraph (1) of Paragraph D, after "sentenced or order of confinement", added "correct the Department of Corrections' interpretation or application of the sentence or order of confinement, or challenge the conviction" and after "county of the court in which the", deleted "offence was committed" and added the remainder of the sentence; in Subparagraph (2) of Paragraph D, after "matters other than", added "those set forth in" and after "it shall be filed in the", deleted "judicial district" and added "county"; in Subparagraph (2) of Paragraph E, in the second and fifth sentences, changed thirty days to ninety days; and in Paragraph H, deleted former Subparagraph (3) which provided that if the petition for certiorari is not granted by the Supreme Court within thirty days after filing, it shall be deemed denied.

I. GENERAL CONSIDERATION.

Cross references. — For post-conviction remedy statute, see 31-11-6 NMSA 1978.

For form on a petition for writ of habeas corpus, see Rule 9-701 NMRA.

The 1998 amendment, effective March 16, 1998, inserted "If the petition:" after the paragraph heading in Paragraph D, and deleted "If the petition" at the beginning of Subparagraphs D(1) and (2), deleted "do the following" at the end of Paragraph E, inserted "promptly examine" and deleted "shall be examined promptly by the court" in Subparagraph E(1), rewrote Subparagraph E(2), deleted "may appoint cousel for an indigent petitioner and" following "court" and substituted "a" for "the" in Subparagraph E(4), inserted "Within thirty (30) days" following the paragraph heading in Paragraph G, deleted "within thirty (30) days" following "if the writ is denied", and inserted "after filing" following "days" in Subparagraph G(3).

The 2002 amendment, effective June 1, 2002, in Paragraph D(1), substituted "county in which the offense was committed" for "judicial district in which petitioner was convicted"; in Paragraph G, inserted "in non-death penalty cases" in the bold heading and "If a sentence of death has not been imposed" at the beginning; redesignated Paragraphs F and G as present Paragraphs G and H and added Paragraph F.

Compiler's notes. — Pursuant to the court order of February 10, 1986, the 1986 amendment of this rule applies to all post-conviction motions filed after March 1, 1986.

Preemption. — This rule does not preempt Rules 5-614 or 5-801 NMRA, nor does it preempt 39-1-1 NMSA 1978, which allows post-conviction motion practice. State v. Peppers, 110 N.M. 393, 796 P.2d 614 (Ct. App. 1990).

This rule preempts 36-11-6 NMSA 1978, governing post-conviction remedy. State v. Peppers, 110 N.M. 393, 796 P.2d 614 (Ct. App. 1990).

The 1986 amendment of this rule has only prospective effect. Enright v. State, 104 N.M. 672, 726 P.2d 349 (1986).

The main purpose of this rule is to provide a uniform procedure for determining if a prisoner is entitled to relief. Blatchford v. Gonzales, 100 N.M. 333, 670 P.2d 944 (1983), appeal dismissed and cert. denied, 464 U.S. 1033, 104 S. Ct. 691, 79 L. Ed. 2d 158 (1984).

"In custody" construed where petitioner incarcerated in another jurisdiction. — A defendant is in "custody" for purposes of post-conviction relief under Rule 5-802 NMRA when the defendant is not physically restrained within the state of New Mexico, but is incarcerated in another state serving a sentence imposed by that state to be served concurrently or consecutively with the sentence imposed by the New Mexico court and is entitled to pursue post-conviction relief in New Mexico. Howard v. Martin, 111 N.M. 203, 803 P.2d 1108 (1991).

Not exclusive post-conviction relief. — This rule was not intended to be the exclusive means for seeking post-conviction relief. State v. Peppers, 110 N.M. 393, 796 P.2d 614 (Ct. App. 1990).

Defendant must utilize rule before seeking habeas corpus. Like its federal counterpart, Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA) provides that an application for writ of habeas corpus by a prisoner authorized to apply for post-conviction relief shall not be entertained if the applicant has failed to apply for relief by motion to the sentencing court, unless it also appears that the remedy by motion to test the legality of his detention is inadequate or ineffective. Lewis v. New Mexico, 423 F.2d 1048 (10th Cir. 1970).

Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA) is comparable to the federal statute which sets forth the procedure for collateral attack on federal sentences. 28 U.S.C.A. § 2255. Like its federal counterpart, the rule requires that petitions seeking post-conviction relief be addressed to the sentencing court, and that habeas corpus petitions will not be entertained when the petitioner has failed to utilize the rule, unless it appears that the procedure under the rule is inadequate or ineffective to test the legality of the petitioner's detention. Herring v. Rodriguez, 372 F.2d 470 (10th Cir. 1967).

State motion must be acted upon before state remedies exhausted. — Where a motion filed under this rule has not been acted upon, the motion must be acted upon

before a prisoner has exhausted his state remedies and is permitted to petition for a federal writ of habeas corpus. Martinez v. Romero, 640 F.2d 1151 (10th Cir. 1981).

When state remedies not exhausted. — A petitioner has not exhausted state remedies, for purposes of federal habeas corpus, while his appeal of a first Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA) motion is still pending. Barefield v. New Mexico, 434 F.2d 307 (10th Cir. 1970), cert. denied, 401 U.S. 959, 91 S. Ct. 969, 28 L. Ed. 2d 244 (1971).

Although counsel advised that the state trial court had entered an order denying the appellant's petition under Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA) because the state trial court's order denying relief under that rule was not part of the record on appeal, because the extent and nature of the proceedings in the state trial court was not known and because the record did not disclose whether the appellant had appealed or could appeal from denial of his Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA) petition to the New Mexico supreme court, there was nothing in the record upon which the court might conclude that the remedy provided by that rule was inadequate or ineffective to test the legality of the appellant's detention under the constitutional grounds asserted in the appellant's petition to the United States district court. Appellant had not exhausted his available state remedies when the court below dismissed his habeas corpus petition, and dismissal, without prejudice, was not erroneous. Herring v. Rodriguez, 372 F.2d 470 (10th Cir. 1967).

And when state remedies deemed exhausted. — Where a state prisoner's habeas corpus petition raises no factual issues, and the legal issues have all been considered and rejected by the highest court of the state in a direct appeal, a prisoner would not be denied a federal habeas corpus hearing simply because he had not re-presented the same issues in the state court in a post-conviction proceeding. Sandoval v. Rodriguez, 461 F.2d 1097 (10th Cir. 1972).

As federal court may proceed on merits. — Where defendant appealed his state court conviction to the state supreme court and lost, then filed for state post-conviction relief and was denied, and the Supreme Court of New Mexico decided the same questions in his post-conviction motion and in his subsequent habeas corpus motion, the defendant does not have to appeal the denial of his post-conviction relief under Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA) and the federal district court may proceed on the merits. Cochran v. Rodriguez, 438 F.2d 926 (10th Cir. 1971).

Motions under this rule are not appealable. State v. McGuinty, 97 N.M. 360, 639 P.2d 1214 (Ct. App. 1982).

Attempt to circumvent rule by remand followed by appeal. — The court of appeals would not remand the issue of effectiveness of counsel to the trial court for an evidentiary hearing, and then have the case returned for review, where such a procedure would circumvent the express wording of this rule, providing for review of

postconviction evidentiary proceedings through certiorari to the supreme court. State v. Powers, 111 N.M. 10, 800 P.2d 1067 (Ct. App. 1990).

Remanding a case for an evidentiary hearing to develop facts supporting a defendant's claim on appeal would circumvent this rule, which provides review of post-conviction evidentiary proceedings by way of certiorari to the supreme court. State v. Gomez, 112 N.M. 313, 815 P.2d 166 (Ct. App. 1991).

Res judicata in habeas corpus proceedings. — If an application for a writ of habeas corpus is grounded in facts beyond the record previously presented on appeal, and if the additional facts are those which could not, or customarily would not, be developed in a trial on criminal charges, there should be no issue preclusion. When a post-conviction application makes a substantial showing that due process or another fundamental right has been abridged - and the application is supported by facts ill-suited for development in the original trial - it should be addressed on its merits. Res judicata does not apply. Duncan v. Kerby, 115 N.M. 344, 851 P.2d 466 (1993).

Law reviews. — For note, "Post-Conviction Relief After Release From Custody: A Federal Message and a New Mexico Remedy," see 9 Nat. Resources J. 85 (1969).

For note, "Waiver; Right to Counsel; Certification of Juvenile to Criminal Proceedings," see 9 Nat. Resources J. 310 (1969).

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

For survey of Indian law in New Mexico, see 18 N.M.L. Rev. 403 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 18 Am. Jur. 2d Coram Nobis and Allied Statutory Remedies §§ 44 to 60.

Insanity of accused at time of commission of offense not raised at trial, as ground for habeas corpus or coram nobis after conviction, 29 A.L.R.2d 703.

Delay as affecting right to coram nobis attacking criminal conviction, 62 A.L.R.2d 432.

Voluntary absence when sentence is pronounced, 59 A.L.R.5th 135.

Incompetency of counsel chosen by accused as affecting validity of conviction, 74 A.L.R.2d 1390, 34 A.L.R.3d 470, 2 A.L.R.4th 27, 2 A.L.R.4th 807, 13 A.L.R.4th 533, 15 A.L.R.4th 582, 18 A.L.R.4th 360, 26 A.L.R. Fed. 218, 53 A.L.R. Fed. 140.

When criminal case becomes moot so as to preclude review of or attack on conviction or sentence, 9 A.L.R.3d 462.

Judicial expunction of criminal record of convicted adult, 11 A.L.R.4th 956.

Coram nobis on ground of other's confession to crime, 46 A.L.R.4th 468.

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

24 C.J.S. Criminal Law § 1610 et seq.; 39 C.J.S. Habeas Corpus § 1 et seq.

II. SCOPE OF RULE; GROUNDS FOR RELIEF.

A. IN GENERAL.

The writ of habeas corpus cannot be used to restore a defendant's right to vote. Cummings v. State, 2007-NMSC-048, 142 N.M. 656, 168 P.3d 1080.

New evidence. — A habeas corpus petitioner may obtain relief, based on a freestanding claim of actual innocence, independent of any constitutional violation at trial, if he can establish by clear and convincing evidence that no reasonable juror would have convicted him in light of new evidence. Montoya v. Ulibarri, 2007-NMSC-035, 142 N.M. 89, 163 P.3d 476.

Purpose of rule. — The purpose of Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA) is to allow a collateral review as to the validity of a conviction. Valles v. State, 90 N.M. 347, 563 P.2d 610 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

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).

The purpose of Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA) is to provide a ready remedy whereby a prisoner in custody under sentence of the court may be freed from custody upon a proper showing that the sentence was imposed in violation of the Constitution of the United States, or the Constitution or the law of New Mexico, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law or is otherwise subject to collateral attack. It is not intended as a means whereby prisoners can with complete abandon and contempt demean and burden the courts and legal profession, falsely accuse the law enforcement officials and impose upon the public great and unnecessary expense. State v. Hansen, 79 N.M. 203, 441 P.2d 500 (Ct. App. 1968).

Constitutionality. — This rule does not violate the 1965 amendment to N.M. Const., art. VI, § 2. State v. Garcia, 101 N.M. 232, 680 P.2d 613 (Ct. App. 1984).

No substitute for habeas corpus. — Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA) does not provide a substitute for appeal. It is a post-conviction remedy, civil in nature, substantially equivalent to habeas corpus, and an issue not properly

cognizable in a habeas corpus proceeding cannot furnish basis for relief under that rule. Smith v. State, 79 N.M. 450, 444 P.2d 961 (1968).

Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA) is a post-conviction remedy not previously available to prisoners in custody. It has not replaced or supplanted habeas corpus which is not suspended, as indeed it could not be under the constitution. State v. Weddle, 77 N.M. 420, 423 P.2d 611 (1967).

Showing of immediate release not necessary. — To obtain a writ of habeas corpus, a petitioner need not demonstrate a right to immediate release. He need prove only that he was denied mandatory credits against his sentence and that such credits affect the timing of his release or of a parole hearing. Martinez v. State, 110 N.M. 357, 796 P.2d 250 (Ct. App. 1990).

And prior appeal not required. — Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA) does not require there to have been an appeal before a post-conviction motion may be considered. State v. Martinez, 85 N.M. 293, 511 P.2d 779 (Ct. App. 1973).

Rule not limited to post-conviction habeas actions. — This rule is not limited by its terms to post-conviction habeas actions and on its face appears to apply to all habeas corpus proceedings, whether challenging confinement before or after conviction or, for that matter, civil custody. Caristo v. Sullivan, 112 N.M. 623, 818 P.2d 401 (1991).

Available where legal custody under sentence of state court. — An attack on a judgment cannot be made under Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA) when petitioner is not in custody under a sentence from a New Mexico court. Roessler v. State, 79 N.M. 787, 450 P.2d 196 (Ct. App.), cert. denied, 395 U.S. 967, 89 S. Ct. 2115, 23 L. Ed. 2d 754 (1969). See also State v. Apodaca, 80 N.M. 155, 452 P.2d 489 (Ct. App. 1969).

Where defendant is in legal custody under sentence of a New Mexico court, he may seek post-conviction relief under Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA), notwithstanding the lack of physical custody by New Mexico. State v. Brill, 81 N.M. 785, 474 P.2d 77 (Ct. App.), cert. denied, 81 N.M. 784, 474 P.2d 76 (1970).

And petitioner must show deprivation of rights. — For a petitioner to be entitled to post-conviction relief, it is not enough to show that indigency occasioned the petitioner's inability to employ counsel or to appeal; the petitioner must show that the state deprived him of his rights under the fourteenth amendment. State action is shown when a responsible official in the state's system of justice rejects a request for counsel or fails to take proper steps toward appointment of counsel for a convicted defendant when he has knowledge of the defendant's indigency and desire for appellate counsel. State v. Raines, 78 N.M. 579, 434 P.2d 698 (Ct. App. 1967).

Or unjust and illegal discrimination. — A motion for post-conviction relief under Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA) presents an issue which courts

with uniformity have held is not one which will be the basis for relief unless there is shown to be present in it an element of intentional or purposeful discrimination, or intentional or arbitrary action amounting to an unjust and illegal discrimination between persons in similar circumstances. State v. Baldonado, 79 N.M. 175, 441 P.2d 215 (Ct. App. 1968).

Or deprivation of fair trial. — It is only under circumstances where it appears that the defendant was fundamentally deprived of a fair trial that post-conviction relief is available. Jones v. State, 81 N.M. 568, 469 P.2d 717 (1970).

The acts complained of must be of such quality as necessarily prevent a fair trial for review and reversal. State v. Olguin, 78 N.M. 661, 437 P.2d 122 (1968).

But no redetermination of issues previously reviewed. — In a motion for post-conviction relief, one is not entitled to successive determination on the merits of issues previously reviewed. State v. Ortega, 81 N.M. 337, 466 P.2d 903 (Ct. App.), cert. denied, 81 N.M. 305, 466 P.2d 871 (1970).

And no review unless cognizable claim. — Motion for post-conviction relief was not the proper procedure for obtaining relief on claim by defendant that parole authorities and penitentiary officials had improperly figured the time he had served on his sentence, since a distinction was drawn between an attack on the court's sentence, which was cognizable by post-conviction motion, and a claim against parole and penitentiary officials for the way sentence was executed, which was not cognizable. State v. Bambrough, 81 N.M. 548, 469 P.2d 527 (Ct. App. 1970).

No review of some constitutional issues. — Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA) does not require collateral review of constitutional issues where the facts submitted were known or available to the petitioner at the time of his trial. Jones v. State, 81 N.M. 568, 469 P.2d 717 (1970).

And no review if clemency proper remedy. — Where defendant's conviction was based upon perjury his remedy is by application for executive clemency not by a motion pursuant to Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA). State v. Minns, 81 N.M. 428, 467 P.2d 1000 (Ct. App. 1970).

Habeas corpus relief inappropriate to modify probation condition. — When the district court failed to make a determination showing grounds for habeas corpus relief existed, the court abused its discretion by modifying defendant's probation condition which had been agreed upon pursuant to a plea bargain. State v. Trujillo, 117 N.M. 769, 877 P.2d 575 (1994).

Petitioner may file motion at any time. — The authorization contained in Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA), is not limited to the term of court during which the incorrect sentence was imposed, as a motion for such relief may be made at any time. McCroskey v. State, 82 N.M. 49, 475 P.2d 49 (Ct. App. 1970).

Defendant whose suspended sentence had been revoked was not required to wait until the claimed time, if credited, would entitle defendant to his release to bring post-conviction relief proceeding to obtain credit for probation time. State v. Sublett, 78 N.M. 655, 436 P.2d 515 (Ct. App. 1968).

Prison mailbox rule. — Because New Mexico's rules require receipt by the clerk before a habeas petition is filed, the prison mailbox rule, as articulated in Houston v. Lack, 487 U.S. 266, 101 L. Ed. 2d 245, 108 S. Ct. 2379 (1988), does not apply to prisoners requesting state post-conviction relief in New Mexico. Adams v. LeMaster, 223 F.3d 1177 (10th Cir. 2000), cert. denied, 531 U.S. 1195, 121 S. Ct. 1198, 149 L. Ed. 2d 113 (2001).

Commences civil proceeding. — A motion pursuant to Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA) is a civil proceeding, not criminal, and is governed by the rules of civil procedure. State v. Brinkley, 78 N.M. 39, 428 P.2d 13 (1967). See also State v. Eckles, 79 N.M. 138, 441 P.2d 36 (1968); State v. Robbins, 77 N.M. 644, 427 P.2d 10, cert. denied, 389 U.S. 865, 88 S. Ct. 130, 19 L. Ed. 2d 137 (1967); State v. Gilbert, 78 N.M. 437, 432 P.2d 402 (1967); State v. Knight, 78 N.M. 482, 432 P.2d 838 (1967).

Where findings under similar federal rule deemed persuasive. — Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA) was adopted from 28 U.S.C. § 2255. The interpretation placed on that section by the federal courts is persuasive as to the meaning of the state rule. Lewis v. New Mexico, 423 F.2d 1048 (10th Cir. 1970); State v. Weddle, 77 N.M. 420, 423 P.2d 611 (1967); State v. Fines, 78 N.M. 737, 437 P.2d 1006 (1968); State v. Guy, 79 N.M. 128, 440 P.2d 803 (Ct. App. 1968); State v. Hodnett, 79 N.M. 761, 449 P.2d 669 (Ct. App. 1968). See also State v. Eckles, 79 N.M. 138, 441 P.2d 36 (1968).

B. PRETRIAL MATTERS.

Absence of some facts from complaint not grounds for relief. — Defendant convicted of rape could not vacate his conviction on the ground the complaint failed to allege knowledge of the facts from which the complainant concluded that there was probable cause to believe that defendant had committed rape. State v. Sedillo, 79 N.M. 9, 439 P.2d 226 (1968).

Where allegations sufficient to charge offense. — Where allegations, notwithstanding the misreference to offense, are sufficient to charge the offense they provide no grounds for error or for post-conviction relief. State v. Holly, 79 N.M. 516, 445 P.2d 393 (Ct. App. 1968).

And amendment of information permitted. — Unless prejudice to the defendant results, a reviewing court on motion for post-conviction relief will not disturb the trial court's discretion in permitting an amended information. State v. Sanchez, 80 N.M. 688,

459 P.2d 850 (Ct. App. 1969). See also State v. Crouch, 77 N.M. 657, 427 P.2d 19 (1967).

That the court granted the prosecutor's motion to endorse the information thereby adding the witness' name who had testified, in the absence of abuse of discretion, was not error entitling defendant to post-conviction relief. State v. Lujan, 79 N.M. 200, 441 P.2d 497 (1968).

Claim of illegal arrest, in itself, is not basis for post-conviction relief. Herring v. State, 81 N.M. 21, 462 P.2d 468 (Ct. App. 1969); State v. Hudman, 78 N.M. 370, 431 P.2d 748 (1967); State v. Gibby, 78 N.M. 414, 432 P.2d 258 (1967); State v. Ramirez, 78 N.M. 418, 432 P.2d 262 (1967); State v. Ramirez, 78 N.M. 584, 434 P.2d 703 (Ct. App. 1967); State v. Simien, 78 N.M. 709, 437 P.2d 708 (1968); State v. Hansen, 79 N.M. 203, 441 P.2d 500 (Ct. App. 1968).

And illegality waived by guilty plea. — That defendant's arrest on the worthless check charge was without a warrant provides no basis for relief. Illegality, if any, in defendant's arrest was waived by his guilty plea. State v. Gorton, 79 N.M. 775, 449 P.2d 791 (Ct. App. 1969). See also State v. Baumgardner, 79 N.M. 341, 443 P.2d 511 (Ct. App. 1968); State v. Williams, 78 N.M. 211, 430 P.2d 105 (1967); State v. Losolla, 79 N.M. 296, 442 P.2d 786 (1968).

That the arresting officer failed to have a warrant for defendant's arrest at the time he was taken into custody; that defendant was placed in a lineup for identification purposes before he had obtained an attorney to represent him; that a gun claimed to be material evidence was obtained through an unlawful search and seizure; and that defendant was not served with the information constitute claimed defects in the proceedings that are waived by a subsequent plea of guilty entered with the advice of counsel. State v. Tipton, 78 N.M. 600, 435 P.2d 430 (1967).

Or by proceeding to trial. — Where defendant pleaded not guilty and proceeded to trial, claim of illegal arrest was waived. State v. Ramirez, 78 N.M. 418, 432 P.2d 262 (1967).

But relief available for delay in apprehension. — Where it is contended that the right of New Mexico to revoke defendant's probation was waived by reason of the long delay in apprehending defendant, based on the claim that defendant's whereabouts were known to the state or should have been known to the state had it exercised ordinary care to ascertain the location of defendant, such a claim provides a legal basis for relief. State v. Murray, 81 N.M. 445, 468 P.2d 416 (Ct. App. 1970).

Denial of use of telephone after arrest not grounds for relief. — Absent prejudice, no basis for release is established by denial of use of a telephone after arrest. State v. Gibby, 78 N.M. 414, 432 P.2d 258 (1967).

Without showing of prejudice. — He does not claim, and the record does not suggest, any prejudice by reason of the claimed refusals of his requests to use the telephone. Absent some basis of prejudice, a claim that he was refused the use of a telephone is not ground for vacating a judgment and sentence. State v. Knerr, 79 N.M. 133, 440 P.2d 808 (Ct. App. 1968).

Defendant may waive statutory right to copy of information. — Statutory right to be furnished a copy of the information at least 24 hours prior to being required to plead was waived by plea of not guilty and so no grounds for relief were stated by defendant. State v. Knight, 78 N.M. 482, 432 P.2d 838 (1967).

When illegal search not grounds for relief. — Illegal search of car, if it did occur, would not afford defendant a basis for post-conviction relief for the reason that no evidence so obtained was used against him. State v. Baumgardner, 79 N.M. 341, 443 P.2d 511 (Ct. App. 1968).

Where defendant asserts that an illegal search was made of his automobile, and that he was identified without being placed in a lineup, even if his claim of an illegal search be true, as no evidence secured thereby was used against him and he pleaded guilty, he cannot be heard to complain and he is not entitled to post-conviction relief. State v. Hansen, 79 N.M. 203, 441 P.2d 500 (Ct. App. 1968).

Where the circumstances of a claimed illegal search and seizure are known to defendant at the time of trial, the question of use of illegally seized evidence cannot properly be raised by motion under Rule 93, N.M.R. Civ. P. State v. Barton, 79 N.M. 70, 439 P.2d 719 (1968).

When absence of preliminary hearing not grounds for relief. — The bare claim that defendant was never taken before a magistrate and advised of his rights without claim that this prejudiced him in any way, provides no basis for post-conviction relief. Woods v. State, 84 N.M. 248, 501 P.2d 692 (Ct. App. 1972).

Where, upon motion for post-conviction relief under Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA), defendant charged with aggravated battery claimed that he was charged in the criminal information with an offense concerning which there had been no preliminary examination, but where the record did not show any objection to the lack of preliminary examination on the aggravated battery charge, showing instead that defendant pleaded not guilty when arraigned and proceeded to trial without raising a question as to the propriety of the magistrate's bind over, defendant's claim for relief was waived. State v. Hibbs, 82 N.M. 722, 487 P.2d 150 (Ct. App. 1971).

Defendant's voluntary plea of guilty in the district court constituted a waiver of a preliminary hearing and precluded relief on grounds that waiver was obtained through undue influence. State v. Baumgardner, 79 N.M. 341, 443 P.2d 511 (Ct. App. 1968).

Nor delay in preliminary hearing. — That defendant was not taken before a magistrate for two and one-half days after his arrest provided no legal basis for relief as there is no showing, in fact no claim, that the delay deprived defendant of a fair trial or that he was prejudiced in any way. Barela v. State, 81 N.M. 433, 467 P.2d 1005 (Ct. App. 1970).

Where confession was made by appellant promptly upon being interrogated, without any claim of threats, force or psychological pressure, and within 30 hours of arrest, the fact that appellant was not taken forthwith before a magistrate cannot be held to make the statement inadmissible. State v. Minor, 78 N.M. 680, 437 P.2d 141 (1968).

Irregularities which may have occurred prior to arraignment are not subject to inquiry by way of post-conviction relief. State v. Martinez, 79 N.M. 232, 441 P.2d 761 (1968).

Unless fair trial prevented. — The acts complained of, such as unreasonable delay in arraignment, must be of such quality as necessarily prevent a fair trial, to obtain review and reversal. State v. Olguin, 78 N.M. 661, 437 P.2d 122 (1968).

Constitutional validity of plea deemed proper subject of motion for relief. — Where the claims made, if true, would raise serious questions as to the constitutional validity of the guilty pleas, then these claims are to be asserted in a motion for post-conviction relief. State v. Martinez, 84 N.M. 766, 508 P.2d 36 (Ct. App. 1973).

Since plea deemed void if not voluntary. — A guilty plea must be voluntarily made, and if it is not so made but is in fact induced by promises or threats, then it is void and subject to collateral attack. State v. Baumgardner, 79 N.M. 341, 443 P.2d 511 (Ct. App. 1968).

It is a fundamental rule of criminal procedure that a judgment and sentence cannot stand if based upon an involuntary plea of guilty induced by an unkept promise of leniency. A guilty plea induced by either promises or threats which deprive it of the character of a voluntary act is void and subject to collateral attack. State v. Ortiz, 77 N.M. 751, 427 P.2d 264 (1967).

But where plea not grounds for relief. — The fact that alternatives were considered in reaching a decision to plead guilty does not necessarily render the decision involuntary, and where there is substantial evidence that the plea was made voluntarily after proper advice of counsel and with full understanding of the consequences, there is no basis for post-conviction relief. Mondragon v. State, 84 N.M. 175, 500 P.2d 999 (Ct. App. 1972).

The alleged facts of a need for a prostate operation, time in a mental hospital and prior conviction of a "finding" charge raise no issue as to an involuntary plea of guilty and provide no grounds for post-conviction relief. Stafford v. State, 82 N.M. 365, 482 P.2d 68 (Ct. App. 1971).

Defendant who was told by his attorney that if he didn't plead guilty to second-degree murder he would die in gas chamber could not claim on motion for post-conviction relief that his guilty plea was induced by coercion, threats or promise of leniency, because such plea represented a choice between two alternatives and a voluntary selection of a plea to a lesser charge. State v. French, 82 N.M. 209, 478 P.2d 537 (1970).

If in fact defendant chose to rely on counsel's advice and plead guilty rather than trust his fate to a jury on a charge involving the death penalty, defendant does not gain thereby on a motion for post-conviction relief. Such a factual claim provides no legal basis for holding his plea involuntary. State v. Kenney, 81 N.M. 368, 467 P.2d 34 (Ct. App. 1970).

Absent any claim that anyone representing the state said or did anything to induce the guilty plea, the statement made to defendant by his own counsel did not provide a basis for post-conviction relief. State v. Montoya, 81 N.M. 233, 465 P.2d 290 (Ct. App. 1970); Goodwin v. State, 79 N.M. 438, 444 P.2d 765 (Ct. App. 1968).

That defendant pleaded guilty in exchange for dismissal of criminal charges against a young woman petitioner passed off as his wife, provides no basis for relief. Roessler v. State, 79 N.M. 787, 450 P.2d 196 (Ct. App.), cert. denied, 395 U.S. 967, 89 S. Ct. 2115, 23 L. Ed. 2d 754 (1969).

If this is a claim that petitioner entered his plea on advice of counsel, it provides no basis for relief. If this is a claim that petitioner did not fully understand the consequences of his plea, it provides no basis for relief. If he did not understand, he could have asked his attorney. If this is a claim that the trial court failed to explain the effect of the plea, it still provides no basis for relief. The trial court is not obligated to explain the effect of a guilty plea entered by a defendant represented by counsel. Roessler v. State, 79 N.M. 787, 450 P.2d 196 (Ct. App.), cert. denied, 395 U.S. 967, 89 S. Ct. 2115, 23 L. Ed. 2d 754 (1969).

Where two attorneys represented defendant at different times, both being capable and competent attorneys, who appear to have done all defendant would permit them to do, and the defendant stands convicted upon his voluntary plea of guilty, which he made, after consulting, at his specific request, with a competent attorney at the arraignment proceedings, the plea is binding and the defendant is not entitled to post-conviction relief. State v. Hansen, 79 N.M. 203, 441 P.2d 500 (Ct. App. 1968).

It is, of course, unquestioned that a plea of guilty induced by an unkept promise of leniency is void. Where in this case, however, the allegation upon which the contention is based demonstrates that no "promises" were made either by the deputy sheriff or appellant's counsel and the statements attributed to the deputy sheriff and counsel on their face do not bear out the assertion that a promise or promises of leniency were made but amount to no more than speculation as to what the district attorney or the trial judge might do if appellant entered a plea of guilty, the plea of guilty is not void and the

defendant is not entitled to post-conviction relief. State v. McCain, 79 N.M. 197, 441 P.2d 237 (Ct. App. 1968).

While the accused may have to take the consequences of a poor defense, he may at least say the fault was not his own. But this is not so when he pleads guilty. Here the deed is his own; here there are not the baffling complexities which require a lawyer for illumination; if voluntarily and understandingly made, even a layman should expect a plea of guilty to be treated as an honest confession of guilt and a waiver of all defenses known and unknown. And such is the law. A plea of guilty may not be withdrawn after sentence on a motion for post-conviction relief except to correct a "manifest injustice", and it is difficult to imagine how "manifest injustice" could be shown except by proof that the plea was not voluntarily or understandingly made, or a showing that defendant was ignorant of his right to counsel. Certainly ineffective assistance of counsel, as opposed to ignorance of the right to counsel, is immaterial in an attempt to impeach a plea of guilty, except perhaps to the extent that it bears on the issues of voluntariness and understanding. State v. Knerr, 79 N.M. 133, 440 P.2d 808 (Ct. App. 1968).

Where defendant stated to trial court that (1) he was familiar with and understood the charges, (2) he had received advice of counsel, (3) no one had indicated what the court might do, (4) no threats had been made, (5) he realized he had a right to be tried by a jury and (6) he was changing his plea freely and voluntarily and defendant denied that any promises had been made to induce him to change his plea, waived a presentencing report and asked the court to sentence him "at this time," motion for post-conviction relief was properly denied. State v. Decker, 79 N.M. 41, 439 P.2d 559 (Ct. App. 1968).

Increase in bail would not be basis for post-conviction relief unless petitioner was prejudiced by the increase. Hernandez v. State, 81 N.M. 634, 471 P.2d 204 (Ct. App. 1970).

Nor failure to set bond where plea of guilty. — The failure to set bond, like delay in bringing appellant before a magistrate, was waived by the entry of a plea of guilty. This contention presents no basis for relief under Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA). State v. Helm, 79 N.M. 305, 442 P.2d 795 (1968).

Nondisclosure of information sufficient for relief. — Where nondisclosed information would have provided the defense with two independent witnesses not connected with defendant or his family who tended to corroborate the defense and to contradict police witnesses concerning the method of entry, which was relevant to defendant's intent upon entry, this deprivation is prejudicial; the order denying post-conviction relief is reversed and the cause remanded with instructions to set aside the judgment and sentence and grant defendant a new trial. Chacon v. State, 88 N.M. 198, 539 P.2d 218 (Ct. App. 1975).

Where defendant prejudiced by material nondisclosure. — Where a violation of Rule 27(a)(5) (see now Rule 5-501 NMRA) is not discovered until after trial, the standards to be applied in determining whether defendant is entitled to a new trial

because of nondisclosure are that the nondisclosed items must be material to the guilt or innocence of the accused, or to the penalty to be imposed, and furthermore, that nondisclosure of items material to the preparation of the defense is not reversible error in the absence of prejudice. Chacon v. State, 88 N.M. 198, 539 P.2d 218 (Ct. App. 1975) (decided prior to 1980 amendment).

Separate interrogations not grounds for relief. — Appellant's claim that his conviction was illegal because he was interrogated apart from other witnesses during the investigation presents no grounds for post-conviction relief. State v. Franklin, 79 N.M. 608, 446 P.2d 883 (1968), cert. denied, 394 U.S. 965, 89 S. Ct. 1318, 22 L. Ed. 2d 566 (1969).

No relitigation of admissibility of confession. — Where the issue as to the admissibility of the confession had been earlier decided, it could not be relitigated in post-conviction proceedings. State v. Padilla, 85 N.M. 140, 509 P.2d 1335 (1973).

And defendant must litigate admissibility if presented opportunity. — The defendant has the right to a determination of the voluntariness of confession but a defendant cannot sit idly by and fail to accept an offer by the court for such a hearing and subsequently predicate error in a motion for post-conviction relief on the fact that he did not receive such a hearing. State v. Soliz, 79 N.M. 263, 442 P.2d 575 (1968).

Limited education not grounds for relief. — The claim that defendant was improperly convicted because of his "limited education background" does not state a basis for post-conviction relief. Maes v. State, 84 N.M. 251, 501 P.2d 695 (Ct. App. 1972).

The fact that defendant was 20 years of age, had either an eighth or an eleventh grade education, was a mechanic and was not trained in court procedures, presented no issue upon his ability to understand and appreciate what he had done, or upon his capacity to knowingly, intelligently and understandingly waive his rights, which had been so fully explained to him and which he had so consistently stated he understood and therefore afforded no grounds for a post-conviction hearing on relief. State v. Maples, 82 N.M. 36, 474 P.2d 718 (Ct. App. 1970).

Claim that defendant was incompetent to stand trial because he was only 22 years old, lacked education and "in a general manner" did not understand the proceedings in the trial court did not provide a basis for post-conviction relief since he could have asked his appointed counsel. State v. Montoya, 81 N.M. 233, 465 P.2d 290 (Ct. App. 1970).

Nor limited ability to understand English where counsel present. — Petitioner's claim that he did not understand English well enough to understand the arraignment proceedings at which he entered a guilty plea or the advice of rights given him in English did not provide a basis for post-conviction relief where there was substantial evidence to support a finding of sufficient understanding of English, and where, even if he did not have such sufficient understanding, the record showed that he was represented by counsel at the arraignment proceedings and could have asked his

attorney about what he did not comprehend. Mondragon v. State, 84 N.M. 175, 500 P.2d 999 (Ct. App. 1972).

Nor insanity where trial court found competency. — Where the trial court found as a fact that they were not suffering from withdrawal symptoms and that they were mentally competent at the time of their plea, there was no factual basis for the claim of insanity at the time of their plea, and no basis for post-conviction relief. State v. Botello, 80 N.M. 482, 457 P.2d 1001 (Ct. App. 1969).

But when competency properly considered. — Where defendant's motion raised the issue of his competency to plead guilty, and the question had not been previously raised, the question was properly before the court in post-conviction proceeding. State v. Barefield, 80 N.M. 265, 454 P.2d 279 (Ct. App. 1969).

Allegations of post-conviction confinement in a mental institution and diagnosis as a psychotic are sufficiently close to the date of his plea to raise a factual issue concerning his competency to plead. State v. Cliett, 79 N.M. 719, 449 P.2d 89 (Ct. App. 1968).

Right of confrontation deemed proper issue. — The question of a denial of a transcript of grand jury testimony, and thus of the constitutional right of confrontation, was cognizable under a proceeding pursuant to Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA). Valles v. State, 90 N.M. 347, 563 P.2d 610 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

But when may not raise issue. — Since proceedings under Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA) are civil in nature, question whether defendant was denied right of confrontation in pretrial hearing may not be raised for the first time on appeal. State v. Trimble, 78 N.M. 346, 431 P.2d 488 (1967).

Absence of lineup is not basis for post-conviction relief. State v. Jones, 84 N.M. 500, 505 P.2d 445 (Ct. App. 1972).

That no police lineup was held and petitioner first faced his accuser at the time of trial in district court provides no basis for post-conviction relief as petitioner had no right to be identified in a lineup. Hernandez v. State, 81 N.M. 634, 471 P.2d 204 (Ct. App. 1970).

Nor showing of defendant's photograph in absence of counsel. — The showing of photographs of defendant to witnesses after defendant had been charged and counsel appointed but in absence of counsel was not prejudicial to defendant where witnesses produced clear and convincing evidence that their in-court identifications were not based on having seen the photographs and thus provided no basis for post-conviction relief. State v. Carrothers, 79 N.M. 347, 443 P.2d 517 (Ct. App. 1968).

Where illegal extradition not grounds for relief. — An illegal extradition provides no basis for relief as the claim was waived by the guilty plea. State v. Gorton, 79 N.M. 775, 449 P.2d 791 (Ct. App. 1969).

It is well established that where a person accused of crime is found within the territorial jurisdiction where he is charged, the jurisdiction of the court where the charge is so pending is not impaired by the fact he was brought from another jurisdiction by illegal means and so defendant has not stated a basis for post-conviction relief. State v. Martinez, 79 N.M. 232, 441 P.2d 761 (1968).

Nor transfer of action from juvenile court. — Petitioner just as effectively waives the shortcomings in the transfer proceedings out of the juvenile court, if they were shortcomings, as he waived his right to counsel, when he did not assert the rights in the district court upon arraignment after counsel had been appointed and they had had an opportunity to consult. Neller v. State, 79 N.M. 528, 445 P.2d 949 (1968).

Where pretrial publicity not grounds for relief. — Where defendant moved to vacate judgment and sentences pursuant to Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA), contending that pretrial publicity in county caused him to enter pleas of guilty, the trial court's finding in denying motion for change of venue, that the publicity given the case had not prejudiced the minds of inhabitants of the county, was conclusive where no abuse of discretion was shown. State v. Barela, 78 N.M. 323, 431 P.2d 56 (1967).

And where insufficient time to prepare case not grounds for relief. — Defendant, who, through his attorney, waived both his statutory right to be furnished a copy of amended information and a preliminary hearing thereon, was not denied equal justice under the law because his trial counsel did not have time to prepare his case and trial court properly denied, without hearing, defendant's motion for post-conviction relief. State v. Sanchez, 80 N.M. 688, 459 P.2d 850 (Ct. App. 1969).

C. TRIAL MATTERS.

Recantation of testimony. — A petitioner seeking a new trial through a writ of habeas corpus because of recanted testimony must prove, based upon the entire record, including the original trial proceedings at issue, that the recantation is credible and was significant to the original verdict. In assessing the recantation’s credibility, the trial court, in addition to weighing the credibility to the witnesses, must consider the following factors, none of which is dispositive by itself: (1) the original verdict was based upon uncorroborated testimony; (2) the recantation is corroborated by additional new evidence; (3) the recantation occurred under circumstances free from suspicion of undue influence or pressure from any source; (4) the record fails to disclose any possibility of collusion between the defendant and the witness between the time of the trial and the retraction; and (5) the witness admitted the perjury on the witness stand and thereby subjected himself or herself to prosecution. To show that a credible recantation was significant, the petitioner must prove that the evidence meets each of the following requirements: (1) it must have been discovered since the trial; (2) it could not have been discovered before the trial by the exercise of due diligence; (3) it must be material; (4) it must not be merely cumulative; (5) it must not be merely impeaching or contradictory; and (6) the court is left with a firm belief that but for the perjured

testimony, the defendant would most likely not have been convicted. Case v. Hatch, 2008-NMSC-024, 144 N.M. 20, 183 P.3d 905.

Recantation was not newly discovered evidence. — Where the recantation of a witness was an effort to revert to the original statement the witness gave to the police that the witness did not know anything about the event leading to the victim's death and where the inconsistency of the original statement and the witness's subsequent statement to the police implicating the defendant were the subject of the original trial, the recantation was not newly discovered evidence. Case v. Hatch, 2008-NMSC-024, 144 N.M. 20, 183 P.3d 905.

Where instructions by court not grounds for relief. — Where self-defense was not at issue, fundamental error did not occur when the court failed to include the element of unlawfulness in the deliberate-intent murder instruction and when the court failed to explicitly tell the jury that the state had to disprove self-defense beyond a reasonable doubt. State v. Sutphin, 2007-NMSC-045, 142 N.M. 191, 164 P.3d 72.

State court's decision not to hold evidentiary hearing is not cognizable as a federal habeas claim. LaVoy v. Snedeker, ____F.Supp.____(D.N.M. 2004).

Claim based on absence of essential facts in record. — Spanish-speaking defendant's claim regarding the inadequacy of his interpreter was rejected by the court of appeals, based on the absence of essential facts in the record, not because the court examined the evidence and found the issues to be without merit, and defendant was not precluded from pursuing post-conviction relief involving the alleged inadequacy. State v. Gomez, 112 N.M. 313, 815 P.2d 166 (Ct. App. 1991).

Issue of speedy trial does not provide basis for post-conviction relief. Salazar v. State, 85 N.M. 372, 512 P.2d 700 (Ct. App. 1973). See also State v. Padilla, 85 N.M. 140, 509 P.2d 1335 (1973).

Where appellant pleaded guilty to one count of robbery, but was not at that time sentenced because an information was immediately filed charging him with being an habitual offender; and where, following a jury verdict with respect to the habitual offender proceeding, appellant was sentenced to life imprisonment; and where supreme court reversed the habitual conviction, but whereas no issue was raised in that case as to appellant's plea of guilty, the reversal did not grant a new trial as to the plea of guilty, so that thereafter the habitual criminal information was dismissed and the court sentenced appellant to a prison term upon the charge to which he had originally pleaded guilty, appellant's motion for post-conviction relief under Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA) asserting a claimed denial of a speedy trial and sentence because of the delay between the guilty plea and the sentence was completely without merit, where he was promptly sentenced after supreme court's decision in the first case and received full credit for the time he had served under the prior illegal sentence. Dalrymple v. State, 78 N.M. 368, 431 P.2d 746 (1967).

And defendant may waive right to speedy trial. — Regardless of the fact that a delay in a particular case might have been construed to be a deprivation of the right to a speedy trial, the defendant cannot be heard to complain in a motion for post-conviction relief if he consented to or acquiesced in the delay. State v. McCroskey, 79 N.M. 502, 445 P.2d 105 (Ct. App. 1968).

The entry of a voluntary plea of guilty constitutes a waiver of whatever right a defendant may have had to a speedy trial. State v. McCroskey, 79 N.M. 502, 445 P.2d 105 (Ct. App. 1968).

Where joinder of unrelated offenses not sufficient grounds for relief. — As his two offenses were unrelated, defendant asserts that he should have had two separate trials. However, the pleas on the unrelated charges were accepted at the same proceeding and there was no trial as pleas waived trial; therefore, this claim provides no basis for relief. State v. Gorton, 79 N.M. 775, 449 P.2d 791 (Ct. App. 1969).

Nor claims as to jurors. — Appellant's claim that his conviction was illegal because the jurors should have been called and picked, one at a time, and to do otherwise constituted improper impaneling, is frivolous and constitutes no grounds for post-conviction relief. State v. Franklin, 79 N.M. 608, 446 P.2d 883 (1968), cert. denied, 394 U.S. 965, 89 S. Ct. 1318, 22 L. Ed. 2d 566 (1969).

Where defendant contends he was denied trial by an impartial jury because one juror was a personal friend of the prosecutor, but there was no claim that this friendship, if a fact, prejudiced the defendant, the claim does not provide a basis for post-conviction relief. State v. Sharp, 79 N.M. 498, 445 P.2d 101 (Ct. App. 1968).

The mere allegation that persons of a certain nationality were not included among jurors trying the case forms no basis upon which to consider it was the result of such scheme or design as necessary to establish prejudice needed to allow post-conviction relief. State v. Martinez, 79 N.M. 232, 441 P.2d 761 (1968).

Nor failure of state to call witnesses. — Defendant's contention on Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA) motion that in not calling certain witnesses who would have supported defendant's testimony and then in arguing to the jury that the evidence introduced failed to support defendant's testimony, the prosecutor's arguments were misconduct, was without merit where the witnesses, not called at the trial, testified at the post-conviction hearing, but their testimony failed to support defendant's testimony. State v. Hodnett, 82 N.M. 710, 487 P.2d 138 (Ct. App. 1971). See also State v. Hibbs, 79 N.M. 709, 448 P.2d 815 (Ct. App. 1968); State v. Lujan, 79 N.M. 200, 441 P.2d 497 (1968).

Nor use by state of new witnesses at trial. — The trial court found the state used certain witnesses at the trial who had not testified at the preliminary hearing. This fact provides no legal basis for relief. Barela v. State, 81 N.M. 433, 467 P.2d 1005 (Ct. App. 1970). See also Pena v. State, 81 N.M. 331, 466 P.2d 897 (Ct. App. 1970).

Claim concerning credibility of evidence introduced at trial provides no basis for post-conviction relief. State v. Reid, 79 N.M. 213, 441 P.2d 742 (1968).

Claim that the main witness changed his testimony two or three times on the witness stand is an attack on the credibility of the witness and provided no basis for post-conviction relief. Pena v. State, 81 N.M. 331, 466 P.2d 897 (Ct. App. 1970).

Claims concerning the credibility of witnesses and the weight to be given their testimony are matters decided by the jury when they convict defendant, and they provide no basis for post-conviction relief. State v. Tapia, 80 N.M. 477, 457 P.2d 996 (Ct. App. 1969).

Defendant's motion containing a statement to the effect that material testimony at the trial was false, even if the affidavit be true, does not establish a basis for post-conviction relief, as the defendant has not shown, nor does he assert, that the particular testimony was known to be false by the agents of or counsel for the state. State v. Minns, 81 N.M. 428, 467 P.2d 1000 (Ct. App. 1970).

Claim that defendant was convicted on prejudiced testimony states no basis for relief. Andrada v. State, 83 N.M. 393, 492 P.2d 1010 (Ct. App. 1971).

Nor stipulation by counsel. — Where the trial court found that a stipulation, wherein it was agreed that the jury should not be permitted to return a verdict calling for the death penalty, was entered into by counsel for defendant in murder trial as a part of the trial strategy, it should not be made the basis for relief under Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA) since there was no prejudice in appellant having been given a trial free from the risks incident to having the jury consider the possibility of imposing death as the penalty, in the event of a verdict of guilty of murder in the first degree. Smith v. State, 79 N.M. 450, 444 P.2d 961 (1968).

Nor errors committed in overruling objections at trial. — Any error committed in overruling objections made at trial cannot properly be raised in a post-conviction proceeding, under Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA), where they do not constitute violations of the United States or New Mexico Constitutions, and they are not matters which form a basis for a collateral attack upon the judgment of conviction or the sentence as they are evidentiary matters which may be raised only on a direct appeal. State v. Sisneros, 79 N.M. 600, 446 P.2d 875 (1968).

Nor whether defendant tried for proper degree of murder. — Whether defendant was properly tried for first-degree murder rather than voluntary manslaughter is a factual question which the jury resolved by its verdict and presents no grounds for relief. State v. Williams, 78 N.M. 431, 432 P.2d 396 (1967).

Where instructions by court not grounds for relief. — The claimed error as to the failure to properly instruct on right of self-defense cannot be raised on a motion for post-conviction relief. State v. Williams, 80 N.M. 63, 451 P.2d 556 (1969).

"Shotgun" or supplementary instruction given by the court some time after the jury had received the case for its deliberations and had failed to reach a verdict does not establish grounds for relief on fundamental error. State v. Travis, 79 N.M. 307, 442 P.2d 797 (Ct. App. 1968).

Giving of instruction on self-defense that it is for jury to determine from all of the evidence whether the claim of the defendant that he acted in self-defense is made in good faith or is a mere pretense was not fundamental error which could be raised on motion to vacate judgment. State v. Travis, 79 N.M. 307, 442 P.2d 797 (Ct. App. 1968).

Entrapment does not state basis for post-conviction relief after a trial. State v. Dominguez, 80 N.M. 328, 455 P.2d 194 (Ct. App. 1969); State v. Apodaca, 78 N.M. 412, 432 P.2d 256 (1967); State v. Simien, 78 N.M. 709, 437 P.2d 708 (1968).

Although the supreme court has recognized entrapment as a defense, it clearly pertains to the merits of the cause, it is to be determined at trial and it is subject to review on appeal. A claim of entrapment does not state a basis for post-conviction relief under Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA). State v. Losolla, 79 N.M. 296, 442 P.2d 786 (1968).

Where defendant's allegations of conspiracy and entrapment were found by trial court to be unsupported by the record and in conflict with it and that there were no facts on which entrapment could be based, conspiracy and entrapment claims did not state a basis for post-conviction relief. State v. Dominguez, 80 N.M. 328, 455 P.2d 194 (Ct. App. 1969).

Sufficiency of evidence does not provide basis for post-conviction relief. Woods v. State, 84 N.M. 248, 501 P.2d 692 (Ct. App. 1972); State v. Gray, 80 N.M. 751, 461 P.2d 233 (Ct. App. 1969); Herring v. State, 81 N.M. 21, 462 P.2d 468 (Ct. App. 1969); State v. Jacoby, 82 N.M. 447, 483 P.2d 502 (Ct. App. 1971); Andrada v. State, 83 N.M. 393, 492 P.2d 1010 (Ct. App. 1971).

Where defendant raises the question of substantial evidence to support the jury's determination of sane at the time of the alleged crime and at the time of trial, defendant's claim is without merit because insufficiency of the evidence is not a basis for granting post-conviction relief. Faulkner v. State, 83 N.M. 742, 497 P.2d 744 (Ct. App. 1972).

The claim that defendant did not commit aggravated battery because his victim was not permanently disfigured goes to the sufficiency of the evidence for conviction and is not cognizable in a proceeding under Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA). State v. Hibbs, 82 N.M. 722, 487 P.2d 150 (Ct. App. 1971).

Question of whether there was substantial evidence to support the verdict of guilty of armed robbery which was affirmed on appeal, could not be raised on a motion under

Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA). Nance v. State, 80 N.M. 123, 452 P.2d 192 (Ct. App. 1969).

Allegations as to the insufficiency of the evidence, or claimed errors which may have occurred during trial pertaining to the introduction or failure of introduction of certain evidence, are not matters upon which relief can be granted in a proceeding under Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA). State v. Sedillo, 79 N.M. 254, 442 P.2d 212 (Ct. App. 1968).

But fundamental error deemed sufficient for relief. — Where there is a total absence of evidence to support a conviction as well as evidence of an exculpatory nature, there is a duty to apply the doctrine of fundamental error and to reverse the trial court conviction on a post-conviction motion. State v. Salazar, 78 N.M. 329, 431 P.2d 62 (1967).

Scope of fundamental error. — Error that is fundamental must be such error as goes to the foundation or basis of a defendant's rights or must go to the foundation of the case or take from the defendant a right which was essential to his defense and no court could or ought to permit the defendant to waive this right, and in determining whether fundamental error exists, each case must stand on its own. State v. Gillihan, 85 N.M. 514, 514 P.2d 33 (1973); State v. Garcia, 46 N.M. 302, 128 P.2d 459 (1942).

However, doctrine of fundamental error seldom used. — Insufficiency of the evidence of a degree amounting to fundamental error is resorted to only under exceptional circumstances and is applied as a means of preventing a miscarriage of justice. State v. Jacoby, 82 N.M. 447, 483 P.2d 502 (Ct. App. 1971).

Where the innocence of defendant does not appear indisputable, or that the question of his guilt is so doubtful that it would shock the conscience to permit his conviction to stand, the doctrine of fundamental error cannot properly be invoked and applied. State v. Sisneros, 79 N.M. 600, 446 P.2d 875 (1968).

And relief provided where defendant denied constitutional right. — Comment by the prosecution which calls attention to defendant's failure to testify violates the accused's privilege against self-incrimination and when certain constitutional guaranties are denied, overlooked or omitted, the conviction or sentence is not by a "competent" court. This lack of or loss of jurisdiction by the court imposing sentence renders such judgment and sentence subject to collateral attack and sentences subject to collateral attack may be questioned by post-conviction proceedings. State v. Buchanan, 78 N.M. 588, 435 P.2d 207 (1967).

D. POST-TRIAL MATTERS.

This rule supersedes any conflicting provisions found in 31-11-6 NMSA 1978, thus no appeal may be taken from a trial court's denial of a post-conviction motion. State v. Garcia, 101 N.M. 232, 680 P.2d 613 (Ct. App. 1984).

Nonuniform enforcement of laws not basis for relief. — The statute under which appellant was sentenced applies equally to members of a given class. The fact that the statute may not be enforced diligently, does not give rise to a right which would amount to denial of equal protection and does not provide a basis for post-conviction relief. In other words, equal protection does not entail uniform enforcement. State v. Baldonado, 79 N.M. 175, 441 P.2d 215 (Ct. App. 1968).

Citizens are entitled to equal protection of the law but citizens are not entitled to equal protection from the law. The fact that not all criminals are prosecuted is no valid defense to the one prosecuted and cannot provide a basis for post-conviction relief. State v. Baldonado, 79 N.M. 175, 441 P.2d 215 (Ct. App. 1968).

Where interference with stay of execution of sentence not grounds for relief. — Where defendant's authorized stay of execution of sentence did not exceed 90 days, any district attorney's "interference" subsequent to the 90-day period would not be a basis for post-conviction relief because defendant was not legally authorized to be out of the penitentiary after the 90 days expired. State v. Deats, 83 N.M. 154, 489 P.2d 662 (Ct. App. 1971).

Imposition of sentence authorized by law provides no basis for relief. State v. Hall, 83 N.M. 764, 497 P.2d 975 (Ct. App. 1972); State v. McCain, 79 N.M. 197, 441 P.2d 237 (Ct. App. 1968); Hernandez v. State, 81 N.M. 634, 471 P.2d 204 (Ct. App. 1970); State v. Follis, 81 N.M. 690, 472 P.2d 655 (Ct. App. 1970).

Nor alleged inequality in sentences. — Alleged inequality in sentences for the same offense, if true, does not provide a basis for post-conviction relief. The "equal protection of the law" provisions of the United States and New Mexico Constitutions do not require uniform enforcement of the law and do not protect defendant from the consequences of his crime. State v. Sharp, 79 N.M. 498, 445 P.2d 101 (Ct. App. 1968).

And where defendant's absence not grounds for relief. — Appellant argues that the fact that he was not present at the time the district court vacated a portion of its sentence pursuant to our mandate justifies his motion for post-conviction relief; however, as the district court merely eliminated the erroneous portion of the sentence, and the mandate under which appellant is now serving was issued by this court, there was no need for a hearing at all as the trial court merely corrected the record and did not resentence appellant. State v. Lujan, 79 N.M. 200, 441 P.2d 497 (1968).

And as to awareness of possible sentences. — Ordinarily an accused should be advised of the maximum possible sentence and the minimum mandatory sentence which can be imposed. This the court did. Although it is true that the court did not expressly state what were the maximum and mandatory minimum sentences which could be imposed, and that the court's statement as to what the sentence would be was not made until after defendant had announced his plea of guilty, but it was made as a part of the arraignment proceedings and before the entry of the judgment of conviction. It is therefore apparent from the record that defendant understood the consequences of

a guilty plea, and understood what sentence could and would be imposed and his motion for post-conviction relief must be denied. State v. Knerr, 79 N.M. 133, 440 P.2d 808 (Ct. App. 1968).

Where defendant argues that he is entitled to have the judgment of conviction and sentence vacated because the trial judge failed to advise him of the sentence which might be imposed, he must fail in this contention for at least two reasons: first, this question was not presented to the trial court, and, therefore, cannot be raised on appeal; second, the record shows that in a trial court colloquy, defendant's attorney referred to the sentence of three to 25 years, and shortly thereafter the court announced this is what the sentence would be. It was not until 10 years later that defendant first claimed a lack of understanding as to the length of time he could be confined under the sentence which could be and was imposed. State v. Knerr, 79 N.M. 133, 440 P.2d 808 (Ct. App. 1968).

But when sentence deemed void. — Where a court informs a defendant prior to accepting his plea that a certain number of years is the maximum sentence, this must in fact be the maximum, and resentencing imposing an increased sentence is void upon a post-conviction. Williams v. State, 81 N.M. 605, 471 P.2d 175 (1970).

Forfeiture of good-time credits. — *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), should not be read as holding or implying that district courts should never analyze whether a forfeiture or termination of good-time credits has been carried out so as to violate an inmate's right to due process. If a petition demonstrates on its face that a forfeiture or termination has been imposed in a manner that departs from or circumvents the statutory and administrative procedures prescribing how such a forfeiture or termination should be effected, the petition may be alleging a deprivation of the petitioner's right to due process that should be addressed by the court; when presented with such a petition the trial court must hold an evidentiary hearing to verify or discredit the petitioner's factual allegations, unless it plainly appears that the petitioner is not entitled to relief as a matter of law, based on: (1) the facts alleged in the petition, including any attachments thereto, or (2) the uncontroverted facts shown by either the court record or the respondent's response to the petition. Brooks v. Shanks, 118 N.M. 716, 885 P.2d 637 (1994).

Where deviation from statutory procedures not grounds for relief. — Where, at the time defendant's suspended sentence was revoked, the statutory procedure was not followed, but the record shows that counsel was present with defendant at the time of the revocation, that neither the defendant nor his counsel had any objections to the procedure that was in fact followed and defendant, in response to the court's question, stated that he did not desire further hearing on the motion to revoke the suspended sentence, this is a claim concerning the conduct of the proceeding and how it was managed and it does not set forth a basis for relief. State v. Raines, 78 N.M. 579, 434 P.2d 698 (Ct. App. 1967).

Nor error in remanding cause to trial court. — A claim that the supreme court committed error in remanding this cause to the trial court for a determination of indigency does not state a basis for relief under Rule 93, R. Civ. P. (Dist. Cts.) (now Rule 1-093 NMRA), as these post-conviction proceedings are not intended as a substitute for a motion for rehearing or reconsideration of a decision or order of an appellate court, nor are they intended as a substitute for an appeal from a judgment or decision of a court exercising appellate jurisdiction. Anaya v. State, 79 N.M. 755, 449 P.2d 663 (Ct. App. 1968).

Nor denial of medical treatment. — The cruelty against which the constitution protects a convicted man is cruelty inherent in the method of punishment. Defendant's claim of denial of medical treatment does not provide a basis for relief. State v. Blankenship, 79 N.M. 178, 441 P.2d 218 (Ct. App. 1968).

Nor misconduct of district attorney after conviction. — Contention that the district attorney may have been partially responsible for the divorce obtained by defendant's husband since her conviction and imprisonment has no merit as a basis for relief. State v. Knight, 78 N.M. 482, 432 P.2d 838 (1967).

Nor questionable arrangement between informer and police. — The question of the legal effect of the arrangement between the informer and the police could not be raised as an issue in the post-conviction proceeding. Nieto v. State, 79 N.M. 330, 443 P.2d 500 (Ct. App. 1968).

Motion cannot be employed to question action of warden of the state penitentiary or his interpretation of the judgment, commitment or applicable statute under Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA). State v. Walburt, 78 N.M. 605, 435 P.2d 435 (1967).

E. RIGHT TO COUNSEL; OTHER RIGHTS.

Motion under rule preferred procedure. — A defendant may raise the issue of ineffective assistance of counsel by motion under this rule; in fact, motions under this rule appear to be the preferred procedure for addressing such issues. State v. Jordan, 116 N.M. 76, 860 P.2d 206 (Ct. App. 1993).

Aggrieved defendant may petition supreme court. — This rule allows a defendant to raise issues that are not of record on direct appeal, such as ineffective assistance of counsel; while the trial court's decisions on such matters are not appealable, an aggrieved defendant may petition the supreme court for certiorari from the denial of the motion under this rule. State v. Jordan, 116 N.M. 76, 860 P.2d 206 (Ct. App. 1993).

Where denial of effective counsel entitles petitioner to relief. — An appellant is denied effective assistance of counsel and entitled to post-conviction relief only where the trial is considered a mockery of justice, a sham or a farce. State v. Gillihan, 85 N.M. 514, 514 P.2d 33 (1973).

Court appointed counsel has a duty to represent his client until relieved and if a defendant requests counsel to appeal and counsel refuses to do so, this is state action entitling a defendant to post-conviction relief. Maimona v. State, 82 N.M. 281, 480 P.2d 171 (Ct. App. 1971); Barela v. State, 81 N.M. 433, 467 P.2d 1005 (Ct. App. 1970).

Former criminal judgment may be collaterally attacked on denial of counsel grounds by a motion under Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA). State v. Hardy, 78 N.M. 374, 431 P.2d 752 (1967).

But counsel's trial tactics not grounds for relief. — Counsel's decision not to allow defendant to testify, to call witnesses or to seek a change of venue are trial tactics and not the basis for relief. State v. Gillihan, 85 N.M. 514, 514 P.2d 33 (1973).

Claim that counsel did not adequately cross-examine witnesses for the state provides no basis for relief. Barela v. State, 81 N.M. 433, 467 P.2d 1005 (Ct. App. 1970).

The petitioner is not entitled to post-conviction relief on the grounds that the result might have been different if different trial tactics and strategy had been employed. An attorney of record has the exclusive power and control with respect to procedural and remedial matters over the litigation with which he is charged. State v. Ramirez, 81 N.M. 150, 464 P.2d 569 (Ct. App. 1970).

Where defendant's counsel refused to contest the juror who allegedly was the prosecutor's friend, and when objecting, failed to inform the court as to the basis of his objection, these are claims as to counsel's conduct of the trial, and they are not claims that defendant's trial was a sham or mockery of justice. These claims do not provide a basis for post-conviction relief. State v. Sharp, 79 N.M. 498, 445 P.2d 101 (Ct. App. 1968).

Nor failure to advise of all possible defenses. — The failure of an attorney to advise a defendant of all possible defenses is no basis for post-conviction claim of incompetency of counsel. Burton v. State, 82 N.M. 328, 481 P.2d 407 (1971).

Nor joint representation of defendants. — Joint representation of defendants is not inherent error; it is error only if there was a conflict of interest or if prejudice resulted. Patterson v. State, 81 N.M. 210, 465 P.2d 93 (Ct. App. 1970).

Where defendant and codefendant were tried jointly and convicted for murder, defendant's assertion on motion for post-conviction relief that he was denied effective counsel on basis of conflict between interests of the two defendants due to fact that codefendant did the actual killing while defendant was convicted of aiding and abetting, and due to variations in their confessions concerning details of the crime, was without merit where trial court's unattacked finding was that confessions were consistent with one another, and that information concerning defendant in the confession of codefendant was cumulative only, and did not prejudice defendant. Patterson v. State, 81 N.M. 210, 465 P.2d 93 (Ct. App. 1970).

Nor advice to plead guilty. — The fact that his counsel advised defendant to plead guilty did not establish incompetence and did not provide a basis for post-conviction relief. State v. Montoya, 81 N.M. 233, 465 P.2d 290 (Ct. App. 1970).

The bare fact that counsel advised appellant to plead guilty to one count rather than to risk the consequences of conviction of other charges does not indicate ineffectual representation by counsel nor provide a basis for post-conviction relief. The plea by the appellant may well have been most beneficial to him. State v. Pavlich, 80 N.M. 747, 461 P.2d 229 (1969).

Nor advice to defendant to testify. — Advice to testify does not raise an issue as to whether the proceedings were a sham or mockery and provides no basis for post-conviction relief. Barela v. State, 81 N.M. 433, 467 P.2d 1005 (Ct. App. 1970).

Nor shortness of time spent with defendant. — The amount of time counsel spent with defendant prior to the hearing provides no basis for post-conviction relief as the competence and effectiveness of counsel cannot be determined by the amount of time counsel spent or failed to spend with defendant. Maimona v. State, 82 N.M. 281, 480 P.2d 171 (Ct. App. 1971).

If it is being suggested that, by reason of the limited time within which to confer with counsel, the defendant was thereby denied the effective assistance of counsel, entitling him to post-conviction relief, he must fail in this suggestion; first, because of his voluntary plea of guilty to the charge, and second, because the competence and effectiveness of counsel cannot be determined by the amount of time counsel spent or failed to spend with defendant. State v. Knerr, 79 N.M. 133, 440 P.2d 808 (Ct. App. 1968).

The competence of court-appointed counsel at probation revocation hearings could not be determined by the amount of time he spent or failed to spend with the accused. Such an allegation, therefore, did not constitute grounds upon which relief could be granted under Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA). The failure of an attorney to confer with his client, without more, could not establish the incompetence of that attorney. State v. Brusenhan, 78 N.M. 764, 438 P.2d 174 (Ct. App. 1968).

Nor failure to give certain advice. — Defendant's post-conviction claim that he was denied adequate counsel because his attorney had failed to advise him that the judge who resentenced him could be precluded from sitting, since that judge had been district attorney at original criminal proceedings, was without merit where defendant was aware that the judge had been prosecuting attorney, had been so informed by both the judge and his attorneys, and had specifically consented to the judge. State v. French, 82 N.M. 209, 478 P.2d 537 (1970).

That counsel did not advise defendant he could appeal as an indigent provides no basis for relief. Barela v. State, 81 N.M. 433, 467 P.2d 1005 (Ct. App. 1970).

Defendant's bare claim that counsel did not advise him that he could appeal, in the absence of any other showing, does not set forth a basis for post-conviction relief. Chavez v. State, 80 N.M. 560, 458 P.2d 812 (Ct. App. 1969).

Nor inexperience of counsel. — Where defendant's counsel admitted that he was inexperienced in criminal practice to the extent that he could not competently represent this petitioner; this general claim, not being supported by specific factual allegation, does not provide a basis for post-conviction relief. State v. Sharp, 79 N.M. 498, 445 P.2d 101 (Ct. App. 1968).

Nor assertion of pro forma representation. — The mere assertion that attorney was "pro forma rather than zealous and active" provides no basis for relief. State v. Gonzales, 80 N.M. 168, 452 P.2d 696 (Ct. App. 1969).

Nor denial of request for change of attorney. — The claim that defendant's request for a change of attorney was denied, in itself, was insufficient to support motion for post-conviction relief. State v. Hibbs, 82 N.M. 722, 487 P.2d 150 (Ct. App. 1971).

Nor dissatisfaction with results of counsel. — Dissatisfaction with the results obtained through the efforts of attorney does not provide a basis for post-conviction relief. State v. Apodaca, 78 N.M. 412, 432 P.2d 256 (1967).

Complaint concerning inadequacy of representation by counsel furnishes no basis for relief. State v. Lobb, 78 N.M. 735, 437 P.2d 1004 (1968).

And defendants must cooperate with counsel. — Where defendants refused to cooperate with appointed counsel they cannot now complain about the consequences of their actions and, therefore, their motion for post-conviction relief was appropriately denied. Bobrick v. State, 83 N.M. 657, 495 P.2d 1104 (Ct. App. 1972).

Burden of showing incompetency of counsel is on appellant. Smith v. Ninth Judicial Dist., 78 N.M. 449, 432 P.2d 414 (1967).

And defendant's burden. — Absent infidelity on the part of his attorney, a defendant should not be permitted to urge the ignorance or incompetence of, or mismanagement by, his attorney as a ground for a new trial, unless there be a strong showing of both incompetence and prejudice. State v. Gibby, 78 N.M. 414, 432 P.2d 258 (1967).

Where alleged mixed allegiance of counsel not grounds for relief. — Defendant's claim that he was entitled to a new trial as a matter of law because, when he was tried, his former defense attorney was an employee of the district attorney's office which prosecuted the case did not provide a basis for relief, where an appearance of unfairness was dissipated by an evidentiary hearing which showed that the attorney in question had nothing to do with the trial of defendant's case, never entered the courtroom when the case was tried, never talked or consulted with the prosecutor and

lent no assistance in the prosecution. State v. Mata, 88 N.M. 560, 543 P.2d 1188 (Ct. App. 1975).

And when lack of counsel not grounds for relief. — Motion for post-conviction relief was properly denied because it stated no basis for post-conviction relief as defendant's claim that he was not furnished counsel at the juvenile transfer proceeding, nor advised of any right to counsel in that proceeding, was invalid as such a right can be, and here was, waived. State v. Gallegos, 82 N.M. 618, 485 P.2d 374 (Ct. App.), cert. denied, 82 N.M. 601, 485 P.2d 357 (1971).

Where defendant was given a hearing to ascertain if his confession was in fact involuntary on his Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA) motion and the trial court found the statement or confession was voluntary, the fact that he was not furnished counsel prior to giving the statement is not a basis for setting aside his conviction. Burton v. State, 82 N.M. 328, 481 P.2d 407 (1971).

Where both the justice of the peace (magistrate) and the district court advised defendant that, if indigent, counsel would be appointed to represent him and defendant affirmatively waived counsel in both courts and the district court questioned defendant extensively as to his understanding of the charges, the penalties if convicted, his various rights including the right to counsel, to a jury trial and to an appeal if found guilty, defendant's motion for post-conviction relief on the grounds of lack of counsel was denied as defendant effectively waived his right to counsel. State v. Martin, 80 N.M. 531, 458 P.2d 606 (Ct. App. 1969).

As defendant was financially able to procure counsel and he was informed at the time of arraignment of his right to counsel in his defense, and, further, that counsel would not be appointed for him, his appearance pro se does not present grounds to overturn his conviction on a post-conviction motion. Anaya v. State, 79 N.M. 755, 449 P.2d 663 (Ct. App. 1968).

Where petitioners were neither advised of their right to counsel nor given counsel during the juvenile proceedings, but counsel was appointed to represent them in the district court, and did represent them at a preliminary hearing and at their arraignment in the district court where, with the advice of counsel, they each entered pleas of guilty to murder in the second degree and no objection was then made concerning the failure to provide counsel at the juvenile waiver hearing, the entry of a plea at the arraignment in the district court, with the advice of counsel and without objection to the failure to provide counsel at the juvenile hearing, constitutes an effective waiver of the right to counsel at such juvenile proceeding and provides no basis for post-conviction relief. State v. Salazar, 79 N.M. 592, 446 P.2d 644 (1968).

The supreme court has repeatedly held that the right to have a preliminary hearing may be and is waived upon entry of a plea in the district court. And, as the preliminary hearing can be thus waived, the right to counsel at the preliminary hearing can likewise

be waived, when competently and intelligently done, and so the defendant has stated no basis for post-conviction relief. State v. Sanders, 79 N.M. 587, 446 P.2d 639 (1968).

Where defendant upon being brought before the magistrate, was advised of his right to counsel and he then expressly waived such right and likewise waived preliminary hearing, defendant cannot later assert a right to post-conviction relief in this proceeding on the ground that counsel was not provided for him. State v. Baumgardner, 79 N.M. 341, 443 P.2d 511 (Ct. App. 1968).

Absent a showing of prejudice, plea of guilty constituted a waiver of the claim that defendant was denied counsel in proceedings prior to arraignment and the defendant is not entitled to post-conviction relief. State v. McCormick, 79 N.M. 22, 439 P.2d 239 (1968).

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).

In case where sentencing court repeatedly cautioned appellant concerning gravity of habitual criminal charge, and where appellant's answers to questions by the court were by his own admission voluntarily given and where each of the prior convictions was freely acknowledged, the waiver of counsel was intelligently made, the appellant was not deprived of due process and, therefore, the district court's denial of the motion to vacate sentence made under Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA) was correct. State v. Coates, 78 N.M. 366, 431 P.2d 744 (1967).

Rules applicable for overcoming waiver where a plea of guilty is entered were announced in Moore v. Michigan, 355 U.S. 155, 78 S. Ct. 191, 2 L. Ed. 2d 167 (1957), where it was held that petitioner had the burden of showing by a preponderance of the evidence that he did not intelligently and understandably waive his right to counsel and a finding of waiver is not lightly to be made. State v. Lopez, 79 N.M. 235, 441 P.2d 764 (1968).

No hard and fast rule can be laid down as to what must be stated in each case in order to adequately explain a prisoner's rights before permitting him to waive counsel. Each case must be decided on its own peculiar facts which shall include consideration of the background, education, training, experience and conduct of the defendant and should proceed as long and as thoroughly as the circumstances demand. State v. Lopez, 79 N.M. 235, 441 P.2d 764 (1968).

And when lack of advice as to rights not grounds for relief. — The lack of advice as to petitioner's rights, without a showing of prejudice, provides no basis for post-conviction relief. Hernandez v. State, 81 N.M. 634, 471 P.2d 204 (Ct. App. 1970).

Where defendant's assertions that he was not advised of his right to remain silent; that he was at no time afforded counsel; that he signed a statement without assistance of

counsel; and that the district attorney's office advised him as to what to do when he entered his plea were not sustained by the record, the claims stated no basis for relief. State v. King, 82 N.M. 200, 477 P.2d 1015 (Ct. App. 1970).

Claims that accused was not advised of his rights when arrested, that he was interrogated without having the assistance of counsel, that he did not have counsel at his preliminary hearing and that no attorney was appointed to represent him until weeks after the preliminary hearing provided no basis for post-conviction relief because there was no contention that accused was in any way prejudiced by the lack of advice as to his constitutional rights, by the absence of counsel or the delay in appointment of counsel. Pena v. State, 81 N.M. 331, 466 P.2d 897 (Ct. App. 1970).

Whether defendant had been advised prior to making the statement or confession of his right to remain silent and of his right to counsel were issues of fact submitted to the trial court upon defendant's motion to suppress the statement. The same issues were again submitted to the jury at the trial upon the indictment. Defendant is not entitled to a retrial of these issues of fact in a post-conviction proceeding. State v. Gray, 80 N.M. 751, 461 P.2d 233 (Ct. App. 1969).

Mere failure of police to advise accused of his rights to counsel and to remain silent, without any showing of prejudice, constitutes no basis for relief under Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA). State v. Bryant, 79 N.M. 620, 447 P.2d 281 (Ct. App.), cert. denied, 79 N.M. 688, 448 P.2d 489 (1968).

As claim must show prejudice to defendant. — As defendant does not claim that he was prejudiced by the alleged failure to advise him of his right to counsel, his claim is only that such advice was not given; this, therefore, provides no basis for relief. State v. Gorton, 79 N.M. 775, 449 P.2d 791 (Ct. App. 1969).

And guilty plea may bar hearing on denial of rights. — Defendant, who voluntarily pleaded guilty, was not entitled to a post-conviction hearing under Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA), for the purpose of determining whether or not the state obtained evidence, which warranted the filing of the complaint, as a result of a claimed questioning of him contrary to his constitutional rights to remain silent and to the aid of counsel. State v. Brewster, 78 N.M. 760, 438 P.2d 170 (1968).

III. DELAYED OR SUCCESSIVE MOTIONS AND DIRECT APPEAL ISSUES.

A. IN GENERAL.

The doctrine of laches does not apply in habeas corpus. State v. Sutphin, 2007-NMSC-045, 142 N.M. 191, 164 P.3d 72.

Per se fundamental error. — It is per se fundamental error for aggravated battery to be used as an alternative predicate for felony murder and a habeas corpus petitioner

may assert the error even if the issue could have been raised on appeal. Campos v. Bravo, 2007-NMSC-021, 141 N.M. 801, 161 P.3d 846.

Denial of motion not ban to subsequent motions. — Objection to the request for amendment of a Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA) motion was based on untimeliness and because the state was not prepared to meet the matters sought to be raised. The trial court's denial of the motion was without prejudice to the filing of a subsequent motion asserting the same grounds. Appellant is not foreclosed from filing a new motion based on matters he sought to include by way of amendment. State v. Hodnett, 79 N.M. 761, 449 P.2d 669 (Ct. App. 1968).

B. GROUNDS COULD HAVE BEEN RAISED ON APPEAL.

A habeas corpus petitioner may assert fundamental error even if the claim could have been raised on appeal. State v. Sutphin, 2007-NMSC-045, 142 N.M. 191, 164 P.3d 72.

No review of issues not raised on appeal. — Defendant may not obtain review in a post-conviction proceeding of issues that could have been raised on appeal. State v. Martinez, 85 N.M. 293, 511 P.2d 779 (Ct. App. 1973).

Post-conviction proceedings are not a method of obtaining consideration of questions which might have been raised on appeal, and as defendant did not raise these issues on his direct appeal, he may not properly raise them in post-conviction proceedings. State v. Lee, 83 N.M. 655, 495 P.2d 1102 (Ct. App. 1972). See also, State v. Sedillo, 84 N.M. 293, 502 P.2d 318 (Ct. App. 1972).

Defendant may not raise claims for first time in motion for post-conviction relief. State v. Sharp, 79 N.M. 498, 445 P.2d 101 (Ct. App. 1968).

And no relief given. — Relief predicated upon Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA) cannot be obtained upon grounds which could have been, but were not, raised on direct appeal. State v. Gillihan, 86 N.M. 439, 524 P.2d 1335 (1974).

Case is affirmed where the matters urged for reversal are ones which have already been decided or should have been submitted to the court of appeals on the original appeal. State v. Manlove, 85 N.M. 438, 512 P.2d 1274 (Ct. App. 1973).

Even where constitutional rights involved. — Where defendant did not appeal from his original conviction, and is later seeking release from prison under Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA), his contention that he was denied his constitutional right to a fair and impartial trial due to the remarks and actions of the trial judge in connection with prospective and excused jurors on the issue of impartiality is without merit because this issue should have been raised on appeal following the original trial and is not a proper subject for an appeal under Rule 93, R. Civ. P. (Dist.

Cts.) (former Rule 1-093 NMRA). State v. Hall, 83 N.M. 764, 497 P.2d 975 (Ct. App. 1972).

Or error in preliminary hearing. — The question of error in a preliminary hearing is foreclosed by failure to take an appeal from original conviction. State v. Anderson, 84 N.M. 786, 508 P.2d 1019 (Ct. App. 1973).

Or errors at trial. — Proceedings under Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA) are not intended as a substitute for an appeal as a means for correcting errors which may have occurred during the course of the trial, and neither is a post-conviction proceeding a method by which one can obtain consideration of questions which might have been raised on appeal. State v. Beachum, 83 N.M. 526, 494 P.2d 188 (Ct. App. 1972).

Or sufficiency of evidence questioned. — Even if defendant had been found guilty after a trial, post-conviction proceedings are not a method for obtaining a retrial of his case, and thus, insufficiency of the evidence is not a basis for granting post-conviction relief. State v. Bonney, 82 N.M. 508, 484 P.2d 350 (Ct. App. 1971).

Where defendant's contention that there was no substantial evidence upon which the verdict of the jury could be based was not raised in the original appeal, it could not be considered on motion for post-conviction relief under Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA), since ordinarily such proceedings could not be used as a substitute for an appeal. State v. Clark, 84 N.M. 150, 500 P.2d 435 (Ct. App. 1972).

Defendant's claim that the district attorney's action in changing charges indicated that he had no case against defendant could only be construed as an allegation of lack of substantial evidence to sustain his conviction. Such allegation, even if proven, would suggest error that could be remedied on direct review and not in a post-conviction proceeding. A post-conviction proceeding was neither a substitute for an appeal nor a method by which to obtain consideration of questions which might have been raised on appeal. State v. Sanchez, 80 N.M. 688, 459 P.2d 850 (Ct. App. 1969).

Or voluntariness of defendant's statement. — At the trial it was determined that defendant's statement was freely and voluntarily made. If this determination was in error, it could have been corrected on direct review. Defendant's direct appeal was dismissed at his own request. A post-conviction proceeding is not a method of obtaining a retrial of the case or a consideration of questions which might have been raised on appeal. State v. Reid, 79 N.M. 213, 441 P.2d 742 (1968).

Or knowledge of right to appeal. — Where defendant's motion for post-conviction relief claimed that the record was silent as to whether he was advised of his right to appeal, that he did not waive the right to be represented by counsel on appeal and that he did not waive the right to appeal, none of the claims made in the motion amounted to an assertion that defendant ever asked for or even desired an appeal. Therefore post-conviction relief was not afforded because an appeal was not taken, and there was no

denial of such right by the state. State v. Montoya, 81 N.M. 233, 465 P.2d 290 (Ct. App. 1970).

Or legality of detention and escape. — Neither the assertion that he was illegally detained nor the claim that at the time of the alleged escape he was not guarded and assumed he could go home, presents a proper issue for post-conviction relief. These are matters for consideration on appeal. Proceedings under Rule 93, N.M.R. Civ. P. (former Rule 1-093 NMRA) are not a substitute for appeal. State v. Martinez, 79 N.M. 232, 441 P.2d 761 (1968).

While new evidence not to be asserted. — Petitioner's claim in a fifth post-conviction motion that his daughters were physically absent and had never been in the state prior to and including the dates of the incest offenses of which he was convicted, along with a claim of ineffective assistance of counsel based on the alleged facts regarding the daughters' absence, were matters which could have been raised on direct appeal, and not being claims of fundamental error, did not state a basis for post-conviction relief. Cisneros v. State, 88 N.M. 368, 540 P.2d 848 (Ct. App. 1975).

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).

And settled issues not to be relitigated. — Where the record shows that the issue of seizure of the item was raised and ruled on against defendant at his 1958 trial, defendant cannot relitigate that issue in a post-conviction proceeding. Salazar v. State, 82 N.M. 630, 485 P.2d 741 (Ct. App. 1971).

But relief available if fundamental deprivation of fairness. — Post-conviction relief is available, regardless of whether the issue could have been raised on direct appeal, if the defendant has been fundamentally deprived of a fair trial. State v. Hall, 83 N.M. 764, 497 P.2d 975 (Ct. App. 1972); State v. Williams, 80 N.M. 63, 451 P.2d 556 (1969).

Ordinarily post-conviction proceedings are not intended to be utilized as a substitute for appeal as a means of correcting error occurring during the course of trial even though the errors relate to constitutional rights. It is only where there has been a denial of the substance of fair trial that the validity of the proceeding may be attacked collaterally. State v. Garcia, 80 N.M. 21, 450 P.2d 621 (1969).

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).

And right to appeal not affected by motion. — The fact that defendant filed a Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA) motion does not affect his right to a direct appeal. State v. Reyes, 79 N.M. 632, 447 P.2d 512 (1968).

C. PREVIOUS CONSIDERATION ON APPEAL OR HABEAS CORPUS.

No reconsideration of matters already appealed. — A Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA) motion may not be used to reconsider matters previously considered on appeal. State v. Clark, 84 N.M. 150, 500 P.2d 435 (Ct. App. 1972).

Defendant may not properly convert a proceeding under Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA) into another review of matters previously considered on appeal. Miller v. State, 82 N.M. 68, 475 P.2d 462 (Ct. App. 1970).

Issues considered and found without merit on appeal may not be relitigated in post-conviction proceeding. Patterson v. State, 81 N.M. 210, 465 P.2d 93 (Ct. App. 1970); Herring v. State, 81 N.M. 21, 462 P.2d 468 (Ct. App. 1969).

Where no new facts or law. — Where defendant does not claim, allege or argue the discovery of new facts or the pronouncement of new law, issues raised and decided on a prior appeal may not be relitigated in post-conviction proceedings. Nance v. State, 80 N.M. 123, 452 P.2d 192 (Ct. App. 1969).

And not method to obtain retrial of case. — A Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA) motion may not be used to reconsider matters considered on appeal, nor a method of obtaining a retrial of a case or considerations of questions which would have been raised on appeal. State v. Blackwell, 79 N.M. 230, 441 P.2d 759 (1968).

Even if cognizable issue. — Even if the sufficiency of the evidence is a cognizable issue in post-conviction proceedings, it cannot be relitigated after having been previously decided on appeal. Woods v. State, 84 N.M. 248, 501 P.2d 692 (Ct. App. 1972).

But review proper if change in law governing error. — The trial court's denial of defendant's post-conviction motion on the ground that the issue of the denial of the grand jury minutes had been considered on the prior appeal is in error since although Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA) is not intended to allow collateral review of claimed error which has already been raised and decided on direct appeal, in cases where there has been a change in the law governing the error, such a review is proper. Valles v. State, 90 N.M. 347, 563 P.2d 610 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

And no hearing on matters decided adversely in habeas corpus proceeding. — The defendant is not entitled to a successive determination on the merits of contentions previously held against him in the habeas corpus proceeding. State v. Sisneros, 79 N.M. 600, 446 P.2d 875 (1968).

Where petitioner unsuccessfully sought relief through habeas corpus in this court on the same grounds advanced in the court below, although not res judicata, he is not entitled

to again seek relief on the identical grounds as a matter of right. State v. Sisk, 79 N.M. 167, 441 P.2d 207 (1968).

When grounds substantially similar. — Where defendant filed a motion to vacate judgment and sentence, pursuant to Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA), alleging substantially the same grounds as contained in denied habeas corpus petition, the trial court order denying the motion was correct. State v. Thompson, 80 N.M. 134, 452 P.2d 468 (1969).

Or no new grounds raised. — Motion to vacate sentence, which raised no new grounds for relief not raised in previous habeas corpus proceeding, was properly found to be repetitious, even though transcript of habeas corpus proceeding was never admitted into evidence. Lott v. State, 77 N.M. 612, 426 P.2d 588 (1967).

D. GROUNDS NOT RAISED BEFORE APPEAL OR MOTION.

Hearing on claims denied unless raised at trial. — Claim that the trial record is not truthful, based on defendant's view of his trial and his view as to what witnesses knew and testified about, was not raised before the trial court, and would not be considered for the first time in post-conviction proceeding. State v. Hibbs, 82 N.M. 722, 487 P.2d 150 (Ct. App. 1971).

The claim of an illegal search and the claim that pictures of the room where the crime occurred were illegally obtained were insufficient where the circumstance of the alleged illegal search and seizure was known to defendant at trial and should have been raised there rather than on motion for post-conviction relief. State v. Hibbs, 82 N.M. 722, 487 P.2d 150 (Ct. App. 1971).

The admissibility of illegally obtained evidence is not an issue reviewable under this rule, if the circumstances of the search and seizure were fully known to defendant at the time of trial. State v. Rodriguez, 83 N.M. 180, 489 P.2d 1178 (1971).

Or prior to trial. — A claimed lack of a speedy trial does not provide a basis for post-conviction relief where the claim was not raised prior to trial. Patterson v. State, 81 N.M. 210, 465 P.2d 93 (Ct. App. 1970).

A claim of denial of the right to a speedy trial is not sufficient basis for a collateral attack by post-conviction proceedings upon a judgment and sentence, and especially so if the claim was not raised at or prior to the time of trial or entry of a plea of guilty. State v. McCroskey, 79 N.M. 502, 445 P.2d 105 (Ct. App. 1968).

Defendant's contentions that he was denied due process because he was held in custody for 20 days prior to the preliminary hearing; that he was not advised of his rights nor granted counsel during this period; that no attorney was appointed until after the preliminary hearing; and that the bail set was excessive and unreasonable are invalid.

By proceeding to trial, he effectively waived his right to object to prior defects in the proceedings. State v. Blackwell, 79 N.M. 230, 441 P.2d 759 (1968).

Or at any time prior to filing of motion. — Failure to object to the statements of the prosecutor at the time they were made, before the jury retired or, in fact, at any time prior to the filing of this motion will foreclose defendant from seeking relief under Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA). State v. Gillihan, 86 N.M. 439, 524 P.2d 1335 (1974).

But no prejudice for failure to raise competency before trial court. — If one is mentally incompetent, then, by definition, he cannot be expected to raise that contention before the trial court and thus cannot be prejudiced by his failure to do so, as it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently "waive" his right to have the court determine his capacity to stand trial. State v. Guy, 79 N.M. 128, 440 P.2d 803 (Ct. App. 1968).

E. SUCCESSIVE MOTIONS.

It is within court's discretion to grant or deny successive motions to vacate conviction. State v. Lobb, 78 N.M. 735, 437 P.2d 1004 (1968); Lott v. State, 77 N.M. 612, 426 P.2d 588 (1967).

No bar where no hearing on first motion. — Defendant was not barred from having a second motion for post-conviction relief heard where no hearing had been held in which the issues of the first Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA) motion could have been litigated and determined. State v. Patton, 82 N.M. 29, 474 P.2d 711 (Ct. App. 1970).

A second or successive motion may be refused only if the prior denial rested on an adjudication of the merits of the ground presented in the subsequent application. State v. Blankenship, 79 N.M. 178, 441 P.2d 218 (Ct. App. 1968).

Only when an evidentiary hearing has been held or the matters asserted are otherwise determined on their merits can a second motion be denied under Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA) wherein the court is relieved of the duty to entertain successive motions for similar relief. State v. Lobb, 78 N.M. 735, 437 P.2d 1004 (1968).

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).

Nor if new grounds asserted. — Where defendant's motion was based on grounds different from the ground asserted in his first motion, the basis for denying his second motion was improper. State v. Blankenship, 79 N.M. 178, 441 P.2d 218 (Ct. App. 1968).

Where the 1969 motion attacked the legality of the 1959 conviction and the 1967 motion related to defendant's admission that he was the person convicted in 1959 and to his subsequent waiver of a right to trial on that issue, the trial court's denial of the 1969 motion without a hearing upon the ground that the allegation of that motion is the same as in the 1967 motion is error. State v. Chavez, 81 N.M. 427, 467 P.2d 999 (Ct. App. 1970).

And benefit of doubt to defendant. — If doubts arise in particular cases as to whether the grounds in a subsequent application are different, they should be resolved in favor of the applicant. State v. Canales, 78 N.M. 429, 432 P.2d 394 (1967).

While within court's discretion to redetermine issues. — Even if the prior application was rejected on the merits on the same ground, it is within the sound discretion of the court to permit a redetermination of those issues if the ends of justice would thereby be served. State v. Canales, 78 N.M. 429, 432 P.2d 394 (1967).

But burden on defendant to show justice of redetermination. — The burden is on the applicant to show that, although the ground of the new application was determined against him on the merits on a prior application, the ends of justice would be served by a redetermination of the ground. State v. Canales, 78 N.M. 429, 432 P.2d 394 (1967).

And coram nobis proceeding deemed prior motion. — Claim for post-conviction relief under Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA), upon the same grounds as a claim for such relief in a coram nobis proceeding, constitutes a second or successive motion for similar relief within the meaning of that rule. State v. Canales, 78 N.M. 429, 432 P.2d 394 (1967).

F. GROUNDS COULD HAVE BEEN RAISED ON PRIOR MOTIONS.

Grounds omitted from previous motions deemed waived. — Where the denial of petitioner's first motion for post-conviction relief was affirmed, and the contention made in the second motion could have been raised in the first motion, such grounds omitted in the prior proceedings are deemed waived. Faulkner v. State, 86 N.M. 715, 526 P.2d 1308 (Ct. App. 1974).

Unless fundamental error present. — Grounds for relief asserted in second or successive post-conviction proceedings will not be considered if those grounds could have been asserted in prior proceedings unless these grounds constitute fundamental error, which is error which goes to the foundation or basis of a defendant's rights, or error which goes to the foundation of the case, or error which takes from defendant a right which was essential to his defense. Cisneros v. State, 88 N.M. 368, 540 P.2d 848 (Ct. App. 1975).

IV. FORM OF MOTION; TRANSCRIPT.

No error to deny request for transcript. — Assertion that the trial court erred in denying defendant's request for a transcript of the trial did not state a basis for post-conviction relief. Ewing v. State, 80 N.M. 558, 458 P.2d 810 (Ct. App. 1969).

Where no evidence transcript would aid appellant. — Where appellant failed to particularize or to set forth any factual basis and made no attempt to show how the transcript of the trial would have aided in the presentation of his claims of error, which is essential before any of these issues may be considered in a motion under Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA), the trial court did not err in refusing to provide a transcript. State v. Hodnett, 79 N.M. 761, 449 P.2d 669 (Ct. App. 1968).

Where there was nothing on which to base relief and no attempt to show how the transcript of the trial would have aided in the presentation of the claims of error, the trial court did not err in refusing to provide a transcript. State v. Reid, 79 N.M. 213, 441 P.2d 742 (1968).

Or where errors raised on matters outside record. — The trial court correctly denied a complete transcript where the errors raised by the motions dealt with matters outside the record or with issues which were not the proper subject for consideration under motion for post-conviction relief. State v. Martinez, 79 N.M. 232, 441 P.2d 761 (1968).

And not denial of equal protection. — The refusal of the trial court to provide defendant with a free transcript does not deny him equal protection of the laws as guaranteed by the United States Constitution. State v. Brewton, 84 N.M. 763, 508 P.2d 33 (Ct. App. 1973).

Because no constitutional right to copy of transcript. — Absent a showing of special circumstances, defendant had no federal constitutional right to a copy of the transcript for use in preparation of a motion for post-conviction relief or a petition for habeas corpus. State v. Toussaint, 84 N.M. 677, 506 P.2d 1224 (Ct. App. 1973).

V. MOTION TO BE SPECIFIC.

General conclusions without supporting facts deemed insufficient. — A defendant who seeks post-conviction relief must allege some specific factual basis for the relief sought and not vague conclusional charges. State v. Anderson, 84 N.M. 786, 508 P.2d 1019 (Ct. App. 1973).

Claim that attorney failed to object to testimony of the state's witnesses, as alleged by the defendant, constitutes a general claim and is not substantiated by specific facts which would serve as a basis for post-conviction relief. State v. Gillihan, 85 N.M. 514, 514 P.2d 33 (1973).

Defendant's conclusionary charges that his constitutional rights were violated in the revocation of suspended sentence proceedings are insufficient to provide a basis for post-conviction relief. State v. Carr, 85 N.M. 463, 513 P.2d 397 (Ct. App. 1973).

A motion for post-conviction relief based solely upon conclusions with no supporting factual base does not state a basis for relief as there must be adequate allegations to support any conclusory statement; it is insufficient to allege that threats and coercion occurred and nothing more. State v. Gillihan, 85 N.M. 514, 514 P.2d 33 (1973).

As defendant has failed to allege a specific factual basis sufficient to raise the issue of fundamental error, such relief as prayed for pursuant to Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA), may not be granted. State v. Gillihan, 85 N.M. 514, 514 P.2d 33 (1973).

An allegation of denial of effective assistance of counsel or that trial counsel was incompetent must be supported by allegations in the petition stating why counsel's representation was such that defendant's trial was a sham, farce or mockery, lest the court not know whether defendant's claims fall within the cases where post-conviction relief has been denied where the claim was incompetent counsel. State v. Anderson, 84 N.M. 786, 508 P.2d 1019 (Ct. App. 1973).

Assertion that defendant was coerced into taking the stand where there were no allegations as to the facts of the alleged coercion was too vague to provide a basis for post-conviction relief. State v. Lee, 83 N.M. 655, 495 P.2d 1102 (Ct. App. 1972).

Assertion that aggravation of the offense was prompted by discrimination against defendant because of his Mexican heritage did not present a claim since it was not set forth with adequate specificity or factual basis to afford relief. Andrada v. State, 83 N.M. 393, 492 P.2d 1010 (Ct. App. 1971).

Claim that the trial judge was prejudiced in that he condoned and allowed perjury was a conclusion and too vague, and therefore insufficient to support a motion for post-conviction relief. State v. Hibbs, 82 N.M. 722, 487 P.2d 150 (Ct. App. 1971).

Defendant's post-conviction claim that his counsel was incompetent because he failed to bring "perjury" to the attention of the trial judge, apart from the vagueness of the claim, was insufficient in that it is not contended that counsel knew of the alleged "perjury". State v. Hibbs, 82 N.M. 722, 487 P.2d 150 (Ct. App. 1971).

Claim that the jury was incompetent and predetermined on a guilty verdict was insufficient to support claim for post-conviction relief because it was a conclusion and too vague. State v. Hibbs, 82 N.M. 722, 487 P.2d 150 (Ct. App. 1971).

Defendant's claims that he was inadequately represented by his court-appointed counsel which alleged no factual basis in support of his conclusions did not state a

basis for post-conviction relief. State v. Dominguez, 80 N.M. 328, 455 P.2d 194 (Ct. App. 1969).

Since there were no specific factual allegations on which to base a claim that defendant's constitutional rights were violated and that defendant was subjected to double jeopardy and as only conclusory allegations were stated, there is no basis for relief. State v. Jacoby, 82 N.M. 447, 483 P.2d 502 (Ct. App. 1971).

Conclusory claims that defendant was held under excessive bail are too vague to provide a basis for post-conviction relief. State v. Jacoby, 82 N.M. 447, 483 P.2d 502 (Ct. App. 1971).

Where defendant did not factually support his claims that by harassment and trickery his guilty plea was induced, his claims were factually insufficient and, therefore, too vague to state a basis for post-conviction relief. State v. Martinez, 82 N.M. 51, 475 P.2d 51 (Ct. App. 1970).

Where defendant has not shown how he was prejudiced, his contention cannot form a basis for post-conviction relief. State v. Ortega, 81 N.M. 337, 466 P.2d 903 (Ct. App.), cert. denied, 81 N.M. 305, 466 P.2d 871 (1970).

Claims that defendant's trial counsel did not advise him of the right to appeal provided no basis for post-conviction relief, since it was not a claim that he was denied the right to an appeal. State v. Montoya, 81 N.M. 233, 465 P.2d 290 (Ct. App. 1970).

Defendant must show the manner in which his constitutional rights were violated for this court to consider his claim on a motion for post-conviction relief. Chavez v. State, 80 N.M. 560, 458 P.2d 812 (Ct. App. 1969).

An allegation of narcotics addiction in a Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA) motion, without more, is insufficient to raise a question as to defendant's sanity at the time of the offense. State v. Botello, 80 N.M. 482, 457 P.2d 1001 (Ct. App. 1969).

A general claim that language trouble between defendant and his counsel hindered the preparation of his defense, unsupported by specific factual allegations either as to the nature of the trouble or its effect upon the defense, provided no basis for post-conviction relief. State v. Tapia, 80 N.M. 477, 457 P.2d 996 (Ct. App. 1969).

Defendant's claims that an assistant district attorney, a state police officer and two other persons violated New Mexico conspiracy statute, 30-28-2 NMSA 1978, that this conspiracy was directed against him and that as a result his conviction, judgment and sentence were illegal, but which did not allege in what manner the alleged conspiracy affected him did not state a basis for post-conviction relief. State v. Dominguez, 80 N.M. 328, 455 P.2d 194 (Ct. App. 1969).

Defendant raising issue of incompetency to plead must allege a specific factual basis for the relief sought. The motion is insufficient if it fails to allege facts indicating mental incompetence at the time of the plea. State v. Barefield, 80 N.M. 265, 454 P.2d 279 (Ct. App. 1969).

Defendant does not allege a factual basis for this claim and absent a factual allegation, a claim of absence of due process fails to state a basis for relief. State v. Gorton, 79 N.M. 775, 449 P.2d 791 (Ct. App. 1969).

Claim that the trial court showed prejudice to defendant by overruling all objections made by defendant's counsel was too general and did not provide a basis for post-conviction relief. State v. Hibbs, 79 N.M. 709, 448 P.2d 815 (Ct. App. 1968).

Allegations of perjury without specification of the details thereof would not suffice to raise an issue on a motion under Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA). State v. Lobb, 78 N.M. 735, 437 P.2d 1004 (1968).

When defendant asserts that his counsel failed to subpoena witnesses in his behalf, but does not name or otherwise identify the witnesses he claims were not called, and does not indicate what their testimony might have been had they been called, a mere assertion of failure to subpoena witnesses on his behalf is not ground for relief under Rule 93, N.M.R. Civ. P. (former Rule 1-093 NMRA). State v. Crouch, 77 N.M. 657, 427 P.2d 19 (1967).

In petition or affidavit. — Where defendant failed to set forth sufficient facts in his petition, or by affidavit, to warrant consideration by the trial court, as the contended newly discovered evidence was not disclosed, nor is it revealed by the record in this court, his post-conviction petition must fail. State v. Till, 82 N.M. 555, 484 P.2d 1265 (1971).

When defendant entitled to evidentiary hearing. — To be entitled to an evidentiary hearing, defendant must have alleged a factual basis for relief; vague conclusional charges are insufficient. Further, defendant's claims must raise issues which cannot be conclusively determined from the files and records and those claims must be such that, if true, provide a legal basis for the relief sought. State v. Kenney, 81 N.M. 368, 467 P.2d 34 (Ct. App. 1970).

Where a petition for post-conviction relief alleges facts, set out in particularity, of a claim of inadequate criminal representation, defendant is entitled to a hearing on the question under Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA). State v. Moser, 78 N.M. 212, 430 P.2d 106 (1967).

VI. INITIAL CONSIDERATION; SUMMARY DISMISSAL.

A. IN GENERAL.

Hearing properly denied if no basis for relief stated. — Contention that the trial court erred in not conducting an evidentiary hearing on the motion for post-conviction relief was invalid; as no basis for relief was asserted, an evidentiary hearing was not required. State v. Lee, 83 N.M. 655, 495 P.2d 1102 (Ct. App. 1972).

It is incumbent on defendant to merit a hearing on the motion for post-conviction relief, to set forth matters therein which, if proved, would require the setting aside of the conviction. Where an examination of the motion discloses a total absence of ground which could accomplish the end sought by petitioner, the trial court is not required to grant a hearing. State v. Bruce, 82 N.M. 315, 481 P.2d 103 (1971).

Where motion stated no basis for post-conviction relief, the trial court properly denied the motion without a hearing. State v. Tafoya, 81 N.M. 686, 472 P.2d 651 (Ct. App.), cert. denied, 81 N.M. 721, 472 P.2d 984 (1970).

Where defendant's claims did not provide a basis for post-conviction relief, the trial court did not err in deciding defendant's motion without an evidentiary hearing and without appointing counsel to represent him at that hearing. State v. Ramirez, 81 N.M. 150, 464 P.2d 569 (Ct. App. 1970).

The trial court did not err in denying the motion after a discussion between the court and the defendant's appointed counsel. No hearing is required on a motion under Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA) if the motion alleges no basis for relief. Ewing v. State, 80 N.M. 558, 458 P.2d 810 (Ct. App. 1969).

Where the post-conviction motion did not present an issue on which post-conviction relief could be granted, the trial court did not err in denying the motion without a hearing. Nieto v. State, 79 N.M. 330, 443 P.2d 500 (Ct. App. 1968).

A motion, to merit a hearing and consideration, must set forth matters therein which, if proved, would require the setting aside of the conviction. Where an examination of the motion discloses a total absence of grounds which could accomplish the end sought by the petitioner, the trial court is not required to appoint counsel or grant a hearing. State v. Lobb, 78 N.M. 735, 437 P.2d 1004 (1968).

In motion, files and records of trial. — Where the motions, files and records of the case show conclusively that defendant is not entitled to relief, a hearing is not required. State v. Sanders, 82 N.M. 61, 475 P.2d 327 (1970).

Where the trial record shows conclusively that an appellant is not entitled to relief under Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA), the court may deny the motion without a hearing or appointment of counsel. State v. Gillihan, 85 N.M. 514, 514 P.2d 33 (1973).

Where the file and records conclusively establish that this claim of lack of competency to stand trial was false, defendant was not entitled to a hearing on this claim. State v. Kenney, 81 N.M. 368, 467 P.2d 34 (Ct. App. 1970).

Since the files and records conclusively establish that this claim of inadequate representation of counsel was false, defendant was not entitled to a hearing on this claim. State v. Kenney, 81 N.M. 368, 467 P.2d 34 (Ct. App. 1970).

Even though the motion for relief alleges a factual basis concerning an alleged mental incompetency to plead, a hearing on the motion is not required if the motion, files and records conclusively show that the petitioner is not entitled to relief. State v. Guy, 79 N.M. 128, 440 P.2d 803 (Ct. App. 1968).

As judged on their face. — Where defendant's allegations do not state sufficient grounds for relief, on their face, defendant is not entitled to have counsel appointed and a hearing on his motion. State v. Sedillo, 79 N.M. 254, 442 P.2d 212 (Ct. App. 1968).

Defendant's contention that he was entitled to a hearing on "issue raised by motion of no consideration of leniency given him", was upon its face without merit. Leniency in the imposition of sentence involves a matter of judicial discretion. State v. Baumgardner, 79 N.M. 341, 443 P.2d 511 (Ct. App. 1968).

And must appear defendant in no way entitled to relief. — Dismissal of defendant's motion for post-conviction relief for failure to state a claim upon which relief can be granted was improper unless it appeared that defendant was not entitled to relief under any state of facts provable under the claim. Maes v. State, 84 N.M. 251, 501 P.2d 695 (Ct. App. 1972).

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).

So court must consider what defendant might offer. — Where defendant claimed that his guilty plea was coerced, court's overruling claim without a hearing and without considering what the defendant might offer to support it was improper. State v. Byrd, 79 N.M. 13, 439 P.2d 230 (1968).

But not matters outside of record. — The physician's report was not a part of the files and records of the original proceeding. It could not serve as a basis for denying defendant a hearing upon his post-conviction motion. State v. Guy, 79 N.M. 128, 440 P.2d 803 (Ct. App. 1968).

And hearing necessary if record not conclusive. — Unless record conclusively shows that defendant is not entitled to relief, he is entitled to an evidentiary hearing on

his claim that he was not competent to stand trial. Roman v. State, 81 N.M. 477, 468 P.2d 878 (Ct. App. 1970).

Since petitioner's claim of double jeopardy went outside the record and thus the files and records of the case did not conclusively show petitioner was not entitled to relief under that claim, he was entitled to an evidentiary hearing on that claim where the burden would be on him to prove a factual basis showing double jeopardy. Woods v. State, 84 N.M. 248, 501 P.2d 692 (Ct. App. 1972).

Where the only record before court of appeals was the petitioner's motion and the proceedings in connection therewith, and court was unable to determine what the files and records of the case showed, but the motion itself did not conclusively show that the prisoner was entitled to no relief, a hearing should have been held in accordance with Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA), for a determination of the issues and for the filing of findings of fact and conclusions of law with respect thereto. Salazar v. State, 83 N.M. 352, 491 P.2d 1163 (Ct. App. 1971).

Although no hearing if records conclusive. — If the files and records conclusively show that defendant's probation was properly revoked, a ruling may be based on those files and records. Maes v. State, 84 N.M. 251, 501 P.2d 695 (Ct. App. 1972).

Hearing barred because of similar hearing by different court. — A district court was without jurisdiction to grant an evidentiary hearing, pursuant to a petition for writ of habeas corpus, when a different district court had previously conducted a full evidentiary hearing on the same alleged facts and issues pursuant to a post-conviction motion for relief under this rule. State ex rel. Sullivan v. Kaufman, 103 N.M. 410, 708 P.2d 322 (1985).

B. GRANT OF EVIDENTIARY HEARING.

Hearing not automatic. — A claim in a Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA), motion that a coerced plea resulted from some act, verbal or otherwise, which occurred outside the courtroom and under such circumstances that the occurrence would not ordinarily come to the attention of the trial court, and reference thereto would not ordinarily be made a part of the record, does not always entitle a defendant to a hearing. State v. Hansen, 79 N.M. 203, 441 P.2d 500 (Ct. App. 1968).

But when facts raise sufficient issue. — Allegations of post-conviction confinement in a mental institution in 1962 and early 1963 when sufficiently close to the date of his plea raise a factual issue concerning his mental competency to plead. State v. Guy, 79 N.M. 128, 440 P.2d 803 (Ct. App. 1968).

Where the trial court recommended that defendant be given psychiatric and medical care, that is sufficient grounds to require an evidentiary hearing. State v. Guy, 79 N.M. 128, 440 P.2d 803 (Ct. App. 1968).

Where a prisoner's motion asserts that his counsel in a former felony conviction was unknown to him, related to the complaining witness and the motion further charged specific instances of misconduct at the trial of his case, including failure of the attorney to challenge the jurors who were uncles of the complaining witness, then under such circumstances the prisoner was just as much without counsel as if he was represented by ineffectual appointed counsel and due process requires the right to a hearing and presentation of evidence thereon. State v. Moser, 78 N.M. 212, 430 P.2d 106 (1967).

There were sufficient facts to at least warrant an evidentiary hearing on the issue of actual notice where the petitioner was not notified before his disciplinary hearing that a conviction of a minor level offense would possibly result in major level punishment due to the presence of elevating factors. Miller v. Tafoya, 2003-NMSC-025, 134 N.M. 335, 76 P.3d 1092.

And when asserted claims conflict with record. — Where defendants' claims asserted in their petitions and affidavits are in conflict with the record made at the time the pleas were accepted and defendants' claims involve matters which allegedly occurred outside the courtroom and, if established would warrant vacating the sentences, such a conflict cannot be resolved in the absence of an evidentiary hearing at which the facts can be fully developed even though the circumstances surrounding the acceptance of the plea of guilty would constitute sufficient support for a finding and determination that the pleas were voluntarily made. State v. Swim, 82 N.M. 478, 483 P.2d 1318 (Ct. App. 1971).

Right to hearing to prove matters outside record. — Where factual allegations relating primarily to purported occurrences outside of the courtroom put in issue matters upon which the record could cast no real light, the court must hold a hearing at which the prisoner is permitted to offer evidence. State v. Swim, 82 N.M. 478, 483 P.2d 1318 (Ct. App. 1971).

Where defendants' allegations of pleas coerced or induced by threats to use statements, allegedly improperly obtained, would be sufficient, if true, to collaterally attack the judgments against defendants, and which could not be conclusively determined from the files or records, the court held that a hearing on motion for post-conviction relief was required. State v. Patton, 82 N.M. 29, 474 P.2d 711 (Ct. App. 1970).

Defendant is entitled to an evidentiary hearing on the question of whether there was an unreasonable delay in executing the arrest warrants where the record indicates the probation authorities promptly had a warrant issued on the basis of the probation violations, but nothing is indicated in the record of their attempts to execute the warrants for defendant's arrest. State v. Murray, 81 N.M. 445, 468 P.2d 416 (Ct. App. 1970).

Defendant's claims of the refusal of court-appointed counsel to process his appeal as requested concern matters outside the record and are such that defendant is entitled to a hearing where he has the burden of proving them and if defendant fails to establish

that he made either of the alleged requests then he is not entitled to post-conviction relief. State v. Gorton, 79 N.M. 775, 449 P.2d 791 (Ct. App. 1969).

Where among claims made by petitioner there are several concerning occurrences outside the record which, if true, would be grounds for vacating his sentence, these assertions cannot be resolved without a hearing. Admittedly, these allegations conflict with the record made at the time of the arraignment. However, absent a hearing at which testimony is adduced, no method is available for determining the truth. Therefore, the court erred in denying the motion without counsel and an evidentiary hearing. State v. Reece, 79 N.M. 142, 441 P.2d 40 (1968).

Machibroda v. United States, 368 U.S. 487, 82 S. Ct. 510, 7 L. Ed. 2d 473 (1962), held that there must be a hearing where issues raised by the motion related primarily to purported occurrences outside the courtroom and upon which the record could, therefore, cast no real light and where the allegations did not concern circumstances of a kind that the district judge could completely resolve by drawing upon his own personal knowledge or recollection. State v. Buchanan, 78 N.M. 588, 435 P.2d 207 (1967).

In trial resulting in conviction of armed robbery, refusal of the trial court to allow defendant to be present and submit testimony with respect to his allegation of comment by the state in closing argument in the original case on appellant's failure to testify was error requiring reversal; and because this related to a question not raised in prior appeal, nor could it have been because there was no record made of the closing arguments, the defendant had a right in an evidentiary hearing to submit evidence outside of the original record. State v. Henry, 78 N.M. 573, 434 P.2d 692 (1967).

Ineffective-assistance claim. — The remand of a case to the district court for an evidentiary hearing on an ineffective assistance claim is limited to those cases in which the record on appeal establishes a prima facie case of ineffective assistance. State v. Swavola, 114 N.M. 472, 840 P.2d 1238 (Ct. App. 1992); State v. Hosteen, 1996-NMCA-084, 122 N.M. 228, 923 P.2d 595, aff'd, 1997-NMSC-063, 124 N.M. 402, 951 P.2d 619.

VII. EVIDENTIARY HEARING.

A. COUNSEL.

Right to counsel provided by the U.S. Constitution does not apply to post-conviction relief proceedings. State v. Ramirez, 78 N.M. 418, 432 P.2d 262 (1967).

Absent constitutional requirement, appointment of counsel is within discretion of court. State v. Ramirez, 78 N.M. 418, 432 P.2d 262 (1967).

No appointment of counsel to explore post-conviction relief. — Where the conviction has been affirmed on direct review, the trial court is not required to appoint counsel to assist the prisoner in exploring the possibilities for post-conviction relief. State v. Ramirez, 78 N.M. 418, 432 P.2d 262 (1967).

Appointment of counsel is not required for assistance in formulating claim or exploratory evolutions in cases under Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA). Birdo v. Rodriguez, 84 N.M. 207, 501 P.2d 195 (1972).

And no violation of equal justice. — Denial of the appointment of counsel to assist defendant in exploring the possibilities for post-conviction relief did not constitute a violation of equal justice. State v. Tapia, 80 N.M. 477, 457 P.2d 996 (Ct. App. 1969).

And no appointment if motion for relief groundless. — Where the motion for post-conviction relief is completely groundless, the trial court need not appoint counsel to represent defendant in connection with the motion and may determine the motion without the presence of defendant. State v. Sanchez, 78 N.M. 25, 420 P.2d 786 (Ct. App. 1966).

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).

Nor if motion states no basis for relief. — Appointment of counsel to represent defendant in connection with the motion for post-conviction relief is not necessary in denying the motion without a hearing, where the motion stated no basis for relief. State v. Tafoya, 81 N.M. 686, 472 P.2d 651 (Ct. App.), cert. denied, 81 N.M. 721, 472 P.2d 984 (1970).

Where defendant's motion was a successive motion and stated no basis for relief, appointment of counsel was not required and court did not err in denying his motion without a hearing. State v. Ramirez, 82 N.M. 486, 484 P.2d 328 (1971).

Where defendant's motion presented no basis for post-conviction relief, the trial court was not required to appoint counsel to represent defendant in connection with the motion. State v. Tapia, 80 N.M. 477, 457 P.2d 996 (Ct. App. 1969).

Where files and records conclusively show that defendant was not entitled to post-conviction relief, trial court did not err in failing to appoint counsel or hold a hearing on the motion. State v. Decker, 79 N.M. 41, 439 P.2d 559 (Ct. App. 1968).

Once prisoner alleges some factual basis raising substantial issue, counsel must be appointed. State v. Ramirez, 78 N.M. 418, 432 P.2d 262 (1967).

Counsel was not required to be appointed to represent defendant in connection with his post-conviction motion until a factual basis was alleged which raises a substantial issue. State v. Barefield, 80 N.M. 265, 454 P.2d 279 (Ct. App. 1969).

And appointed counsel to act as advocate. — The requirement by the United States supreme court is that court appointed counsel be an advocate rather than amicus curiae. State v. Selgado, 78 N.M. 165, 429 P.2d 363 (1967).

Setting forth contentions urged by petitioner and necessary for review. — Appointed counsel should set forth contentions urged by a petitioner whether or not counsel feels they have merit and whether such contentions are in fact argued by counsel, and it is incumbent upon counsel for the petitioner to have included in record such parts as may be necessary to assure a review by this court, whether or not counsel considers such contentions to have any merit and whether or not he intends to advance any argument thereon. State v. Franklin, 78 N.M. 127, 428 P.2d 982 (1967).

When denial of motion to dismiss counsel not abuse of discretion. — The denial of defendants' motions to dismiss counsel and grant a continuance so they could retain counsel immediately prior to post-conviction hearing was not an abuse of discretion nor was it a denial of due process. Bobrick v. State, 83 N.M. 657, 495 P.2d 1104 (Ct. App. 1972).

B. PROCEDURE OF HEARING.

Rules to apply to proceedings. — R. Civ. P. (Dist. Cts.), including the rule concerning findings of fact, apply to proceedings under Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA). McCroskey v. State, 82 N.M. 49, 475 P.2d 49 (Ct. App. 1970).

A Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA) or 31-11-6 NMSA 1978 proceeding is an independent civil action, and, therefore, Rule 52, R. Civ. P. (Dist. Cts.) (see now Rule 1-052 NMRA), requiring the making of findings of fact, applies to such proceedings. State v. Hardy, 78 N.M. 374, 431 P.2d 752 (1967).

Burden of proof at proceedings on defendant. — Proceedings under Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA) are civil and the burden of establishing the charges set forth in a motion under the rule rests upon the defendant. State v. Botello, 80 N.M. 482, 457 P.2d 1001 (Ct. App. 1969).

Proceedings under Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA) are civil and the burden is on defendant to prove his claims. State v. Marquez, 79 N.M. 6, 438 P.2d 890 (1968).

Defendant has the burden of establishing his claims. State v. Chavez, 78 N.M. 446, 432 P.2d 411 (1967).

By a preponderance of the evidence. — It is the settled rule that appellant has the burden of proving his allegations at the hearing under Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA) by a preponderance of the evidence. State v. Baughman, 79 N.M. 442, 444 P.2d 769 (Ct. App. 1968).

The burden of proof at the hearing under Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA) rests upon appellant to convince the court of his allegations by a preponderance of the evidence. State v. Simien, 78 N.M. 709, 437 P.2d 708 (1968).

As to fairness of trial. — Claim that the newspaper articles or evidence as to their contents deprived defendant of a fair trial is without merit as defendant had the burden of proof and he did not meet this burden. Barela v. State, 81 N.M. 433, 467 P.2d 1005 (Ct. App. 1970).

Burden of sustaining charge of attorney's incompetence rests upon appellant. State v. Walburt, 78 N.M. 605, 435 P.2d 435 (1967).

As to waiver of right to counsel. — Burden of proof at the Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA) hearing rests on defendant to establish that he did not competently and intelligently waive his right to counsel by a preponderance of the evidence. State v. Gilbert, 78 N.M. 437, 432 P.2d 402 (1967).

As to want of jurisdiction. — It is a fundamental rule that the burden of demonstrating want of jurisdiction rests upon the party asserting such want, particularly where the challenge is applied to a court exercising general jurisdiction. State v. Reyes, 78 N.M. 527, 433 P.2d 506 (Ct. App. 1967).

As to credibility of witnesses. — Trial court is the judge of the credibility of the witnesses and of the weight to be given evidence at a hearing for post-conviction relief and the petitioner has the burden of establishing his claims. State v. Sandoval, 80 N.M. 333, 455 P.2d 837 (1969).

As to perjured testimony. — The rule is that before relief may be granted on a claim that conviction was obtained on perjured testimony the moving party must show by a preponderance of the evidence that: (1) the testimony was perjured; and (2) the prosecuting officials knowingly and intentionally used such testimony to secure a conviction, and the mere allegation that conviction was based on perjured testimony was insufficient to raise the issue. State v. Hodnett, 79 N.M. 761, 449 P.2d 669 (Ct. App. 1968).

And as to voluntariness of plea. — The burden of proof is on defendant to show that the plea is involuntary. State v. Ortiz, 77 N.M. 751, 427 P.2d 264 (1967).

C. SCOPE OF HEARING.

Decisions of trial court entitled to all reasonable support. — The proceedings, decision and judgment of the trial court are entitled to the support of every reasonable intendment and presumption in their favor. State v. Travis, 79 N.M. 307, 442 P.2d 797 (Ct. App. 1968).

Unattacked findings of trial court deemed facts for hearing. — Findings by the trial court that defendant was confronted by and had opportunity to cross-examine all state's witnesses, that testimony of state's witnesses was adequate to sustain conviction, and that counsel for the defendant was both able and experienced, being unattacked were

facts which could not be questioned on motion for post-conviction relief. State v. Hibbs, 79 N.M. 709, 448 P.2d 815 (Ct. App. 1968).

Credibility of witness is issue for determination by trier of facts. State v. Holly, 79 N.M. 516, 445 P.2d 393 (Ct. App. 1968).

And issues at trial not to be redetermined. — Where the extent of defendant's drinking was an issue at the trial, it is not to be redetermined in a post-conviction proceeding. State v. Williams, 78 N.M. 431, 432 P.2d 396 (1967).

Where the jury decided defendant violated statute, and the judgment of conviction entered pursuant to the jury verdict was affirmed by supreme court, defendant may not be heard to contend he did not violate the statute in his motion for post-conviction relief. State v. Crouch, 77 N.M. 657, 427 P.2d 19 (1967).

Where there is a conflict in testimony, appellant's attack on the district court's conclusion of law, that appellant knowingly, intelligently and voluntarily, while being advised by competent counsel, entered a plea of guilty, must fail. State v. Simien, 78 N.M. 709, 437 P.2d 708 (1968).

While substantially supported trial court decisions upheld. — Where hearing under Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA) has been held, nothing more is required than that the evidence and reasonable inferences arising therefrom furnish substantial support for trial court decision. Smith v. State, 79 N.M. 450, 444 P.2d 961 (1968).

So refusal to make inconsistent findings not error. — When findings are supported by substantial evidence, refusal to make other findings opposed to or inconsistent with those findings is not error. State v. Johnson, 81 N.M. 318, 466 P.2d 884 (Ct. App. 1970).

Nor refusal to accept inconsistent testimony. — Where defendant's testimony at the hearing on his motion for post-conviction relief differed greatly in many respects from what is contained in his earlier signed statement as to the events leading to the homicide and his actions thereafter, the trial court was not obliged to accept his testimony as to the claimed coercion and threats by the state police in securing the statement from him. Burton v. State, 82 N.M. 328, 481 P.2d 407 (1971).

Nor refusal to believe testimony under suspicious circumstances. — Delay in asserting claim of denial of right to appeal and failure to assert this claim in habeas corpus and post-conviction proceedings were suspicious circumstances which cast doubt on the truth of petitioner's testimony and so the trial court was not required to accept petitioner's testimony as true and did not err in denying post-conviction relief. Robinson v. State, 82 N.M. 660, 486 P.2d 69 (Ct. App. 1971).

But voluntariness of plea open to review. Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969), does not hold that where there has been no direct review, voluntariness of a plea of guilty may not be determined as a question of fact in a post-conviction proceeding. State v. Elledge, 81 N.M. 18, 462 P.2d 152 (Ct. App. 1969); State v. Cruz, 82 N.M. 522, 484 P.2d 364 (Ct. App. 1971).

D. PRESENCE OF DEFENDANT.

Presence of prisoner not constitutionally required. — Under Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA), a court may hear and determine a post-conviction motion without the presence of the prisoner. To do so is not a denial of the constitutional right "to appear and defend" in criminal proceedings because post-conviction proceedings are civil, not criminal. State v. Hibbs, 82 N.M. 722, 487 P.2d 150 (Ct. App. 1971).

And presence not required at inconclusive hearing. — Where nothing asserted required a hearing to conclusively establish the absence of merit in the claims advanced and counsel was appointed and heard, it was not error to determine the issue without the presence of applicant. His presence would have added nothing. State v. Sisk, 79 N.M. 167, 441 P.2d 207 (1968).

And no right to be heard in particular place. — The due process clause of the fourteenth amendment does not require a judge to have a convicted person present for the hearing on a motion under Rule 93, R. Civ. P. (Dist. Cts.) (now Rule 1-093 NMRA). If appellant did not have a right to be present at the hearing, a fortiori he had no right to be heard in a particular place, absent a showing of prejudice. State v. Eckles, 79 N.M. 138, 441 P.2d 36 (1968).

But presence necessary for sentencing. — Where appellant entered pleas of guilty to charges of burglary and conspiracy to sell a narcotic drug and was thereupon sentenced on these charges, was later charged as an habitual offender and, upon his plea of guilty, was sentenced as an habitual offender, and then filed a motion under Rule 93, R. Civ. P. (Dist. Cts.) (former Rule 1-093 NMRA) to vacate the latter sentence, and the court granted his motion, vacated the sentence imposed and then resentenced the appellant in his absence on the original charges, the sentence must be vacated and the cause remanded to the district court so that sentence may be passed on the appellant in his presence. State v. Verdugo, 78 N.M. 372, 431 P.2d 750 (1967).

5-805. Probation; violations.

A. **Violation of probation.** At any time during probation if it appears that the probationer may have violated the conditions of probation:

(1) the court may issue a warrant for the arrest of the probationer. If conditions of release are provided in the warrant, the probationer may be released on bond pending an adjudicatory hearing on the charges; or

(2) the court or the probation office may issue a notice to appear before the court to answer a charge of violation of the conditions of probation.

B. **Notice of arrest without warrant.** If the probationer is arrested by the probation office without a warrant the probation office shall provide the district attorney with a written notice within one (1) day of the arrest. The notice shall contain a brief description of each alleged probation violation. A copy of the notice shall be given to the probationer and filed with the court.

C. **Technical violation program.** A judicial district may by local rule approved by the Supreme Court in the manner provided by Rule 5-102 NMRA, establish a program for sanctions for probationers who agree to automatic sanctions for a technical violation of the conditions of probation. Under the program a probationer may agree:

(1) not to contest the alleged violation of probation;

(2) to submit to sanctions in accordance with the local rule; and

(3) to waive the provisions of Paragraphs D through L of this rule.

For purposes of this rule, a "technical violation" means any violation that does not involve new criminal charges.

D. **Conditions of release.** If a probationer is arrested and not released on conditions of release, within five (5) days of the arrest of the probationer the sentencing judge or a judge designated by the sentencing judge shall review the notice of arrest or warrant and consider conditions of release pending adjudication of the probation violation. If no conditions for release are set, the probationer may file a motion to appear before the judge to consider conditions of release.

E. **Filing of report.** If there is a recommendation that probation be revoked, within five (5) days of the arrest of probationer the probation office shall submit a written violation or a summary report to the district attorney and the court describing the essential facts of each violation. A copy of the report shall be served on the probationer and the probationer's attorney of record.

F. **District attorney duty.** Within five (5) days of receiving the probation violation or a summary report, the district attorney shall either file a motion to revoke probation setting forth each of the alleged violations or file a notice of intent not to prosecute the alleged violations.

G. **Initial hearing.** An initial hearing on a motion to revoke probation shall be commenced within thirty (30) days after the latest of the following events:

(1) the date of the filing of a motion to revoke probation;

(2) if the proceedings have been stayed to determine the competency of the probationer, the date an order is filed finding the probationer competent to participate in the revocation proceedings;

(3) if an interlocutory or other appeal is filed, the date the mandate or order is filed in the district court disposing of the appeal;

(4) if the probationer is arrested or surrenders in another state, the date the probationer is returned to this state; or

(5) the date of arrest or surrender of a probationer in this state based on a bench warrant issued for failing to report.

H. **Adjudicatory hearing.** The adjudicatory hearing shall commence no later than sixty (60) days after the initial hearing is conducted.

I. **Discovery.** The parties shall exchange witness lists and disclose proposed exhibits no less than ten (10) days after the initial hearing.

J. **Waiver of time limits.** The probationer may waive the time limits for commencement of the adjudicatory hearing.

K. **Extensions of time.** Extensions of time for commencement of a hearing on a motion to revoke probation may be granted in the manner provided by Rule 5-604 NMRA for extension of time for commencement of trial.

L. **Dismissal.** If an adjudicatory hearing on the alleged probation violation is not held within the time limits prescribed by this rule, the motion to revoke probation shall be dismissed with prejudice.

M. **Applicability.** Paragraphs E and F of this rule are not applicable to revocation of probation proceedings that are initiated by the district attorney without a prior recommendation of the probation office to revoke probation.

[Approved by Supreme Court Order 07-8300-08, effective June 1, 2007.]

ANNOTATIONS

Cross references. For statutory provision governing the revocation of probation, see 31-21-15 NMSA 1978.

For warrantless search of probation violator's vehicle, see State v. Ponce, 2004-NMCA-137, 136 N.M. 614, 103 P.3d 54, cert quashed, 2006-NMCERT-04.

5-820. Fugitive complaint.

A. **Complaint.** A fugitive action may be commenced in the district court by filing a sworn fugitive complaint:

(1) identifying the defendant;

(2) identifying the demanding state for which the defendant's arrest is being made;

(3) stating the grounds for extradition; and

(4) stating either that a governor's warrant for the arrest of the defendant is sought or the date and time of arrest for extradition.

The complaint may be amended by the state without leave of court prior to arraignment. The complaint shall be substantially in the form approved by the Supreme Court.

B. **Where commenced.** A fugitive action shall be commenced in the county in which the defendant has been arrested or where the defendant is expected to be found.

C. **Service of complaint.** If the fugitive is arrested without a warrant, a fugitive complaint shall be prepared and given to the defendant prior to transferring the defendant to the custody of the detention facility. The complaint shall be filed with the district court at the time it is given to the defendant. If the court is not open at the time the copy of the complaint is given to the defendant, the complaint shall be filed the next business day of the court.

[Approved, effective January 1, 2002.]

ANNOTATIONS

Cross references. — For the fugitive complaint approved by the Supreme Court, see Rule 9-805 NMRA.

Effective dates. — Pursuant to a court order dated November 8, 2001, this rule is effective January 1, 2002.

5-821. Arraignment and commitment hearing prior to issuance of the governor's rendition warrant.

A. **Time.** If the defendant has not been arraigned in the magistrate or metropolitan court, the defendant shall be brought before the district court for an arraignment and commitment hearing, as soon as practicable, but in no event later than forty-eight (48) hours after arrest as a fugitive.

B. **Procedure.** At the arraignment, the court shall:

(1) inform the defendant of the defendant's right to retain counsel;

(2) provide the defendant with copies of any documents on which the prosecution has relied;

(3) inform the defendant of the right to the issuance and service of a warrant of extradition before being extradited and of the right to petition for a writ of habeas corpus pursuant to law; and

(4) ask the defendant to admit or deny that the defendant is the person described in the fugitive complaint.

C. **Waiver of extradition.** The defendant may waive extradition proceedings by signing a written waiver of extradition substantially in the form approved by the Supreme Court. If the court finds the waiver is voluntary, the court shall issue an order to hold the defendant without bail for delivery to an authorized agent of the demanding state.

D. **Identity question.** If the defendant denies being the person described in the fugitive warrant, the court shall examine the information on which the arrest was made and determine whether it appears that the defendant is the person sought.

E. **Conditions of release.** If the defendant does not waive extradition or denies being the person described in the fugitive complaint, the court may set conditions of release pending the issuance of the rendition warrant by the governor.

F. **Time limits for governor's rendition.** If the defendant does not waive extradition or denies being the person described in the fugitive complaint, the defendant may be held in custody for a period of not more than thirty (30) days pending receipt of a rendition warrant from the governor. On motion, the court may extend the commitment or conditions of release pending issuance of a governor's rendition warrant for a period of not more than sixty (60) additional days.

G. **Dismissal of fugitive complaint.** If a governor's rendition warrant is not filed within the times provided by Paragraph F, the fugitive complaint shall be dismissed without prejudice and the defendant released.

[Approved, effective January 1, 2002.]

ANNOTATIONS

Effective dates. — Pursuant to a court order dated November 8, 2001, this rule is effective January 1, 2002.

5-822. Commencement and continuation of fugitive actions after issuance of a governor's rendition warrant.

A. **Filing of warrant and return.** If a person accused to be a fugitive is arrested on a rendition warrant for extradition issued by the governor, and a fugitive action based on the same demand is not pending in the district court, a fugitive action shall be commenced by filing:

(1) a copy of the demand for extradition on which the rendition warrant is based together with the documents required by statute to accompany the demand;

(2) the name and address of the agent of the demanding state authorized to receive the alleged fugitive; and

(3) the rendition warrant together with supporting documents.

B. **Where commenced.** If a fugitive action based on the same demand is pending in the district court, the warrant shall be filed in that action. If no fugitive action based on the same demand is pending in the district court when the fugitive is arrested on the governor's rendition warrant, the action shall be commenced in a district court of the district where the fugitive was arrested. If a fugitive action based on the same demand is pending in a magistrate or metropolitan court of this state, the action shall be transferred to the district court for further proceedings pursuant to these rules.

[Approved, effective January 1, 2002.]

ANNOTATIONS

Effective dates. — Pursuant to a court order dated November 8, 2001, this rule is effective January 1, 2002.

5-823. Rights hearing; filing of demand for extradition.

A. **Rights explained.** As soon as practicable after the governor's rendition warrant is filed, but in any event within seven (7) days, the alleged fugitive shall be brought before the court. At that time, the court shall:

(1) inform the accused of the right to counsel and determine whether the accused is entitled to appointed counsel;

(2) inform the accused of the demand for extradition and of the crime which is charged or other basis for extradition which is alleged; and

(3) determine whether the accused wishes to test the legality of the governor's rendition warrant.

B. **Time for filing petition for writ of habeas corpus.** If the alleged fugitive wishes to contest the legality of the arrest pursuant to the governor's rendition warrant, the

court shall fix a reasonable time for the alleged fugitive to file a petition for writ of habeas corpus in the fugitive action.

[Approved, effective January 1, 2002.]

ANNOTATIONS

Effective dates. — Pursuant to a court order dated November 8, 2001, this rule is effective January 1, 2002.

5-824. Petition for writ of habeas corpus.

A. **Grounds.** If a person accused as a fugitive files a petition for writ of habeas corpus, the court may consider only if:

(1) the extradition documents on their face do not authorize the arrest or the issuance of the governor's rendition warrant;

(2) the person accused to be a fugitive has not been charged with a crime in the demanding state;

(3) the person alleged to be a fugitive is not the person demanded; or

(4) the person alleged to be a fugitive is not a fugitive or otherwise subject to extradition pursuant to statute.

The petition for writ of habeas corpus shall state the factual basis for the grounds alleged.

B. **Notice of hearing.** If a petition is filed, the court shall set a date for hearing and give notice of the hearing to the defendant, the state and the agent of the demanding state.

C. **Determination.** The governor's warrant of extradition is prima facie evidence that the constitutional and statutory requirements for extradition have been met. Unless the court finds beyond a reasonable doubt that the rendition warrant is invalid for one or more of the grounds set forth in Paragraph A of this rule, the court shall order the accused to be delivered to the agent of the demanding state.

[Approved, effective January 1, 2002.]

Committee commentary. — If a petition for writ of habeas corpus is filed, the grounds on which relief can be granted are very narrow. *See Michigan v. Doran*, 439 U.S. 282, 99 S. Ct. 530, 58 L. Ed. 2d 521 (1978) and *New Mexico ex rel. Ortiz v. Reed*, 524 U.S. 151, 118 S. Ct. 1860, 141 L. Ed. 2d 131 (1998). Questions relating to guilt or innocence, alibi, speedy trial, res judicata, and double jeopardy are not for the asylum state, but for

the demanding state to determine after the defendant is returned. *State v. Sandoval*, 95 N.M. 254, 620 P.2d 1279 (1980). Even if arrest on a previous governor's rendition warrant was held to be illegal, that is not res judicata on whether a subsequent rendition warrant is proper. *Id.*; *see generally* Annot., "Discharge on Habeas Corpus of One Held in Extradition Proceedings as Precluding Subsequent Extradition Proceedings," 33 A.L.R.3d 1443.

The grounds stated here are generally those listed in *Sandoval*, which based them on *Michigan v. Doran*, 439 U.S. 282, 99 S. Ct. 530, 58 L. Ed. 2d 521 (1980). The issue of whether the extradition documents are "in order" has been restated for clarity. *Sandoval* and *Doran* are true fugitive cases. Since there are statutory grounds for extradition in addition to fugitive status, provision also is made for them in this rule. *See also Colfax County Bd. of Commr's v. State of N.H.*, 16 F.3d 1107 (10th Cir. 1994) (a habeas proceeding cannot be transformed into an inquiry into the appropriateness of the demanding state's actions. "'Surrender is not to be interfered with by the summary process of habeas corpus upon speculations as to what ought to be the result of a trial in the place where the Constitution provides for its taking place.'" *Id.* (*quoting Drew v. Thaw*, 235 U.S. 432, 440, 59 L. Ed. 302, 35 S. Ct. 137 (1914)); *Hopper v. State ex. rel. Schiff*, 101 N.M. 71, 678 P.2d 699 (1984) (court may not look behind the charging documents to determine the applicability of the demanding state's criminal statute); *State v. Sandoval*, 95 N.M. 254, 620 P.2d 1279 (1980) (district court may not consider questions of res judicata or delays in the extradition hearing); and *Bazaldua v. Hanrahan*, 92 N.M. 596, 592 P.2d 512 (1979) (governor's warrant is prima facie evidence that the constitutional and statutory requirements have been met and fugitive must prove alibi beyond a reasonable doubt).

That the defendant's name is the same as the name of the person sought is prima facie evidence that the defendant is the person sought, even if the name is common. *Wright v. Florida*, 497 So.2d 1313 (Fla. App. 1986).

The petition is required to state the factual basis for the grounds alleged so that the prosecutor and demanding state will have a fair opportunity to prepare for the hearing on the petition. More specificity is required than for other motions in order to avoid needing extra time for discovery, so that the defendant can be delivered to the demanding state quickly if extradition is proper.

Notice to the agent of the demanding state is required by Section 31-4-10 NMSA 1978.

In general, conflicting evidence concerning a crime must be resolved in the state where the crime is charged, and extradition is proper. *Bazaldua v. Hanrahan*, 92 N.M. 596, 592 P.2d 512 (1979); accord, *South Carolina v. Bailey*, 289 U.S. 412, 53 S. Ct. 667, 77 L.Ed 1292 (1933) (alibi in another state).

ANNOTATIONS

Effective dates. — Pursuant to a court order dated November 8, 2001, this rule is effective January 1, 2002.

5-825. Bail after arrest on a governor's rendition warrant; dismissal for failure to deliver defendant.

After arrest on a governor's rendition warrant, the accused person shall be ordered held without bail pending delivery to agents of the demanding state for at least thirty (30) days after the arrest. The accused person shall be ordered held without bail pending delivery to agents of the demanding state for at least thirty (30) days after final action on a petition for writ of habeas corpus if the accused files a timely petition for writ of habeas corpus. If agents of the demanding state do not appear within those time periods, the court may dismiss the action and discharge the accused, or, upon good cause shown, may extend the time period for not more than thirty (30) days, during which time the accused person shall be eligible for release on bail.

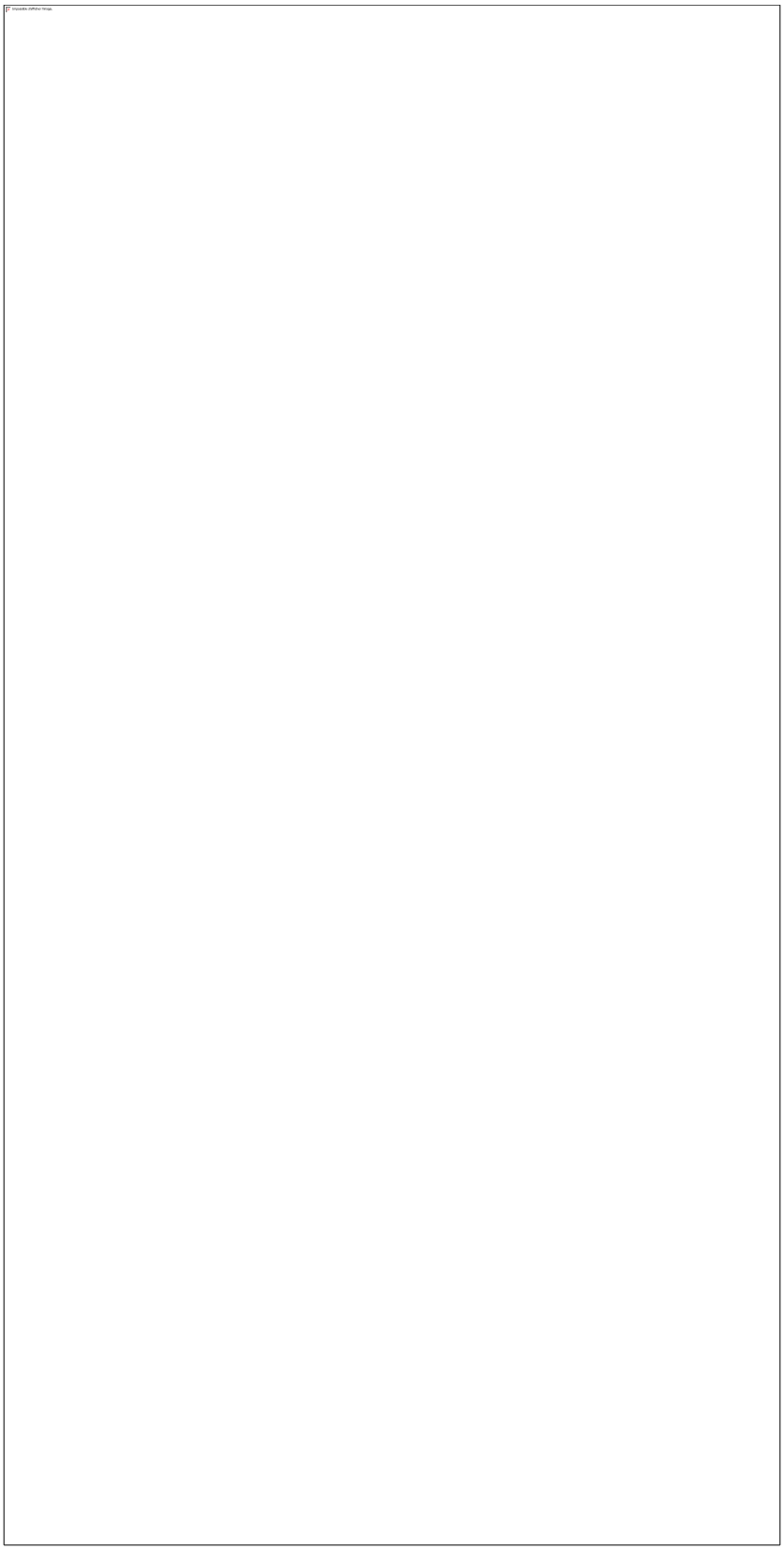
[Approved, effective January 1, 2002.]

ANNOTATIONS

Effective dates. — Pursuant to a court order dated November 8, 2001, this rule is effective January 1, 2002.

ARTICLE 9
Appendices

5-901. Time sequence for typical felony case.



5-902. Contempt of court.

[This paper was originally prepared by University of New Mexico School of Law students as part of the judicial research program of the institute of public law. It has been updated by the staff of the Institute of Public Law and edited by Luis Stelzner, assistant professor of law, University of New Mexico School of Law.]

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I. CONTEMPT OF COURT

Civil and Criminal Contempt Distinguished.

The difference between civil and criminal contempt derives not from the subject out of which it arises but rather the purpose for which the court employs its contempt power. In State ex rel. Bliss v. Greenwood, 63 N.M. 156, 159, 315 P.2d 223, 225 (1957), the New Mexico Supreme Court stated that:

> Where the primary purpose is to preserve the court's authority and to punish for disobedience of its orders, the contempt is criminal. Where the primary purpose is to provide a remedy for an injured suitor and to coerce compliance with an order, the contempt is civil.

By adopting this method of distinguishing between civil and criminal contempt, the court closely followed the reasoning the United States Supreme Court used in Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 441, 31 S. Ct. 492, 55 L. Ed. 797 (1911), which said,

> It is not the fact of punishment but rather its character and purpose that often serve to distinguish between the two classes of cases. If it is for civil contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court.

It should be noted, however, that the courts consider other factors, such as the nature of the act, the parties to the contempt and the conduct of the proceeding may be indicative of whether the contempt proceeding is civil or criminal. See State ex rel. Apodaca v. Our Chapel of Memories of N.M., Inc., 74 N.M. 201, 392 P.2d 347 (1964); International Minerals & Chem. Corp. v. Local 177, United Stone & Allied Prods. Workers, 74 N.M. 195, 392 P.2d 343 (1964); State v. New Mexican Printing Co., 25 N.M. 102, 117 P. 751 (1918).

At first glance the distinction may seem merely semantic and, therefore, unimportant. However, the classification of contempt as either civil or criminal results in very important consequences to the trial judge, whose classification of the contempt proceeding will determine the necessary kind of procedure to be followed. For example, a defendant in a criminal contempt proceeding has a Fifth Amendment right not to testify; see International Minerals & Chem. Corp. v. Local 177, United Stone & Allied Prods. Workers, 74 N.M. 195, 392 P.2d 343 (1964). Indeed, generally, the constitutional and regulatory rights of the criminal defendant attach in a non-summary proceeding for criminal contempt. See id., State v. New Mexican Printing Co., 25 N.M. 102, 117 P. 751 (1918). An injured person in a civil contempt proceeding may be reimbursed for the wrong done as the result of noncompliance with a valid order of the court, including attorneys' fees. See Royal Int'l Optical Co. v. Texas State Optical Co., 92 N.M. 237, 586 P.2d 318 (Ct. App.), cert. denied, 92 N.M. 260, 586 P.2d 1089 (1978), cert. denied, 442 U.S. 930, 99 S. Ct. 2860, 61 L. Ed. 2d 297 (1979).

In addition, it is important to note that criminal contempt can arise out of a civil action (see International Minerals & Chem. Corp. v. Local 177, United Stone & Allied Prods. Workers, 74 N.M. 195, 392 P.2d 343 (1964), where defendants were subject to criminal contempt for failure to obey a district court's temporary restraining order) and that civil contempt can arise out of a criminal action (no New Mexico cases, but see Harris v. United States, 382 U.S. 162, 86 S. Ct. 352, 15 L. Ed. 2d 240 (1965), where defendant was charged with civil contempt for failure to answer questions directed by a federal district court in a proceeding ancillary to a grand jury hearing). The origin of the contempt proceeding is in no way controlling, rather the court should look to its purpose for using its contempt power in determining what kind of procedure to employ. Use of incorrect procedure in the contempt proceedings can lead to reversal by an appellate court. However, the same conduct may constitute both civil and criminal contempt. In such circumstances the civil and criminal contempt may be prosecuted together in one action, and the court may resort to both criminal and civil contempt remedies. Lindsay v. Martinez, 90 N.M. 737, 568 P.2d 263 (Ct. App. 1977) (violation of court's restraining order restraining civil litigants); State v. Our Chapel of Memories of N.M., Inc., 74 N.M. 201, 392 P.2d 347 (1964).

Generally, then, criminal contempt is the power of the court to punish in order to vindicate public authority, whereas civil contempt is remedial and serves to further the cause of justice as between the litigants. The classification of the contempt will necessarily determine the kinds of procedure the court will have to follow.

Direct Contempt Versus Indirect Contempt.

Contempt may be either direct or indirect. The distinction turns on the place where the contumacious conduct occurs. Direct contempt occurs before the court while it is in session and administering justice, whereas indirect contempt occurs beyond the senses of the trial judge and the confines of his courtroom. A direct contempt may also arise out of the failure of an attorney to file documents with the court, such as failure to file a brief which complies with the rules governing appeals, Matter of Avallone, 91 N.M. 777, 581

P.2d 870 (1978), or violation of rules in failing to file a proper docketing statement, State v. Gardner, 91 N.M. 302, 573 P.2d 236 (Ct. App.), cert. denied, 91 N.M. 249, 572 P.2d 1257 (1977).

The New Mexico case law on direct contempt is relatively sparse, primarily because there was no right to appeal from contempt arising out of conduct in the presence of the court until 1971 when the New Mexico Court of Appeals, in State v. Watson, 82 N.M. 769, 487 P.2d 197 (Ct. App. 1971), interpreted the 1965 constitutional amendment to N.M. Const. Art. VI, Sec. 2, as overriding the existing provision disallowing the right to appeal in direct contempt cases. The cases dealing with direct contempt, State v. Sanchez, 89 N.M. 673, 556 P.2d 359 (Ct. App. 1976), State v. Driscoll, 89 N.M. 541, 555 P.2d 136 (1976), and Wollen v. State, 86 N.M. 1, 518 P.2d 960 (1974), involve acts performed in the presence of the court. In the above cases the direct contempt was denominated as criminal; however, direct contempt can also be civil in nature, as in a grand jury proceeding wherein a witness refuses to answer questions. Harris v. United States, 382 U.S. 162, 86 S. Ct. 352, 15 L. Ed. 2d 240 (1965).

The New Mexico cases on indirect contempt are more numerous. More often than not indirect contempt involves disobedience of a court order, which is usually in the form of a temporary restraining order, an injunction, or a court order accompanying a final judgment. Other cases involving indirect contempt include a variety of conduct, including newspaper publications tending to embarrass the court, State v. Morris, 75 N.M. 475, 406 P.2d 349 (1965), State v. New Mexican Printing Co., 25 N.M. 102, 117 P. 751 (1918), intimidation of a witness, State v. Kayser, 25 N.M. 245, 181 P. 278 (1919), State v. Cooper, 64 N.M. 18, 322 P.2d 713 (1958), jury tampering, State v. McAllister, 43 N.M. 514, 96 P.2d 1 (1939), conduct of attorney in discovery proceeding, Escobedo v. Agriculture Prods. Co., 86 N.M. 466, 525 P.2d 393 (1974).

The distinction between direct contempt and indirect contempt is important for determining whether the court can exercise its contempt power by way of a summary proceeding. Generally, if the contempt is direct and of the kind that will necessitate immediate action in order to maintain the dignity and authority of the court, then the court can act summarily. Ex parte Terry, 128 U.S. 289, 9 S. Ct. 77, 32 L. Ed. 405 (1888); State v. Diamond, No. 4294 (N.M. Ct. App., filed February 7, 1980).

The United States Supreme Court has, however, determined some forms of direct contempt that did not justify the use of a summary procedure. In Harris v. United States, 382 U.S. 162, 86 S. Ct. 352, 15 L. Ed. 2d 240 (1965), the court determined that the direct contempt of a grand jury witness who refused to answer questions before a grand jury, and then again in a district court proceeding ancillary to the grand jury did not justify summary action. The court in Harris reasoned that the real contempt had occurred before the grand jury, not before the district court, and that delay for a hearing would not disrupt the grand jury. In Taylor v. Hayes, 418 U.S. 488, 94 S. Ct. 2697, 41 L. Ed. 2d 897 (1974), the court found that, where the summary contempt proceeding of a defense attorney was postponed until after the case-in-chief, the basic justification of

necessity was absent. Therefore, the contemnor's due process rights to notice and an opportunity to be heard had been violated, rendering the summary action invalid.

In State v. Sanchez, 89 N.M. 673, 556 P.2d 359 (Ct. App. 1976), a district court judge found a defense witness in contempt of court for failure to answer questions on cross-examination. The New Mexico Supreme Court held that such conduct in the presence of the court could be punished by the court's contempt power and in a summary proceeding.

In Wollen v. State, 86 N.M. 1, 518 P.2d 960 (1974), the facts were such that the trial judge might have been justified in holding a summary proceeding. Instead, the court waited twenty-six (26) days before sentencing the contemnor for his direct contempt. Because of this delay the New Mexico Court of Appeals found that the lack of notice and opportunity to be heard violated the contemnor's due process rights. State v. Wollen, 85 N.M. 764, 517 P.2d 748 (Ct. App. 1973), rev'd on other grounds, 86 N.M. 1, 518 P.2d 960 (1974). The court of appeals did indicate, however, that a summary proceeding would have been appropriate had there been a need for immediate punishment of the contemnor. The court concluded that the twenty-six (26) day delay effectively negated the policy reasons for allowing summary contempt, viz., the need to preserve order in the courtroom.

In State v. Driscoll, 89 N.M. 541, 555 P.2d 136 (1976), the issue of whether a summary proceeding was justified was not brought before the court. Instead, the opinion focused on the issue of double jeopardy, which was in question because the contemnor had been adjudged to be in contempt in a summary procedure by the trial judge and then tried in a separate proceeding by another judge. One might argue that the court's failure to address the propriety of the summary proceeding amounts to silent approval of a summary proceeding under the same or similar circumstances. This position, absent subsequent clarifying case law, is nonetheless tenuous.

In State v. Diamond, No. 4294 (N.M. Ct. App., filed February 7, 1980), the court held that summary proceedings were improper where an attorney failed to appear in court at the time designated by the judge. The court reasoned that although the absence of the attorney was in the presence of the court the reason for his absence, a significant fact in determining whether the absence was contumacious, was not in the court's presence and required evidence to be presented on that issue in order for the court to make a determination that the failure to appear was without valid excuse. Notice and a hearing were required on the issue of a valid excuse for the failure to appear.

In general, then, summary proceedings, because of due process limitations, are not appropriate when the contempt is indirect, Cooke v. United States, 267 U.S. 517, 45 S. Ct. 390, 69 L. Ed. 767 (1925). In instances of direct contempt, summary proceedings are appropriate when they are the only means of preserving order (such as one or more persons present being orally or physically disruptive) or insuring administration of courtroom procedures (such as a witness, without a claimed privilege, refusing to testify).

Indirect Contempt - Temporary Restraining Orders and Injunctions.

Often the only way of compelling compliance with judicial orders is through the sanction of contempt. As a consequence, a number of the New Mexico cases dealing with contempt arise out of proceedings brought to procure injunctive relief. One of the leading New Mexico cases on contempt is just such a case, State ex rel. Bliss v. Greenwood, 63 N.M. 156, 315 P.2d 223 (1957). In that case defendant was enjoined from using more than a stated amount of water from a well. After defendant used more than the amount allotted, the court, in order to vindicate its injunctive power, held defendant in contempt.

Other cases involving similar enforcement or vindication of the court's injunctive power have included failure to comply with an injunction and state consent decree regulating funeral homes, State ex rel. Apodaca v. Our Chapel of Memories of N.M., Inc. (NSL), 74 N.M. 201, 392 P.2d 347 (1964); failure to comply with injunction enjoining house of prostitution, State v. Clark, 56 N.M. 123, 241 P.2d 328 (1952); temporary restraining orders and injunctions involving labor disputes, New Jersey Zinc Co. v. Local 890, UMW, 57 N.M. 617, 261 P.2d 648 (1953), Jencks v. Goforth, 57 N.M. 627, 261 P.2d 655 (1953), International Minerals & Chem. Corp. v. Local 177, United Stone & Allied Prods. Workers, 74 N.M. 195, 392 P.2d 343 (1964); failure to comply with court order enforcing covenant that restricted house to one story above highest point in area, Greer v. Johnson, 83 N.M. 334, 491 P.2d 1145 (1971).

Indirect Contempt - Miscellaneous Conduct.

Another area where contempt is frequently necessary to encourage compliance with judicial process is in the field of domestic relations. In In re Fullen, 17 N.M. 394, 128 P. 64 (1913), even though the contempt was void for failure to provide defendant with notice and an opportunity to be heard, the court indicated that failure to turn over custody of the child in compliance with the court's order is a proper subject for contempt. In Armijo v. Armijo, 29 N.M. 15, 217 P. 623 (1923), the failure of the husband to comply with an order granting alimony, attorney fees, and court costs was prima facie evidence of contempt.

In Sosaya v. Sosaya, 89 N.M. 769, 558 P.2d 38 (1977), the supreme court held that a trial court does not have power to hold a person in contempt for failure to pay debts incurred during marriage as ordered in a divorce decree if the debt is subject to discharge in a bankruptcy proceeding.

Witness intimidation and perjury are also areas justifying the use of the contempt power. In State v. Kayser, 25 N.M. 245, 181 P. 278 (1919), the court justifiably held the defendant in contempt for attempting to influence a witness' testimony. In State v. Cooper, 64 N.M. 18, 322 P.2d 713 (1958), the court came to a similar conclusion. And in Lopez v. Maez, 38 N.M. 524, 37 P.2d 240 (1934), the supreme court, although reversing on other grounds, determined that perjury, if the trial court has judicial knowledge of falsity, is punishable as contempt.

Acts that interfere with the administration of the court or that fraudulently attempt to divest the court of jurisdiction can also be grounds for contempt. In Norton v. Reese, 76 N.M. 602, 417 P.2d 205 (1966), even though the original contempt charge was dismissed on other grounds, the court indicated that the action of an attorney in securing a temporary restraining order in another county in order to block the carrying out of judicially ordered actions by an officer of the original court could constitute contempt. And in State ex rel. Neumann v. Keller, 36 N.M. 81, 8 P.2d 786 (1932), the court found that defendant's willful conspiracy to defeat the court's jurisdiction in a child custody case by removing the child to Colorado constituted contempt.

Indirect Contempt - Media Publications.

In New Mexico, as elsewhere in the country, the use of the contempt power to silence the media because of attacks on the courts has not been very successful. The earliest New Mexico case, State v. New Mexican Printing Co., 25 N.M. 102, 117 P. 751 (1918), came closest to allowing a contempt against a newspaper. In that case the court, because of lack of proof, ordered the information dismissed and the defendant discharged. The court stated that unless a publication is contemptuous per se, it must be affirmatively shown to be so by way of innuendo.

In State v. McGee Publishing Co., 29 N.M. 455, 71 P.2d 1028 (1924), the issue of the newspaper's contempt in publishing articles critical of a particular court was effectively mooted by a pardon by the governor. As a result, the free speech issues were never effectively developed. Instead, the court spent most of its time discussing the power of the governor to execute a pardon for a contempt charge. The court affirmed the power of the governor to grant pardons in such cases.

A more detailed analysis of the problems created by the First Amendment freedom of the press provision was developed in State v. Morris, 75 N.M. 475, 406 P.2d 349 (1965). In that case the court employed the clear and present danger test as developed by Justice Holmes in Schneck v. United States, 249 U.S. 47, 39 S. Ct. 247, 63 L. Ed. 470 (1919). The court determined that the reporter's often scathing criticisms of a district court judge's handling of a vehicular homicide case involving an assistant district attorney did not present a clear and present danger to society. It reached this conclusion by finding that the state had not proved beyond a reasonable doubt that the articles in question created a clear and present danger, or imminent peril, to the administration of justice.

II. DEFENSES TO CONTEMPT

Inability to Comply.

Inability to comply with a court order or final decree can serve as a defense to a contempt charge in New Mexico. In Andrews v. McMahan, 43 N.M. 87, 85 P.2d 743 (1938), the court held that alleged contemnor's inability to comply, due to no fault of his own, with court's divorce decree provisions was a valid defense to the contempt charge.

In Armijo v. Armijo, 29 N.M. 15, 217 P. 623 (1923), the court indicated that inability to comply with a final order of divorce decree is a defense but that the burden of proving such a defense is on the defendant. In this case, where defendant was shown to have had substantial assets, his claimed inability to comply with the financial requirements of the divorce decree was an imperfect defense. In another contempt case arising out of failure to meet financial obligations imposed by a divorce decree, the New Mexico Supreme Court found alleged contemnor's discharge in bankruptcy of those obligations was a valid defense to the contempt charge. Sosaya v. Sosaya, 89 N.M. 769, 558 P.2d 38 (1977).

Lack of Intent.

From the outset, lack of intent was no defense to a contempt charge. As early as State v. Kayser, 25 N.M. 245, 181 P. 278 (1919), the court expressly stated that intent need not be shown in a contempt proceeding. However, in Abbot v. Sherman Mines, Inc., 41 N.M. 531, 71 P.2d 1037 (1937), the court in dicta indicated that intent was an essential element to be proved in a contempt proceeding.

This ambiguity remained until Seven Rivers Farm, Inc. v. Reynolds, 84 N.M. 789, 508 P.2d 1276 (1973), when the court specifically overruled Abbot by stating that intent need not be shown in either civil or criminal contempt proceedings.

This rule is contrary to that of a substantial majority of jurisdictions that have dealt with the question. See, Contempt 17 C.J.S. § 12. The Seven Rivers Farm view also runs counter to the general common law requirement of mens rea, Criminal Law, LaFave & Scott § 31, p. 218, which view is incorporated in the Model Penal Code § 2.05.

Some ambiguity may yet remain in light of In re Acuff, 331 F. Supp. 819 (D.N.M. 1971), where the federal district court held that a photographer's violation of the no photo equipment rule of the court was not contempt when the attorney general had specifically invited photographers and where the rule had never been printed or disseminated thus affording the defendant no prior notice of the rule. The reasoning used by the district court in reaching its conclusion implies that some sort of mens rea is required in order to punish someone for contempt.

III. PROCEDURE AND CONSTITUTIONAL RESTRAINTS

Notice and Opportunity to Be Heard.

In Cooke v. United States, 267 U.S. 517, 45 S. Ct. 390, 69 L. Ed. 767 (1925), the United States Supreme Court found that indirect contempt always required that notice be given to the alleged contemnor. Similarly, New Mexico has always insisted on notice in cases of indirect civil and criminal contempt.

Indirect criminal contempt proceedings are governed by the Rules of Criminal Procedure. Lindsay v. Martinez, 90 N.M. 737, 568 P.2d 263 (Ct. App. 1977).

In cases involving indirect contempt of both a civil and a criminal nature, New Mexico has required that the alleged contemnor be afforded notice of the action. In re Fullen, 17 N.M. 394, 128 P. 64 (1912). And in instances of direct contempt not punished summarily, the alleged contemnor is also entitled to notice. Wollen v. State, 86 N.M. 1, 518 P.2d 960 (1974).

In both civil and criminal contempt not punished summarily, the alleged contemnor must be charged by a sworn affidavit, information, or verified motion. In State v. Clark, 56 N.M. 123, 241 P.2d 328 (1952), where the district attorney initiated a contempt proceeding with an unverified motion for an order to show cause why the defendant should not be held in contempt, the court held that the district court was without jurisdiction to hear the case because the motion was unsworn. The court came to a similar conclusion in a case involving an unverified motion by defendant's counsel in a civil case where the contumacious acts took place out of the presence of the court. The court held that the lower court's contempt action was void where motion for order to show cause was unsworn. Escobedo v. Agriculture Prods. Co., 86 N.M. 466, 525 P.2d 393 (Ct. App. 1974).

However, an affidavit is not required for direct contempt. Proceedings for direct contempt in the constructive presence of the court for violation of court rules may be initiated by a show cause order or motion. Matter of Avallone, 91 N.M. 777, 581 P.2d 870 (1978).

The kind of notice required in a criminal contempt proceeding is substantially different from that required in a civil contempt proceeding. Roybal v. Martinez, 92 N.M. 630, 593 P.2d 71 (Ct. App. 1979). "If the proceeding be one in criminal contempt, personal service is, of course, necessary and service of defendant's attorney would not suffice." Momsen-Dunnegan-Ryan Co. v. Placer Syndicate Mining Co., 41 N.M. 525, 529, 71 P.2d 1034, 1036 (1937). Personal service is required where criminal contempt is involved, whereas service on one's attorney will suffice when the contempt is civil.

The opportunity to be heard, as an issue addressed in the New Mexico cases, has been treated in connection with notice. The court has found that where there is no notice there can be no opportunity to be heard. In re Fullen, 17 N.M. 394, 128 P. 64 (1912) and State v. Wollen, 85 N.M. 764, 517 P.2d 748 (Ct. App. 1973), rev'd on other grounds, 86 N.M. 1, 518 P.2d 960 (1974). By looking at the right to a hearing in this way the court has recognized that the opportunity to be heard is an essential element of the due process to be afforded the alleged contemnor. The procedural requirements of such a hearing will depend primarily on whether the contempt is civil or criminal in nature.

Right Against Self-Incrimination.

One of the important reasons for distinguishing between civil and criminal contempt is the need to determine the procedure to follow. As already stated, civil contempt is primarily remedial and for the benefit of the litigants, whereas criminal contempt is punitive and for the purpose of vindicating the authority of the court. State ex rel. Bliss v. Greenwood, 63 N.M. 156, 315 P.2d 223 (1957).

In a criminal contempt action, the Fifth Amendment right against self-incrimination, including the right not to testify, applies. The defendant cannot be compelled to testify at his own hearing. Violation of this Fifth Amendment right can result in reversal on appeal. In International Minerals & Chem. Corp. v. Local 177, United Stone & Allied Prods. Workers, 74 N.M. 195, 392 P.2d 343 (1964), the New Mexico Supreme Court reversed a contempt conviction where defendant was not informed of his Fifth Amendment rights and was called to testify. The trial court's failure to follow the dictates of criminal procedure resulted because of its misapprehension concerning the nature of the contempt. The trial court proceeded as if it were dealing with a civil contempt, only to be reversed on appeal when the supreme court determined that the action was actually criminal in nature.

In civil cases the right not to testify is inapplicable since the proceeding is not viewed as criminal.

Right to Trial by Jury.

Generally, there is no right to trial by jury in a contempt proceeding. However, there are certain exceptions created by state statute and recent United States Supreme Court cases interpreting the constitutional guarantee of the right to trial by jury.

Section 34-1-4 NMSA 1978 provides:

> In all proceedings in the district court for indirect criminal contempt arising out of written publications made out of court, the contemnor shall have the right to a trial by jury. The rules of procedure applicable to other criminal proceedings shall apply to these proceedings.

Even though the statute was passed in 1965, there have been no cases dealing directly with the right to trial by jury provision. Nonetheless, the statute is capable of various constructions. For example, in a civil contempt proceeding brought against a newspaper reporter for failure to divulge the source of a particular news story, the reporter would not have a right to a trial by jury. There would be no right to trial by jury because the contempt would have been civil. In contrast, there would be a right to trial by jury under the same facts where the purpose of the court is to vindicate its authority rather than to coerce compliance with a judicial order.

An interesting New Mexico case construing a disqualification statute, with similar language to the above statute, interpreted the provision "including proceedings for indirect criminal contempt arising out of oral or written publications . . .," 38-3-9 NMSA

1978, to include an attorney's act of filing a motion for a temporary restraining order in another county, securing an order of the district court of another county which interfered with the process issued by another district court defeating the execution of a judgment commenced by the original court. Norton v. Reese, 76 N.M. 602, 604, 417 P.2d 205, 207 (1966). With the court's rather sweeping construction of this statute, one should be aware of the possibility of a similarly broad construction of the jury trial statute. Such a broad interpretation could involve all allegedly contemptuous conduct outside the presence of the court where a writing is involved, thus permitting a trial by jury.

The right to trial by jury as protected by the application of the Fourteenth Amendment's due process clause requires that an alleged contemnor be afforded a jury trial under certain circumstances. With Baldwin v. New York, 399 U.S. 66, 90 S. Ct. 1886, 26 L. Ed. 2d 437 (1970), the supreme court determined that the Sixth Amendment, as applied through the Fourteenth Amendment, required the extension of the right to a jury trial to all offenses carrying a potential sentence in excess of six (6) months.

In a case decided four years earlier and not overruled by Baldwin v. New York, 399 U.S. 66, 90 S. Ct. 1886, 26 L. Ed. 2d 437 (1970), the supreme court held that the right to a trial by jury did not attach where the contempt sentence was for six (6) months or less, Cheff v. Schnackenberg, 384 U.S. 373, 86 S. Ct. 1523, 16 L. Ed. 2d 629 (1966). The court came to this conclusion by reasoning that the federal code denominated all offenses carrying a sentence of six (6) months or less as a petty offense. The court also indicated that in federal cases the right to trial by jury would attach where the contempt carried punishment of imprisonment in excess of six (6) months.

In Codispoti v. Pennsylvania, 418 U.S. 506, 94 S. Ct. 2687, 41 L. Ed. 2d 912 (1974), the supreme court held that the alleged contemnor was entitled to trial by jury where the aggregate of his sentences for several contempts arising out of a single trial exceeded six (6) months. In Taylor v. Hayes, 418 U.S. 488, 94 S. Ct. 2697, 41 L. Ed. 2d 897 (1974), the court came to the conclusion that there would not be a right to trial by jury where the state law required concurrent serving of sentences unless specified otherwise by the judge and where the total time that could be spent in jail would not exceed six (6) months.

In response to the United States Supreme Court decision in Baldwin v. New York, 399 U.S. 66, 90 S. Ct. 1886, 26 L. Ed. 2d 437 (1970), rather than Codispoti v. Pennsylvania, 418 U.S. 506, 94 S. Ct. 2687, 41 L. Ed. 2d 912 (1974), and Taylor v. Hayes, 418 U.S. 488, 94 S. Ct. 2697, 41 L. Ed. 2d 897 (1974), the New Mexico Supreme Court, in Seven Rivers Farm, Inc. v. Reynolds, supra at 795, indicated in dicta:

> As matters now stand, if a case arose in which contemnor was, or was in jeopardy of being, imprisoned for more than six months, we would be bound, under the federal cases we have cited, to hold that he had a federal constitutional right to trial by jury.

In response to the issue before it, the court rejected appellant-contemnor's argument that a one thousand dollar ($1,000) fine in a criminal contempt case made the case a serious, i.e., non-petty offense, and, therefore, entitled him to a trial by jury. Taken as a whole Seven Rivers Farm, Inc., holds that there is a right to a trial by jury when the penalty may exceed six (6) months incarceration, and exists when the fine may exceed one thousand dollars ($1,000). There is no right to trial by jury in a summary contempt proceeding where the sentence did not exceed six (6) months. State v. Sanchez, 89 N.M. 673, 556 P.2d 359 (Ct. App. 1976).

There is no federal jury requirement if the sentence of imprisonment is six (6) months or less. The court may avoid a jury demand by announcing in advance that in the event of a conviction the sentence will not exceed six (6) months, if the contempt is tried by the court without a jury.

If the court finds that a sentence of less than six (6) months would be an inadequate sanction, then before the hearing it should announce that the penalty may exceed six (6) months and should advise the alleged contemnor of his right to trial by jury.

Right to Counsel.

No New Mexico cases have addressed the problem of when and under what circumstances an alleged contemnor is entitled to representation by counsel. It would appear that no New Mexico court would prevent an alleged contemnor from being represented by counsel when the proceeding involved was non-summary in nature. However, there might be substantial disagreement concerning when counsel must be appointed to an alleged contemnor who is indigent.

The United States Supreme Court has recently held that the Sixth and Fourteenth Amendments "require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the state has afforded him the right to assistance of appointed counsel . . . ." Scott v. Illinois, 440 U.S. 367, 99 S. Ct. 1158, 59 L. Ed. 2d 383 (1979). In Scott the court was interpreting its earlier decision in Argersinger v. Hamlin, 407 U.S. 25, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972), and thus provided the right to counsel in misdemeanors punished by imprisonment. Neither Scott nor Argersinger involve criminal contempt prosecutions. Nevertheless, the reasoning of the two decisions is clearly applicable to such prosecutions.

Another question arises as to whether an alleged contemnor who is indigent and accused of civil contempt has the right to appointed counsel. No cases before the New Mexico or United States Supreme Court have yet answered the question. The policies behind Scott and Argersinger would seem to support the proposition that indigents should have appointed counsel, when jail time is involved. However, the Sixth Amendment right to counsel delineated in Scott and Argersinger is by its terms applicable only in criminal prosecutions. A court would probably apply a due process analysis to the issue along the lines set forth in Gagnon v. Scarpelli, 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973) and In re Gault, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed.

2d 527 (1967). To afford the accused all the rights to which he is entitled, it might be wise for a district judge to make sure that the alleged contemnor in a civil contempt proceeding has retained his own counsel, been appointed counsel, or waived his right to counsel. In cases requiring minimal sanctions, a fine might avoid the problem and still be an effective sanction. Where the penalty is fine only, Argersinger v. Hamlin, 407 U.S. 25, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972) does not apply.

Disqualification of Judge.

According to 38-3-9 NMSA 1978, a defendant can disqualify a judge without cause when the proceeding involves an indirect criminal contempt arising out of an oral or written publication. The statute expressly excludes other forms of indirect contempt and direct contempt. As a result, a trial judge can be disqualified without cause only when the contemptuous conduct is indirect and involves written or spoken words.

Seven Rivers Farm, Inc. v. Reynolds, 84 N.M. 789, 508 P.2d 1276 (1973), expressly affirmed the operation of this statute. However, the burden of disqualifying the judge is on the defendant, and an affidavit of disqualification is required.

Mandatory Recusal of the Judge.

Until Wollen v. State, 86 N.M. 1, 518 P.2d 960 (1974), there was no indication in New Mexico case law that a trial judge involved in the subject matter of the contempt had to recuse himself. In Wollen the court concluded that in the absence of circumstances necessitating immediate corrective action (i.e., a summary contempt proceeding) a person accused of contempt by a trial judge should be tried before a different judge, one not involved in the subject matter of the contempt or in the citation of the contemnor. Id. at 2, 518 P.2d at 961, citing People v. Kurz, 35 Mich. App. 643, 660, 192 N.W.2d 594, 603 (1971).

A strict interpretation of this holding would require all trial judges not acting summarily who cite someone for contempt to recuse themselves. This would involve contempts of every kind: direct, indirect, civil, and criminal. A closer look at the facts in Wollen v. State, 86 N.M. 1, 518 P.2d 960 (1974), and People v. Kurz, 35 Mich. App. 643, 192 N.W.2d 594 (1971), may serve to limit the operation of the rule. In both cases the alleged contempt arose out of the conduct of an attorney in the presence of the judge. In both instances the judge failed to act summarily. Under these facts, Wollen would be limited only to instances of direct contempt not punished in a summary proceeding. Under this reading of the case, a district court judge would not have to recuse himself where he punished the direct contempt in a summary proceeding and in those cases where the contempt was indirect. To force a trial judge to defer his contempt power to another judge when the contempt is indirect would result in an inefficient use of the court's time and an erosion of the trial judge's power to supervise and enforce judicial orders, the conduct of witnesses, the conduct of jurors, and the administration of equitable remedies.

In Matter of Avallone, 91 N.M. 777, 581 P.2d 870 (1978), the New Mexico Supreme Court held that if the contempt is for failure to follow court rules and the judge does not become personally embroiled in the proceedings, the judge need not recuse himself.

The federal constitutional rule announced in Mayberry v. Pennsylvania, 400 U.S. 455, 91 S. Ct. 499, 27 L. Ed. 2d 532 (1970) is similar to the New Mexico rule set forth above. In that case the United States Supreme Court held that where the trial judge becomes so personally embroiled in the controversy that he can no longer fairly rule in the contempt charge he must, as a matter of due process, recuse himself. In Mayberry the contemnor vilified the judge with obscene language such that the judge became personally embroiled.

Appeal.

Before State v. Watson, 82 N.M. 769, 487 P.2d 197 (Ct. App. 1971), the ability to appeal a contempt adjudication was complicated by the nature of the contempt. In Watson the New Mexico Court of Appeals construed the 1965 amendment to N.M. Const. Art. VI, Sec. 2 as allowing the unqualified right to appeal in all contempt cases, even those involving a summary proceeding. Before Watson, contempts committed in the presence of the court, whether tried summarily or in a later proceeding, could not be appealed as a matter of right.

Under Watson, all contempts are appealable. This case operates as an invasion into the area of summary contempt, once a part of the trial judge's discretion, reviewable only in a habeas corpus proceeding.

Measure of Proof.

The measure of proof in a contempt proceeding will depend whether it is civil or criminal in nature. According to Greer v. Johnson, 83 N.M. 334, 491 P.2d 1145 (1971), the measure of proof in a civil contempt proceeding is a preponderance of the evidence. See also Matter of Briggs, 91 N.M. 84, 570 P.2d 915 (1977).

In criminal contempt proceedings the alleged contemnor must be shown to be guilty beyond a reasonable doubt. State v. Morris, 75 N.M. 475, 406 P.2d 349 (1965), and State v. McAllister, 43 N.M. 514, 96 P.2d 1 (1939).

Summary Contempt.

Summary contempt, because it is to be used only in circumstances necessitating immediate corrective action, is a procedure wherein all the above requirements can be justifiably dispensed with.

The court in State ex rel. Bliss v. Greenwood, 63 N.M. 156, 315 P.2d 223 (1957), recognized that the contempt power is an inherent one that could not be abridged by

legislation, especially in the area of summary contempt. The court recognized the need for a summary procedure when it stated:

Summary measures may be the only effective means of defending the dignity of judicial tribunals and of insuring that they are able to accomplish the purpose of their existence. Id. at 163, 315 P.2d at 231.

Federal cases support the proposition that the formalities of notice, hearing and counsel can be dispensed with in a summary contempt. In Ex parte Terry, 128 U.S. 289, 9 S. Ct. 77, 32 L. Ed. 2d 405 (1888), the court specifically held that a court could act summarily and therefore dispense with the normal procedural requirements. And the supreme court has recognized in dicta that due process is not violated by summary punishment. In re Petition for Green, 369 U.S. 689, 82 S. Ct. 1114, 8 L. Ed. 2d 198 (1962); Mayberry v. Pennsylvania, 400 U.S. 455, 91 S. Ct. 499, 27 L. Ed. 2d 532 (1971); Johnson v. Mississippi, 403 U.S. 212, 91 S. Ct. 1778, 29 L. Ed. 2d 423 (1971); Groppi v. Leslie, 404 U.S. 496, 92 S. Ct. 582, 30 L. Ed. 2d 632 (1972).

The reasons for dispensing with the normal formalities are obvious. First, the need to preserve order in the courtroom required the judge to act swiftly without undue delay. Second, the need for a hearing is dispensed with because there is no question of fact to be settled by a weighing of the evidence; the trial judge saw or heard the contempt and need not hear testimony in order to make a finding of fact. Third, without a need for a hearing there can be no need for counsel. And fourth, notice, which is normally required for the court to exercise its power over a person, is not necessary where all the parties are already before the court and thus conferring on it the necessary personal jurisdiction.

These formalities can be dispensed with only when the contempt is direct and of such a nature as to require immediate corrective measures. Notwithstanding the weight of authority to the contrary, State v. Sanchez, 89 N.M. 673, 556 P.2d 359 (Ct. App. 1976), seems to imply the informal, oral notice in the form of a warning is required in a summary proceeding. In that case the defense witness refused to answer questions on cross-examination. After duly warning the witness of the possibility of contempt and explaining the reason why she would be held in contempt, the court allowed her to purge herself of it. She failed to do so, and the court, in a summary proceeding, sentenced her to two (2) ninety-day jail terms. The New Mexico Court of Appeals, in addressing the notice issue, indicated that the warning by explaining how and when contempt would be applied was sufficient notice. To be on the safe side, the trial judge should at least warn the prospective contemnor and explain why he might be found in contempt.

In addition, the requirement that the Rules of Evidence apply to all contempt proceedings is dispensed with in summary contempt, as provided in Paragraph B of Rule 11-1101.

5-903. Juror handbook (Transferred).

ANNOTATIONS

Compiler's notes. — The juror handbook has been moved to appear at the end of Rule Set 14, Uniform Jury Instructions - Criminal.

Table Of Corresponding Rules

The first table below reflects the disposition of the former Rules of Criminal Procedure for the District Courts. The left-hand column contains the former rule number, and the right-hand column contains the corresponding present rule.

The second table below reflects the antecedent provisions in the former Rules of Criminal Procedure for the District Courts (right-hand column) of the present rules (left-hand column).

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