

1 **5-602.3. Incompetency due to ~~mental retardation~~ developmental or intellectual disability.**

2 A. **Definitions.** The following definitions shall apply for purposes of this rule.

3 (1) **Department.** “Department” means the New Mexico Department of Health.

4 (2) ~~[Mental retardation]~~ **Developmental or intellectual disability.** [~~“Mental~~
5 ~~retardation”~~] Developmental or intellectual disability means significant subaverage intellectual
6 functioning existing concurrently with deficits in adaptive behavior. An intelligence quotient of
7 seventy (70) or below on a reliably administered intelligence quotient test shall be presumptive
8 evidence of ~~[mental retardation]~~ developmental or intellectual disability.

9 B. **Hearing to determine ~~mental retardation~~ developmental or intellectual**
10 **disability.** If a defendant is charged with a felony and found incompetent to stand trial, ~~[upon]~~ on
11 motion of the defense, the court shall hold a hearing to determine if the defendant’s incompetency
12 is due to ~~[mental retardation]~~ developmental or intellectual disability. The purpose of the hearing
13 shall be to determine whether there is a preponderance of the evidence of the following:

14 (1) the defendant has ~~[mental retardation]~~ developmental or intellectual
15 disability; and

16 (2) there is not a substantial probability that the defendant will become
17 competent to proceed in a criminal case within a reasonable time, not to exceed nine (9) months
18 from the original finding of incompetency.

19 C. **Department evaluation; notice of Department’s findings.** If the court makes the
20 findings set forth in Paragraph B of this rule, the court shall order the Department to perform an
21 evaluation within sixty (60) days of service of the order to determine whether the defendant
22 presents a likelihood of serious harm to self or others. At the completion of the evaluation, the
23 Department shall promptly notify the court and the parties of its findings.

1 D. **Proceedings under Chapter 43, Article 1 NMSA 1978.** If the evaluation ordered
2 under Paragraph C of this rule results in a finding by the Department that the defendant presents a
3 likelihood of serious harm to self or others,

4 (1) the Department shall commence proceedings under Chapter 43,
5 Article 1 NMSA 1978 within sixty (60) days of the evaluation if the defendant has been charged
6 in the initial proceedings with one or more of the following offenses:

- 7 (a) murder in the first degree;
8 (b) first degree criminal sexual penetration;
9 (c) criminal sexual contact of a minor; or
10 (d) arson; or

11 (2) the Department may commence proceedings under Chapter 43,
12 Article 1 NMSA 1978 within sixty (60) days of the evaluation if the defendant has not been
13 charged with an offense enumerated in Subparagraph (1) of this paragraph.

14 E. **Notice.**

15 (1) The Department shall notify the court if it commences proceedings under
16 Chapter 43, Article 1 NMSA 1978 and Paragraph D of this rule.

17 (2) The Department shall notify the court as soon as practicable if the
18 Department does not intend to commence proceedings under Paragraph (D)(2) of this rule.

19 F. **Disposition of criminal charges.** Unless the court dismisses the charges at an
20 earlier time, the criminal charges against the defendant shall be dismissed without prejudice [~~upon~~]
21 on the first of the following to occur:

- 22 (1) the hearing under Chapter 43, Article 1 NMSA 1978; or

1 (2) the expiration of fourteen (14) months from the court’s initial determination
2 that the defendant is incompetent to proceed in a criminal case.

3 G. **Automatic sealing of court records.** Any motion, response, assessment, treatment
4 plan, report, or other paper filed under this rule shall be automatically sealed without motion or
5 order of the court as provided in Rule 5-123(C)(2) NMRA. An order issued under this rule shall
6 not be sealed except ~~[upon]~~ on motion and order under Rule 5-123 NMRA.

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

10

11 **Committee commentary.** — ~~[This rule is based on NMSA 1978, Section 31-9-1.6, which~~
12 ~~continues to use the disfavored term “mental retardation.” See, e.g., State v. Linares, 2017 NMSC-~~
13 ~~014, ¶ 1 n.1, 393 P.3d 691 (“We are aware that it is no longer acceptable to describe individuals~~
14 ~~with developmental disabilities as ‘mentally retarded.’”). This rule uses that term to avoid~~
15 ~~confusion with the statute upon which it is based. See id. (“Sadly, our statutes continue to utilize~~
16 ~~this troubling convention. . . . We encourage our Legislature to amend the statutes applicable to~~
17 ~~the developmentally disabled and replace any terms that have pejorative or derogatory~~
18 ~~connotations with suitable and respectful alternatives.”). Mental retardation has been replaced in~~
19 ~~modern usage by the preferred terms intellectual disability or developmental disability.] Until June~~

20 16, 2023, NMSA 1978, Section 31-9-1.6 (1999, amended 2023) used a disfavored term. Old cases
21 used that term in deference to the statute, despite the term not being otherwise acceptable. With
22 the amendment of the statute, this rule has been updated to use the appropriate term of
23 developmental or intellectual disability.

1 The legal definition of [~~mental retardation~~] developmental or intellectual disability under this rule
2 and Section 31-9-1.6(E) is not equivalent to a clinical finding of developmental or intellectual
3 disability. *See State v. Trujillo*, 2009-NMSC-012, ¶ 13, 146 N.M. 14, 206 P.3d 125. A clinical
4 determination of intellectual or developmental disability requires a finding that the issue arose
5 [~~prior to~~] before a person's eighteenth birthday. *See id.* ¶ 10 (citing Am. Psychiatric
6 Ass'n, *Diagnostic and Statistical Manual of Mental Disorders-IV-TR* 41 (2000)). Age of onset,
7 however, is not a factor in a legal determination of [~~mental retardation~~] developmental or
8 intellectual disability for purposes of incompetency. *See Trujillo*, 2009-NMSC-012, ¶ 12 (“[T]he
9 Legislature’s decision to exclude the age of onset factor is logical given that what is legally relevant
10 are the symptoms probative of culpability at the time of the alleged crime and coherence at the
11 time of trial, not the age at which those symptoms started to affect the individual.”).

12 The discretion given to the Department under Subparagraph (D)(2) of this rule is consistent with
13 Section 31-9-1.6(C) as it was originally enacted. Before it was amended in 1999, Subsection 31-
14 9-1.6(C) provided as follows:

15 C. If the department evaluation results in a finding that the defendant presents a likelihood of
16 serious harm to himself or a likelihood of serious harm to others, within sixty days of the
17 department's evaluation the department:

18 (1) shall commence proceedings [~~pursuant to~~] under Chapter 43, Article 1 NMSA
19 1978 if the defendant was charged with first degree homicide, first degree sexual penetration,
20 criminal sexual contact of a minor or arson in the initial proceedings, and the court presiding over
21 the initial proceedings shall enter a finding that the respondent presents a likelihood of harm to
22 others; or

1 (2) may commence proceedings [~~pursuant to~~] under Chapter 43, Article 1 NMSA 1978
2 if the defendant was charged with any crime other than first degree homicide, first degree sexual
3 penetration, criminal sexual contact of a minor or arson in the initial proceedings from which he
4 was referred [~~pursuant to~~] under this section to the department.
5 1997 N.M. Laws, ch. 153. Although the 1999 amendments to Section 31-9-1.6 deleted Subsection
6 (C)(2), *see* 1999 N.M. Laws, ch. 149, the Supreme Court has observed that the deletion “is not
7 dispositive of legislative intent and may only represent a housekeeping deletion of a provision the
8 Legislature deemed superfluous.” *Trujillo*, 2009-NMSC-012, ¶ 27.
9 Subparagraph (D)(2) of the rule therefore clarifies that the Department has discretion to initiate
10 proceedings under NMSA 1978, Chapter 43, Article 1 for a defendant who has not been charged
11 with an enumerated offense when the Department’s evaluation results in a finding that the
12 defendant presents a likelihood of serious harm to self or others. *See Trujillo*, 2009-NMSC-012, ¶
13 28 (holding the 1999 amendments to Section 31-9-1.6 were not “intended to restrict the State from
14 civilly committing defendants . . . accused of a crime other than the four enumerated in Section
15 31-9-1.6(C)”).

16 **Courtroom closure**

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

**DISTRICT COURT CRIMINAL
RULE 5-602.3**

**Supreme Court Approved
February 23, 2024**

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