

1 **5-602.2. Proceedings after a finding of incompetency.**

2 A. **Scope.** This rule governs proceedings after a defendant has been found incompetent  
3 to stand trial under Rule 5-602.1 NMRA. This rule does not apply to a defendant charged with a  
4 felony whose incompetency is believed to be due to [~~mental retardation~~] developmental or  
5 intellectual disability. Those proceedings are governed by Rule 5-602.3 NMRA.

6 B. **Definitions.** For purposes of this rule, the following definitions shall apply.

7 (1) **Competency.** The terms competency, competence, and competent are used  
8 interchangeably throughout this rule and refer to whether the defendant has,

9 (a) sufficient present ability to consult with the defendant's lawyer with  
10 a reasonable degree of rational understanding,

11 (b) a rational as well as factual understanding of the proceedings against  
12 the defendant, and

13 (c) the capacity to assist in the defendant's own defense and to  
14 comprehend the reasons for punishment.

15 (2) **Dangerous.** The terms dangerous or dangerousness mean that, if released,  
16 the defendant presents a serious threat of inflicting great bodily harm on another or of violating  
17 Section 30-9-11 or Section 30-9-13 NMSA 1978. Dangerousness is not a clinical diagnosis;  
18 therefore, a finding of dangerousness need not be based on a psychological evaluation or on expert  
19 testimony.

20 (3) **Department.** The term Department means the New Mexico Department of  
21 Health.

22 C. **Defendant not charged with a felony.** If the incompetent defendant has not been  
23 charged with a felony, the following provisions shall apply.

1           (1)     *Case transferred to district court.* If the case was transferred to the district  
2 court under Rule 6-507.1 NMRA or Rule 8-507.1 NMRA, the court shall remand the case within  
3 two (2) days to the court in which the case is pending as provided in Rule 5-602.1(M)(2)(b)  
4 NMRA.

5           (2)     *Case originally filed in district court.* If the case was originally filed in the  
6 district court, the court may dismiss the case without prejudice in the interests of justice. [~~Upon~~  
7 On dismissal, the court may advise the district attorney to consider initiation of proceedings under  
8 Section 43-1-10 or 43-1-11 NMSA 1978 of the Mental Health and Developmental Disabilities  
9 Code. In the alternative, the court may advise the attorneys in the matter to consider referral to an  
10 appropriate person authorized under Section 43-1B-4 NMSA 1978 to file a petition for assisted  
11 outpatient treatment.

12           D.     **Defendant charged with a felony; dangerousness determination.** If the  
13 incompetent defendant is charged with a felony, the court shall consider whether there is clear and  
14 convincing evidence that the defendant is dangerous as that term is defined by Section 31-9-1.2(D)  
15 NMSA 1978 and this rule. A determination of the defendant's dangerousness shall take into  
16 account only evidence relevant to whether the defendant presents a serious threat of inflicting great  
17 bodily harm on another or of violating Section 30-9-11 or Section 30-9-13 NMSA 1978.

18           E.     **No finding of dangerousness.** If the court does not find that the incompetent  
19 defendant is dangerous under Paragraph D of this rule, the court may dismiss the case without  
20 prejudice in the interests of justice. [~~Upon~~ On dismissal, the court may advise the district attorney  
21 to consider initiation of proceedings under Section 43-1-10 or 43-1-11 NMSA 1978 of the Mental  
22 Health and Developmental Disabilities Code and order the defendant confined for a maximum of  
23 seven (7) days to facilitate preparation and initiation of a petition under that code. In the alternative,

1 the court may advise the attorneys in the matter to consider referral to an appropriate person  
2 authorized under Section 43-1B-4 NMSA 1978 to file a petition for assisted outpatient treatment.

3 F. **Finding of dangerousness.**

4 (1) ***Commitment for treatment to attain competency.*** If the court finds that an  
5 incompetent defendant charged with a felony is dangerous, the court shall commit the defendant  
6 for treatment to attain competency to stand trial. The order of commitment shall order the  
7 defendant transported to a secure, locked facility where the defendant shall remain under the  
8 supervision of the Department. The order also shall provide for return of the defendant to the local  
9 facilities of the court [~~upon~~] on completion of the treatment.

10 (2) ***Inability to treat defendant.*** If after an investigation the Department  
11 determines that it does not have the ability to meet the medical needs of the defendant, the  
12 Department may refuse admission and certify to the court and parties the Department's inability  
13 to meet the medical needs of the defendant. The certification shall be made within fourteen (14)  
14 days of receipt of the court's order of commitment and receipt of necessary and available  
15 documents reasonably required for admission. Within ten (10) days of receipt of the certification,  
16 the court shall set a hearing to determine disposition of the criminal case.

17 (3) ***Initial assessment and report.*** Unless the Department certifies that it is  
18 unable to meet the medical needs of the defendant, within thirty (30) days of the defendant's  
19 admission to undergo treatment to attain competency, the person supervising the defendant's  
20 treatment shall file with the court and serve on the state and the defendant the following:

- 21 (a) an initial assessment and treatment plan;  
22 (b) a report on the defendant's amenability to treatment to competency;

1 (c) an assessment of the facility's capacity to provide treatment for the  
2 defendant; and

3 (d) an opinion about the probability of the defendant's attaining  
4 competency within nine (9) months from the date of the finding of incompetency.

5 (4) ***Status-review hearing.*** Within ninety (90) days of the finding of  
6 incompetency, the court shall hold a hearing, unless waived by the defense, to review whether the  
7 defendant has attained competency, and if not, whether the defendant is making progress under  
8 treatment towards attaining competency within nine (9) months of the finding of incompetency  
9 and whether the defendant remains dangerous.

10 (a) If the court finds the defendant competent, the court shall set the  
11 matter for trial.

12 (b) If the court finds the defendant is not competent but is making  
13 progress toward attaining competency, the court may continue or modify its original order entered  
14 under Subparagraph (F)(1) of this rule, ~~provided that~~ but the court shall review the defendant's  
15 competency again ~~not~~ no later than nine (9) months after the original finding of incompetency.

16 (c) If the court finds that the defendant remains incompetent and is not  
17 making progress towards attaining competency, and that there is not a substantial probability that  
18 the defendant will attain competency within nine (9) months of the original finding of  
19 incompetency, the court shall proceed under Paragraph G of this rule.

20 G. **Treatment ineffective for defendant.** If at any time the court determines that a  
21 defendant ordered to undergo treatment to attain competency is not likely to attain competency  
22 within nine (9) months from the original finding of incompetency, the court shall do either of the  
23 following:

1                   (1)     proceed under Paragraph H of this rule if the defendant is charged with any  
2 of the following:

3                   (a)     a felony that involves the infliction of great bodily harm on another  
4 person;

5                   (b)     a felony that involves the use of a firearm;

6                   (c)     aggravated arson as provided in Section 30-17-6 NMSA 1978;

7                   (d)     criminal sexual penetration as provided in Section 30-9-11 NMSA  
8 1978; or

9                   (e)     criminal sexual contact of a minor as provided in Section 30-9-  
10 13 NMSA 1978; or

11                  (2)     if the defendant is not charged with an offense set forth in Subparagraph (1)  
12 of this paragraph,

13                  (a)     dismiss the case with prejudice; or

14                  (b)     dismiss the case without prejudice in the interest of justice. [~~Upon~~]

15 On dismissal, if the treatment supervisor has issued a report finding that the defendant satisfies the  
16 criteria for involuntary commitment under the Mental Health and Developmental Disabilities  
17 Code, the Department shall commence proceedings under Section 43-1-10 or 43-1-11 NMSA  
18 1978, and the court may order the defendant confined for a maximum of seven (7) days to facilitate  
19 preparation and initiation of a petition under that code. The court may advise the district attorney  
20 to consider initiation of proceedings under Section 43-1-10 or 43-1-11 NMSA 1978. In the  
21 alternative, the court may advise the attorneys in the matter to consider referral to an appropriate  
22 person authorized under Section 43-1B-4 NMSA 1978 to file a petition for assisted outpatient  
23 treatment.

1           H.     **Commitment; hearing.** If the court determines that a defendant charged with an  
2 offense set forth in Subparagraph (G)(1) of this rule is not likely to attain competency within nine  
3 (9) months of the original finding of incompetency, the court shall hold a hearing to determine  
4 whether there is clear and convincing evidence that the defendant committed the criminal act  
5 charged. The court shall decide the issue without a jury, and may admit hearsay or affidavit  
6 evidence on secondary matters as permitted by law.

7           (1)     If the court does not find clear and convincing evidence that the defendant  
8 committed the criminal act, the court shall dismiss the case with prejudice. [~~Upon~~] On dismissal,  
9 the court may advise the district attorney to consider initiation of proceedings under Section 43-1-  
10 10 or 43-1-11 NMSA 1978 of the Mental Health and Developmental Disabilities Code and order  
11 the defendant confined for a maximum of seven (7) days to facilitate preparation and initiation of  
12 a petition under that code. In the alternative, the court may advise the attorneys in the matter to  
13 consider referral to an appropriate person authorized under Section 43-1B-4 NMSA 1978 to file a  
14 petition for assisted outpatient treatment.

15           (2)     If the court finds clear and convincing evidence that the defendant  
16 committed the criminal act but does not find that the defendant is dangerous, the court shall dismiss  
17 the case without prejudice. [~~Upon~~] On dismissal, the court may advise the district attorney to  
18 consider initiation of proceedings under Section 43-1-10 or 43-1-11 NMSA 1978 of the Mental  
19 Health and Developmental Disabilities Code and order the defendant confined for a maximum of  
20 seven (7) days to facilitate preparation and initiation of a petition under that code. In the alternative,  
21 the court may advise the attorneys in the matter to consider referral to an appropriate person  
22 authorized under Section 43-1B-4 NMSA 1978 to file a petition for assisted outpatient treatment.

1           (3) If the court finds clear and convincing evidence that the defendant  
2 committed the criminal act and enters a finding that the defendant remains incompetent and  
3 dangerous, the court shall,

4           (a) order that the defendant shall be detained by the Department in a  
5 secure, locked facility until further order of the court or until the expiration of the period of time  
6 equal to the maximum sentence to which the defendant would have been subjected had the  
7 defendant been convicted in a criminal proceeding;

8           (b) order the Department to report to the district court and the parties  
9 any significant changes in the defendant's condition, including but not limited to competency and  
10 dangerousness; and

11           (c) [~~upon~~] on notice to the parties and to the Department, conduct a hearing  
12 at least every two (2) years to review whether the defendant remains incompetent and dangerous.

13           (i) If the court finds that the defendant is competent, the court  
14 shall continue with the criminal proceeding.

15           (ii) If the court finds that the defendant continues to be  
16 incompetent and dangerous, the court shall review the defendant's competency every two (2) years  
17 until expiration of the period of commitment equal to the maximum sentence to which the  
18 defendant would have been subject had the defendant been convicted in a criminal proceeding.

19           (iii) If the defendant is not committed under this rule or if the  
20 court finds [~~upon~~] on its two (2)-year review that the defendant is no longer dangerous, the  
21 defendant shall be released.

22           I. **Automatic sealing of court records.** Any motion, response, assessment, treatment  
23 plan, report, or other paper filed under this rule shall be automatically sealed without motion or

1 order of the court as provided in Rule 5-123(C)(2) NMRA. An order issued under this rule shall  
2 not be sealed except [~~upon~~] on motion and order under Rule 5-123 NMRA.

3 [Approved by Supreme Court Order No. 18-8300-023, effective for all cases filed on or after  
4 February 1, 2019; as amended by Supreme Court Order No. S-1-RCR-2023-00053, effective for  
5 all cases pending or filed on or after February 23, 2024.]

6  
7 **Committee commentary.** —

8 **Dangerous(ness)**

9 Dangerousness is not a clinical diagnosis or condition. The definition of “dangerous” is taken from  
10 NMSA 1978, Section 39-1-1.2(D) and applies to a person who, if released, presents a serious threat  
11 of inflicting great bodily harm on another or of violating NMSA 1978, Section 30-9-11 or 30-9-  
12 13. A determination of dangerousness is analogous to the inquiry to determine which conditions  
13 of release will “reasonably ensure . . . the safety of any other person or the community.” Rule 5-  
14 401(C) NMRA; *see State v. Rotherham*, 1996-NMSC-048, ¶ 53, 122 N.M. 246, 923 P.2d  
15 1131 (*citing United States v. Salerno*, 481 U.S. 739, 747 (1987)) (“[B]ecause the state seeks to  
16 treat an incompetent [defendant] and to protect the community from danger, detention serves a  
17 regulatory rather than a punitive function.”). As such, a finding of dangerousness need not be  
18 supported by a psychological evaluation or expert testimony. *Cf. State v. Gallegos*, 1990-NMCA-  
19 104, ¶ 24, 111 N.M. 110, 802 P.2d 15 (explaining that the competency evaluations “made prior to  
20 a Section 31-9-1.5 hearing” are not “for the purpose of assessing [the] defendant’s  
21 dangerousness”); *cf. also State ex rel. Torrez v. Whitaker*, 2018-NMSC-005, ¶¶ 97-103, 410 P.3d  
22 201 (providing guidance about “evaluating evidentiary presentations” in pretrial detention  
23 proceedings, including evidence of “one’s character traits based on patterns of past conduct”).



1 Dangerousness is a term of art defined under NMSA 1978, Chapter 31, Article 9 and is not  
2 equivalent to “likelihood of harm to self or others” as used in the Mental Health and Developmental  
3 Disabilities Code. *Compare* NMSA 1978, § 31-9-1.2(D) (“As used in Sections 31-9-1 through 31-  
4 9-1.5 NMSA 1978, ‘dangerous’ means that, if released, the defendant presents a serious threat of  
5 inflicting great bodily harm on another or of violating Section 30-9-11 or 30-9-13 NMSA  
6 1978.”) *with* NMSA 1978, § 43-1-3(M) (“‘likelihood of serious harm to oneself’ means that it is  
7 more likely than not that in the near future the person will attempt to commit suicide or will cause  
8 serious bodily harm to the person’s self by violent or other self-destructive means, including grave  
9 passive neglect”), *and* NMSA 1978, § 43-1-3(N) (“‘likelihood of serious harm to others’ means  
10 that it is more likely than not that in the near future a person will inflict serious, unjustified bodily  
11 harm on another person or commit a criminal sexual offense, as evidenced by behavior causing,  
12 attempting or threatening such harm, which behavior gives rise to a reasonable fear of such harm  
13 from the person”). *See also, e.g.*, NMSA 1978, § 43-1-11(E)(1) (providing that an adult may be  
14 involuntarily committed for evaluation and treatment not to exceed thirty days based upon a  
15 finding, *inter alia*, that “as a result of a mental disorder, the [adult] presents a likelihood of serious  
16 harm to the [adult’s] self or others”).

17 The question of whether a defendant is “dangerous” arises only after a court has held that a  
18 defendant is not competent to stand trial and only if the defendant is charged with a  
19 felony. *See* NMSA 1978, § 31-9-1.2(B); *see also State v. Garcia*, 2000-NMCA-014, ¶ 31, 128  
20 N.M. 721, 998 P.2d 186 (“‘Dangerousness’ is a consideration secondary to the initial  
21 determination of competency.” (citing Rule 5-602(B)(3)(b) NMRA (1991))).

22 **Clear and convincing evidence of dangerousness**

1 Paragraph D of this rule requires clear and convincing evidence of a defendant’s dangerousness to  
2 support a commitment for treatment to attain competency. Application of the clear and convincing  
3 standard is consistent with other proceedings, including mental health proceedings, that may result  
4 in a deprivation of a person’s liberty. *See, e.g.*, § 43-1-11(E) (requiring clear and convincing  
5 evidence to support the involuntary commitment of an adult for evaluation and treatment); NMSA  
6 1978, § 43-1-12(E) (requiring clear and convincing evidence to support an extended commitment  
7 of an adult for treatment); NMSA 1978, § 43-1-15(E) (requiring clear and convincing evidence to  
8 support the appointment of a treatment guardian for an adult); NMSA 1978, § 31-9-1.5(D)  
9 (requiring clear and convincing evidence to support detaining an incompetent defendant who is  
10 not likely to attain competency); Rule 5-409(G) NMRA (requiring clear and convincing evidence  
11 to support pretrial detention of a criminal defendant).

12 **Commitment hearing**

13 The purpose of a hearing under Paragraph H of this rule is to determine whether an incompetent  
14 defendant committed the criminal act charged. *See Rotherham*, 1996-NMSC-048, ¶ 58 (“[T]he  
15 hearing [under Section 31-9-1.5(A)] is not a trial to establish criminal culpability, for which  
16 evidence relating to both *actus reus* and *mens rea* clearly would be relevant. Rather, to justify  
17 further commitment for treatment, the hearing is to determine whether the defendant committed  
18 the criminal *act*. Hence, any evidence relating to the defendant’s state of mind at the time the  
19 criminal act was committed is irrelevant.”); *but see State v. Taylor*, 2000-NMCA-072, ¶ 15, 129  
20 N.M. 376, 8 P.3d 863 (“[T]aken in context, when the Supreme Court characterized ‘state of mind’  
21 as irrelevant, it was using the term as it pertained to the issue before it: the irrelevancy of the  
22 defendant’s ability to form a specific intent.” (citing *Rotherham*, 1996-NMSC-048, ¶ 58)). The

1 defendant therefore may not assert the defenses of insanity or inability to form specific intent. *See*  
2 *Rotherham*, 1996-NMSC-048, ¶ 58.

3 In addition, Paragraph H provides that the court may admit hearsay or affidavit evidence at the  
4 commitment hearing on secondary matters as permitted by law. *Accord* § 31-9-1.5(A) (“The  
5 district court may admit hearsay or affidavit evidence on secondary matters such as testimony to  
6 establish the chain of possession of physical evidence, laboratory reports, authentication of  
7 transcripts taken by official reporters, district court and business records and public documents.”).

8 In determining whether to admit such evidence, the court should be mindful that a person who is  
9 the subject of a commitment proceeding ordinarily is entitled to certain minimum procedural  
10 safeguards as a matter of due process. *See Vitek v. Jones*, 445 U.S. 480, 494-95 (1980). Among  
11 those safeguards is the right to confront and cross-examine government witnesses except upon a  
12 showing of good cause. *See id.* (holding that an inmate had the right, *inter alia*, to confront the  
13 state’s witnesses against him in a proceeding to transfer him to a mental hospital, “except upon a  
14 finding, not arbitrarily made, of good cause for not permitting such presentation, confrontation, or  
15 cross-examination”). To that end, the New Mexico Supreme Court has identified “certain  
16 principles” that are useful in determining “what it means to establish good cause for not allowing  
17 confrontation” in the related context of a probation revocation proceeding. *See State v.*  
18 *Guthrie*, 2011-NMSC-014, ¶ 33, 150 N.M. 84, 257 P.3d 904 (internal quotation marks and citation  
19 omitted); *see also Vitek*, 445 U.S. at 495-96 (holding that a prisoner “facing involuntary transfer  
20 to a mental hospital” is entitled to due process protections similar to those required in a probation  
21 revocation proceeding). Those principles include (1) whether the evidence is offered to prove an  
22 assertion that is “central” or “collateral” to the proceeding; (2) whether the assertion is contested,  
23 or whether the state “is being asked to produce a witness to establish something that is essentially

1 uncontroverted”; (3) whether the evidence is inherently reliable due to its source and the  
2 circumstances surrounding its introduction; and (4) whether live testimony and confrontation  
3 would be useful to test the truthfulness and credibility of the evidence. *Guthrie*, 2011-NMSC-014,  
4 ¶¶ 33-39.

5 **Treatment**

6 Treatment ordered under this rule must include competency restoration treatment and may include  
7 general healthcare and mental healthcare treatment. *See Rotherham*, 1996-NMSC-048, ¶ 79  
8 (Minzner, J., specially concurring) (“During such a commitment, as a matter of substantive due  
9 process, those involuntarily committed under Section 31-9-1.5 have a right to be treated not only  
10 for competency, but to alleviate their dangerousness and accompanying mental illness or  
11 disability.”).

12 **Courtroom closure**

13 Hearings under this rule may be closed only upon motion and order of the court. *See* Rule 5-  
14 124(A) NMRA (“All courtroom proceedings shall be open to the public unless the courtroom is  
15 closed by an order of the court entered under this rule.”); *see also* Rule 5-124 committee  
16 commentary (“[I]f a party believes that courtroom closure is warranted for any reason, including  
17 the protection of confidential information, such party may file a motion for courtroom closure  
18 under Subparagraph (B)(2) of this rule.”).

19 [Approved by Supreme Court Order No. 18-8300-023, effective for all cases filed on or after  
20 February 1, 2019.]