

**PROPOSED REVISIONS TO THE RULES OF CRIMINAL PROCEDURE FOR THE  
DISTRICT COURTS  
PROPOSAL 2025-008**

**March 6, 2025**

The Rules of Criminal Procedure for State Courts Committee has recommended amendments to Rule 5-801 NMRA for the Supreme Court's consideration.

If you would like to comment on the proposed amendments set forth below before the Court takes final action, you may do so by either submitting a comment electronically through the Supreme Court's website at <https://supremecourt.nmcourts.gov/rules-forms-files/rules-forms/open-for-comment/> or sending your written comments by mail, email, or fax to:

Elizabeth A. Garcia, Chief Clerk of Court  
New Mexico Supreme Court  
P.O. Box 848  
Santa Fe, New Mexico 87504-0848  
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505-827-4837 (fax)

**Your comments must be received by the Clerk on or before April 5, 2025**, to be considered by the Court. Please note that any submitted comments may be posted on the Supreme Court's website for public viewing.

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**5-801. [~~Reduction of sentence~~] Correction or Reduction of Sentence.**

A. ~~[Reduction of sentence. A motion to reduce a sentence may be filed within ninety (90) days after the sentence is imposed, or within ninety (90) days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within ninety (90) days after entry of any order or judgment of the appellate court on direct appeal denying review of, or having the effect of upholding, a judgment of conviction. A motion to reduce a sentence may also be filed upon revocation of probation as provided by law. Changing a sentence from a sentence of incarceration to a sentence of probation shall constitute a permissible reduction of sentence under this paragraph.]~~ **Correction of Sentence for Clear Error.** A 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 thirty (30) days after a sentence is imposed. If the corrected sentence results in more onerous sentencing terms, the court shall hold a hearing with the parties and defendant to discuss the effects of the correction.

**B. Reduction of sentence.** A motion to reduce a sentence may be filed within ninety (90) days of any of the following:

1. filing of the written judgment and sentence;
2. after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal;

3. after entry of any order or judgment of the appellate court on direct appeal denying review of, or having the effect of upholding, a judgment of conviction; or  
4. after entry of a written order revoking probation.

**C. Effect of Motion to Reduce Sentence on Notice of Appeal.** A Motion to Reduce Sentence shall serve to toll the time for filing a Notice of Appeal if filed within thirty (30) days of the written judgment and sentence or order revoking probation.

**D. Probation in Lieu of Incarceration Permitted.** Changing a sentence from a sentence of incarceration to a sentence of probation shall constitute a permissible reduction of sentence under this paragraph.

**[B.]E. Mandatory sentence.** This rule does not apply to the death penalty or a mandatory sentence.

[As amended, effective March 1, 1986; August 1, 1989; August 1, 1992; as amended by Supreme Court Order No. 09-8300-006, effective May 6, 2009; as amended by Supreme Court Order No. 14-8300-014, effective for all cases filed on or after December 31, 2014; as amended by Supreme Court Order No. \_\_\_\_\_, effective for all cases pending or filed on or after \_\_\_\_\_.]

**Committee commentary.** — [~~Motions to correct clerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission should be brought under Rule 5-113(B) NMRA. Motions challenging the legal validity of a conviction or a sentence should be brought under Rule 5-802 or Rule 5-803 NMRA. This rule authorizes motions seeking discretionary reduction of a sentence.~~]Modeled in part on Fed. R. Crim. P. 35, Rule 5-801 NMRA permits a district court to correct a sentence for clear error and to consider a reduction of sentence on motion of the defendant. As Fed. R. Crim. P. 35, it permits alteration of a sentence that “resulted from arithmetical, [or] technical” error. Rule 5-113(B) NMRA accounts for corrections of “clerical” errors.

This rule [~~was originally drafted to be substantially the same as Rule 35 of the Federal Rules of Criminal Procedure. Prior to the adoption of Rule 5-801 NMRA there was confusion as to when the district court could modify a sentence. The New Mexico rule was that the district court could modify a sentence of a prisoner during the same term of the conviction, even if the defendant had already commenced to serve his sentence. See *State v. White*, 1962 NMSC 139, ¶ 12, 71 N.M. 342, 378 P.2d 379. The district court, however, lost all power to modify a judgment after the filing of the notice of appeal. See *id.* ¶ 14. The Rules of Criminal Procedure for the District Courts abolished the concept of terms of court and therefore it was desirable to have a specific rule setting forth the limits of power of the district court.~~]

The rule, as originally drafted, limited the period of time that district court could modify a sentence to a period of thirty (30) days after imposition of sentence. Rule 5-801 was revised in 1988 to comply with the Supreme Court’s decision in *Hayes v. State*, 1988 NMSC 021, 106 N.M. 806, 751 P.2d 186. In *Hayes*, the Supreme Court held that if the motion to reduce a sentence is filed within thirty (30) days after the mandate on appeal, the trial court could reduce the sentence within a reasonable time after the filing of the motion. *Id.* ¶ 8. The Supreme Court suggested that ninety (90) days from a timely filed motion was a reasonable time. See also Rule 35, Federal Rules of Criminal Procedure for the United States District Courts.

Under this rule, no modification of sentence can be considered by the trial court after the filing of notice of appeal. However, the trial court may modify the sentence within thirty (30) days after receipt of the mandate.

~~This rule is not to be construed as allowing the reduction, deferral or suspension of a sentence unless such modification of sentence is consistent with applicable New Mexico law.~~

~~A motion under this rule that is filed not later than thirty (30) days after the filing of the judgment tolls the time for appeal under the Rules of Appellate Procedure. See Rule 12-201(D)(1)(b) NMRA (2016); see also *State v. Romero*, 2014-NMCA-063, ¶¶ 5-13, 327 P.3d 525 (concluding that timely filing of post-judgment motion under Rule 5-801 suspends finality of judgment until a written ruling on the motion is entered).]~~ as with the modern iteration of Fed. R. Crim. P. 35, dispenses with the common law principle that a district court retains inherent and unlimited jurisdiction to correct illegal sentences at any time. See Fed. R. Crim. P. 35 advisory comm. notes (1991) (recognizing that Fed. R. Crim. P. 35 aligns with the Sentencing Reform Act of 1984 (SRA) which repealed the district court’s *indefinite* jurisdiction to correct a sentence). The length of time in which a district court retains jurisdiction to correct an illegal sentence for clear error is restricted to thirty (30) days, consistent with the time for appealing sentences. See *State v. Romero*, 2023-NMSC-008, ¶ 29, n.4. Such limitation reduces “the likelihood of jurisdictional questions in the event of an appeal and to provide the parties with an opportunity to address the court’s correction of the sentence, or lack thereof, in any appeal of the sentence.” *Id.*

As the time limits for filing a notice of appeal are shorter than the time limits for a motion to reduce sentence, such a motion will only serve to toll those limits if filed within the time for filing the notice of appeal. See Rule 12-201(D)(1)(b) NMRA (2016); see also *State v. Romero*, 2014-NMCA-063, ¶¶ 5-13, 327 P.3d 525 (concluding that timely filing of post-judgment motion under Rule 5-801 suspends finality of judgment until a written ruling on the motion is entered pursuant to Rule 5-121). In the previous iteration of this Rule, this was solely stated in the commentary. However, the Committee believes that such a fundamentally important issue should be in the Rule, and is now placed in subsection (C).

Post-appeal, motions to reduce sentence must be filed within ninety (90) days. The trial court may reduce the sentence within a “reasonable time” after the filing of the motion. *Id.* ¶ 8. The Supreme Court has suggested that ninety (90) days from a timely filed motion constitutes a “reasonable time.” See *Hayes v. State*, 1988-NMSC-021, 106 N.M. 806, 751 P.2d 186; see also Rule 5-121 NMRA (encouraging prompt orders and requiring “the court to enter the judgment and order within a reasonable time after submission.”)

The authority to correct a sentence under this Rule is intended to be very narrow and to extend only to those cases in which an obvious error or mistake has occurred in the sentence; that is, the error must be of the sort that, if appealed, would almost certainly result in a remand of the case to the trial court for correction of an illegal sentence under the Rule. This Rule is not an opportunity for the court to reconsider the application or interpretation of sentencing statutes or for the court simply to change its mind about the appropriateness of the sentence. Nor should it be used to reopen issues previously resolved at the sentencing hearing. The Committee did not intend that the rule relax any requirement that the parties state all objections to a sentence at or before the sentencing hearing. Motions challenging the legal validity of a conviction or a sentence should be brought under Rules 5-802 or 5-803 NMRA.

The Rule requires a district court to hold a hearing to correct an illegal sentence only where the corrected sentence “results in the terms of the sentence being made more onerous.” See Fed. R. Crim. P. 35 advisory comm. notes (1991) (recognizing that a court may correct an illegal sentence *sua sponte*); *State v. Sommer*, 1994-NMCA-070, ¶ 8, 118 N.M. 58. The defendant must be present at such a hearing. See *Sommer*, 1994-NMCA-070, ¶ 8 (holding that “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.”)

[As amended by Supreme Court Order No. 14-8300-014, effective for all cases filed on or after December 31, 2014; as amended by Supreme Court Order No. 16-8300-014, effective for all cases pending or filed on or after December 31, 2016; as amended by Supreme Court Order No. \_\_\_\_\_, effective for all cases pending or filed on or after \_\_\_\_\_.]

**No Comments  
Received**