5-602.3. Incompetency due to developmental or intellectual disability.

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

(1) ***Department.*** "Department" means the New Mexico Department of Health.

(2) ***Developmental or intellectual disability.*** Developmental or intellectual disability means significant subaverage intellectual functioning existing concurrently with deficits in adaptive behavior. An intelligence quotient of seventy (70) or below on a reliably administered intelligence quotient test shall be presumptive evidence of developmental or intellectual disability.

B. **Hearing to determine developmental or intellectual disability.** If a defendant is charged with a felony and found incompetent to stand trial, on motion of a party or the court, the court shall hold a hearing to determine if the defendant is not competent due to developmental or intellectual disability. The purpose of the hearing shall be to determine whether there is a preponderance of the evidence of the following:

(1) the defendant is not competent to stand trial due to a developmental or intellectual disability; and

(2) there is not a substantial probability that the defendant will [~~be restored to~~] attain competency within nine (9) months from the date the court determined the defendant is not competent to stand trial.

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

D. **Proceedings under NMSA 1978, Chapter 43, Article 1.** If the Department determines that the defendant presents a likelihood of serious harm to self or others,

(1) the Department shall, within sixty (60) days of its notification to the court and the parties of its findings, initiate involuntary commitment proceedings in accordance with the Mental Health and Developmental Disabilities Code if the defendant is charged with an offense enumerated in NMSA 1978, Section 31-9-1.6(C); [~~one or more of the following offenses:~~

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

~~(b) a felony involving infliction of great bodily harm, as defined in NMSA 1978, Section 30-1-12, on another person;~~

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

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

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

~~(f) a crime provided for in the Sexual Exploitation of Children Act;~~

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

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

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

(2) the Department may, within sixty (60) days of its notification to the court and the parties of its findings, initiate involuntary commitment proceedings in accordance with the

Mental Health and Developmental Disabilities Code if the defendant has not been charged with an offense enumerated in [~~Subparagraph (1) of this paragraph~~] Section 31-9-1.6(C).

E. **Notice.**

(1) The Department shall notify the court if it initiates involuntary commitment proceedings in accordance with the Mental Health and Developmental Disabilities Code and Paragraph D of this rule.

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

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

(1) the involuntary commitment hearing; or

(2) the expiration of fourteen (14) months from the court's initial determination that the defendant is not competent to stand trial.

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

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

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

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

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

(2) may commence proceedings under Chapter 43, Article 1 NMSA 1978 if the defendant was charged with any crime other than first degree homicide, first degree sexual penetration, criminal sexual contact of a minor or arson in the initial proceedings from which he was referred under this section to the department.

1997 N.M. Laws, ch. 153. Although the 1999 amendments to Section 31-9-1.6 deleted Subsection (C)(2), *see* 1999 N.M. Laws, ch. 149, the Supreme Court has observed that the deletion "is not dispositive of legislative intent and may only represent a housekeeping deletion of a provision the Legislature deemed superfluous." *Trujillo*, 2009-NMSC-012, ¶ 27.

Subparagraph (D)(2) of the rule therefore clarifies that the Department has discretion to initiate proceedings under NMSA 1978, Chapter 43, Article 1 for a defendant who has not been charged with an enumerated offense when the Department's evaluation results in a finding that the defendant presents a likelihood of serious harm to self or others. *See Trujillo*, 2009-NMSC-012, ¶ 28 (holding the 1999 amendments to Section 31-9-1.6 were not "intended to restrict the State from civilly committing defendants . . . accused of a crime other than the four enumerated in Section 31-9-1.6(C)").

Courtroom closure

Hearings under this rule may be closed only on 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-2023-00053, effective for all cases pending or filed on or after February 23, 2024.]