5-602.2. Proceedings after a finding of incompetency.

A. **Scope.** This rule governs proceedings after a defendant has been found incompetent to stand trial under Rule 5-602.1 NMRA or Rule 7-507.1 NMRA. This rule does not apply to a defendant charged with a felony whose incompetency is believed to be primarily due to developmental or intellectual disability. Those proceedings are governed by Rule 5-602.3 NMRA.

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

(1) ***Community-based competency restoration*.** A court-approved program that is designed to restore a defendant to competency provided in an outpatient setting in the community where the defendant resides.

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

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

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

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

(3) ***Dangerous*.** A defendant who is not competent is dangerous if the court finds by clear and convincing evidence that the defendant presents a serious threat of:

(a) committing murder in the first or second degree, as provided in NMSA 1978, Section 30-2-1;

(b) inflicting great bodily harm, as defined in NMSA 1978, Section 30-1-12, on another person;

(c) committing criminal sexual penetration, as provided in NMSA 1978, Section 30-9-11;

(d) committing criminal sexual contact of a minor, as provided in NMSA 1978, Section 30-9-13;

(e) committing abuse of a child, as provided in NMSA 1978, Section 30-6-1(D);

(f) violating a provision of the Sexual Exploitation of Children Act;

(g) committing human trafficking, as provided in NMSA 1978, Section 30-52-1;

(h) committing aggravated arson, as provided in NMSA 1978, Section 30-17-6; or

(i) committing any "serious violent offense" enumerated in NMSA 1978, Section [~~33-2-34(L)(4)(a)-(n)~~] 33-2-34(N)(4)(a)-(n) with the use of a firearm.

(4) ***Department.*** The term Department means the New Mexico Department of Health.

C. **Cases transferred to the district court and restoration to competency.** If a defendant is restored to competency in a case that was transferred to the district court under Rules 6-507.1, 7-507.1, or 8-507.1 NMRA, the district court shall remand the case to the originating court within two (2) days of the finding of competency.

D. **Dangerousness determination.** In every case where a defendant is found not competent, the court shall consider whether there is clear and convincing evidence that the defendant is dangerous under NMSA 1978, Section 31-9-1.2(A). Unless the court approves a stipulation by the parties, the court shall hold a hearing to determine dangerousness. A

determination of the defendant's dangerousness shall take into account only evidence relevant to [~~whether the defendant presents a serious threat of committing one of the enumerated crimes listed in Section 31-9-1.2(A)~~] Subparagraph (B)(3) of this rule.

E. **No finding of dangerousness.** If the court does not find that the incompetent defendant is dangerous under Paragraph D of this rule, the court may order the defendant to participate in a community-based competency restoration program or dismiss the case without prejudice in the interests of justice. On dismissal, the district court shall notify the transferring court, if any, of the dismissal and the court may advise the district attorney to consider initiation of proceedings under NMSA 1978, Section 43-1-10 or 43-1-11 of the Mental Health and Developmental Disabilities Code and order the defendant confined for a maximum of seven (7) days to facilitate preparation and initiation of a petition under that code. In the alternative, the court may advise the district attorney to consider initiation of proceedings under NMSA 1978, Section 43-1B-4 to file a petition for assisted outpatient treatment.

(1) ***Community-based competency restoration program.*** The court can order a defendant to participate in a community-based competency restoration program for no more than ninety (90) days as required under Section 31-9-1.2(C).

F. **Finding of dangerousness.**

(1) ***Commitment for competency restoration.*** If the court finds that an incompetent defendant is dangerous, the court may commit the defendant for inpatient competency restoration in a secured, locked facility, where the defendant shall remain under the supervision of the Department. The order also shall provide for return of the defendant to the local facilities within seventy-two (72) hours of the defendant's restoration to competency, completion of the competency restoration program, or as otherwise required by the court.

(2) ***Inability to treat defendant.*** If the Department determines that it does not have the ability to meet the needs of the defendant, the Department's Secretary or Secretary's Designee may refuse admission by providing written certification to the committing court and parties of the Department's inability to meet the needs of the defendant. The certification shall be made within seven (7) days of receipt of the court's order of commitment and receipt of necessary and available documents reasonably required for admission. Within ten (10) days of receipt of the certification, the court shall set a hearing to determine disposition of the criminal case.

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

(a) an initial assessment and treatment plan;

(b) a report on the defendant's amenability to competency restoration;

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

(d) an opinion about the probability of the defendant being restored to competency within nine (9) months from the date the court determined the defendant is not competent to stand trial.

(4) ***Status-review hearing.*** Within ninety (90) days of the court's determination the defendant is not competent, the court shall hold a hearing, unless waived by the defense, to review whether the defendant has been restored to competency, and if not, whether the defendant is making progress towards competency restoration within nine (9) months of the finding of incompetency and whether the defendant remains dangerous.

(a) If the court finds the defendant is restored to competency, the court shall set the matter for trial or, in a case transferred to the district court under Rules 6-507.1, 7-507.1, or 8-507.1, remand the case within two (2) days to the originating court. The court may order continued care or treatment until the conclusion of the criminal proceedings if the defendant is in need of continued care or treatment and the Department agrees to continue to provide it.

(b) If the court finds the defendant is not competent but is making progress toward being restored to competency within nine (9) months from the date the court determined the defendant is not competent, the court may continue or modify its original order entered under Subparagraph (F)(1) of this rule, but the court shall review the defendant's competency again no later than nine (9) months after the original finding of incompetency and the treatment supervisor shall submit a written progress report at least seven (7) days prior to the hearing.

(c) If the court finds that the defendant remains not competent and is not making progress towards being restored to competency, and that there is not a substantial probability that the defendant will be restored to competency within nine (9) months of the original finding of incompetency, the court shall proceed under Paragraph G of this rule. Additionally, the court may order continued care or treatment until the conclusion of the criminal proceedings if the defendant is in need of continued care or treatment and the Department agrees to continue to provide it.

G. **Competency restoration ineffective for defendant.** If at any time the court determines there is not a substantial probability that a defendant is likely to be restored to competency within nine (9) months from the original finding of incompetency, the district court shall do either of the following:

(1) hold a criminal commitment hearing in accordance with NMSA 1978, Section 31-9-1.5 within three (3) months if the defendant is charged with one of the offenses set forth in Section 31-9-1.5(A); or

(2) if the defendant is not charged with an offense set forth in Section 31-9-1.5(A), the district court may

(a) dismiss the criminal case with prejudice; or

(b) dismiss the criminal case without prejudice in the interest of justice.

On dismissal, if the treatment supervisor reports to the court that the defendant satisfies the criteria for involuntary commitment under the Mental Health and Developmental Disabilities Code, the Department shall initiate proceedings under Section 43-1-10 or 43-1-11, and the court may order the defendant confined for a maximum of seven (7) days to facilitate the initiation of a petition under that code. In the alternative, the district attorney may initiate involuntary commitment proceedings in the Department's stead.

H. **Criminal commitment; hearing.** If the court determines that there is not a substantial probability that a defendant charged with an offense set forth in NMSA 1978, Sections [~~32A-9-1.4(A) or 32A-9-1.5(A)~~] 31-9-1.4(A) or 31-9-1.5(A) will be restored to competency within nine (9) months of the original finding of incompetency, the court shall hold a commitment hearing to determine whether there is clear and convincing evidence of the defendant's guilt if the defendant is charged with one of the enumerated charges outlined in Section 31-9-1.5(A). The court shall decide the issue without a jury, and may admit hearsay or affidavit evidence on secondary matters as permitted by law.

(1) If the court does not find clear and convincing evidence that the defendant committed the crime charged, the court shall dismiss the case with prejudice.

(2) If the court finds clear and convincing evidence that the defendant committed the crime charged but does not find that the defendant is dangerous, the court shall dismiss the case without prejudice.

(3) If the court finds clear and convincing evidence that the defendant committed the crime charged and enters a finding that the defendant remains not competent and dangerous, the court shall,

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

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

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

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

(ii) If the court finds that the defendant continues to remain not competent and dangerous, the court shall review the defendant's competency every two (2) years until expiration of the period of commitment equal to the maximum sentence to which the defendant would have been subject had the defendant been convicted in a criminal proceeding.

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

(4) At any time, the Department or the district attorney may initiate civil involuntary commitment proceedings under NMSA 1978, Section 43-1-10 or 43-1-11 of the Mental Health and Developmental Disabilities Code, and the court may order the defendant confined for a maximum of seven (7) days to facilitate the initiation of those proceedings. In the alternative, the Department or district attorney may initiate proceedings under Section 43-1B-4 to file a petition for assisted outpatient treatment.

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

[Approved by Supreme Court Order No. 18-8300-023, effective for all cases filed on or after February 1, 2019; as amended by Supreme Court Order No. S-1-RCR-2023-00053, effective for all cases pending or filed on or after February 23, 2024; as provisionally amended by Supreme Court Order No. S-1-RCR-2025-00143, effective for all cases pending or filed on or after September 30, 2025; provisional amendments approved as amended by Supreme Court Order No. S-1-RCR-2026-00200, effective for all cases pending or filed on or after December 31, 2026.]

Committee commentary. —

Dangerous(ness)

Dangerousness is not a clinical diagnosis or condition. The definition of "dangerous" is taken from NMSA 1978, Section [~~39-1-1.2(D)~~] 31-9-1.2(A) (2025)[~~, and applies to a person who,~~

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

Dangerousness is a term of art defined under NMSA 1978, Chapter 31, Article 9 and is not equivalent to "likelihood of harm to self or others" as used in the Mental Health and Developmental Disabilities Code. [~~*Compare* NMSA 1978, § 31-9-1.2(D) ("As used in Sections 31-9-1 through 31-9-1.5 NMSA 1978, 'dangerous' means that, if released, the defendant presents a serious threat of inflicting great bodily harm on another or of violating Section 30-9-11 or 30-9-13 NMSA 1978.") *with* NMSA 1978, § 43-1-3(M) ("'likelihood of serious harm to oneself' means that it is more likely than not that in the near future the person will attempt to commit suicide or will cause serious bodily harm to the person's self by violent or other self-destructive means, including grave passive neglect"), *and* NMSA 1978, § 43-1-3(N) ("'likelihood of serious harm to others' means~~

~~that it is more likely than not that in the near future a person will inflict serious, unjustified bodily harm on another person or commit a criminal sexual offense, as evidenced by behavior causing, attempting or threatening such harm, which behavior gives rise to a reasonable fear of such harm from the person").~~] *Compare* Section 31-9-1.2(A) (providing that a defendant "is dangerous if the court finds by clear and convincing evidence that the defendant presents a serious threat of" committing certain criminal offenses; inflicting great bodily harm, as defined in NMSA 1978, Section 30-1-12, on another person; or violating a provision of the Sexual Exploitation of Children Act, NMSA 1978, Section 30-6A-1 to -4) *with* NMSA 1978, § 43-1-3(N) ("'serious harm to self' means that: (1) it is more likely than not that in the near future, the person will attempt to cause self-inflicted death or will intentionally cause serious bodily harm to the person's self; or (2) the person's recent behavior: (a) demonstrates that, as a result of a mental disorder, the person lacks the decisional capacity to satisfy the person's need for nourishment, personal or medical care, shelter or self-protection and safety and that it is more likely than not that the lack of decisional capacity will result in death, serious bodily injury or serious physical or mental debilitation in the near future if treatment is not ordered; and (b) makes it more likely than not that the person will suffer serious physical debilitation in the near future unless adequate treatment is provided pursuant to the Mental Health and Developmental Disabilities Code"), *and* Section 43-1-3(M) ("'serious harm to others' means that within the recent past, the person has inflicted or attempted to inflict serious bodily harm on another or has acted in such a way as to create a substantial risk of serious bodily harm to another and it is more likely than not that the conduct will be repeated in the near future"). *See also, e.g.*, NMSA 1978, § 43-1-11(E)(1) (providing that an adult may be involuntarily committed for evaluation and treatment not to exceed thirty days based upon a

finding, *inter alia*, that "as a result of a mental disorder, the [adult] presents a likelihood of serious harm to the [adult's] self or others").

The question of whether a defendant is "dangerous" arises only after a court has held that a defendant is not competent to stand trial [~~and only if the defendant is charged with a felony~~] in any criminal case, regardless of whether the defendant is charged with a felony. *See* [~~NMSA 1978,~~] § 31-9-1.2[~~(B)~~](A); *see also State v. Garcia*, 2000-NMCA-014, ¶ 31, 128 N.M. 721, 998 P.2d 186 ("'Dangerousness' is a consideration secondary to the initial determination of competency." (citing Rule 5-602(B)(3)(b) NMRA (1991))).

Clear and convincing evidence of dangerousness

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

Commitment hearing

The purpose of a hearing under Paragraph H of this rule is to determine whether an incompetent defendant committed the criminal act charged. *See Rotherham*, 1996-NMSC-048, ¶

58 ("[T]he hearing [under Section 31-9-1.5(A) is not a trial to establish criminal culpability, for which evidence relating to both *actus reus* and *mens rea* clearly would be relevant. Rather, to justify further commitment for treatment, the hearing is to determine whether the defendant committed the criminal *act*. Hence, any evidence relating to the defendant's state of mind at the time the criminal act was committed is irrelevant."); *but see State v. Taylor*, 2000-NMCA-072, ¶ 15, 129 N.M. 376, 8 P.3d 863 ("[T]aken in context, when the Supreme Court characterized 'state of mind' as irrelevant, it was using the term as it pertained to the issue before it: the irrelevancy of the defendant's ability to form a specific intent." (citing *Rotherham*, 1996-NMSC-048, ¶ 58)). The defendant therefore may not assert the defenses of insanity or inability to form specific intent. *See Rotherham*, 1996-NMSC-048, ¶ 58.

In addition, Paragraph H provides that the court may admit hearsay or affidavit evidence at the commitment hearing on secondary matters as permitted by law. *Accord* § 31-9-1.5(A) ("The district court may admit hearsay or affidavit evidence on secondary matters such as testimony to establish the chain of possession of physical evidence, laboratory reports, authentication of transcripts taken by official reporters, district court and business records and public documents."). In determining whether to admit such evidence, the court should be mindful that a person who is the subject of a commitment proceeding ordinarily is entitled to certain minimum procedural safeguards as a matter of due process. *See Vitek v. Jones*, 445 U.S. 480, 494-95 (1980). Among those safeguards is the right to confront and cross-examine government witnesses except upon a showing of good cause. *See id*. (holding that an inmate had the right, *inter alia*, to confront the state's witnesses against him in a proceeding to transfer him to a mental hospital, "except upon a finding, not arbitrarily made, of good cause for not permitting such presentation, confrontation, or cross-examination"). To that end, the New Mexico Supreme Court has identified "certain

principles" that are useful in determining "what it means to establish good cause for not allowing confrontation" in the related context of a probation revocation proceeding. *See State v. Guthrie*, 2011-NMSC-014, ¶ 33, 150 N.M. 84, 257 P.3d 904 (internal quotation marks and citation omitted); *see also Vitek*, 445 U.S. at 495-96 (holding that a prisoner "facing involuntary transfer to a mental hospital" is entitled to due process protections similar to those required in a probation revocation proceeding). Those principles include (1) whether the evidence is offered to prove an assertion that is "central" or "collateral" to the proceeding; (2) whether the assertion is contested, or whether the state "is being asked to produce a witness to establish something that is essentially uncontroverted"; (3) whether the evidence is inherently reliable due to its source and the circumstances surrounding its introduction; and (4) whether live testimony and confrontation would be useful to test the truthfulness and credibility of the evidence. *Guthrie*, 2011-NMSC-014, ¶¶ 33-39.

Treatment

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

Courtroom closure

Hearings under this rule may be closed only upon motion and order of the court. *See* Rule 5-124(A) NMRA ("All courtroom proceedings shall be open to the public unless the courtroom is closed by an order of the court entered under this rule."); *see also* Rule 5-124 committee

commentary ("[I]f a party believes that courtroom closure is warranted for any reason, including the protection of confidential information, such party may file a motion for courtroom closure under Subparagraph (B)(2) of this rule.").

[Approved by Supreme Court Order No. 18-8300-023~~[, effective for all cases filed on or after February 1, 2019]~~; as amended by Supreme Court Order No. S-1-RCR-2026-00200.]