

**STATE HABEAS**

LAW OFFICE OF THE PUBLIC DEFENDER DEPARTMENT

PRO SE HABEAS CORPUS PACKET

THIS PACKET INCLUDES ALL THE RULES, INSTRUCTIONS AND  
FORMS NEEDED TO FILE A PETITION FOR WRIT OF HABEAS  
CORPUS IN THE NEW MEXICO STATE COURTS

THESE ARE NEW FORMS

USE ONLY THESE FORMS AS OF **DECEMBER 31, 2014**

## STEPS FOR FILING A STATE PETITION FOR WRIT OF HABEAS CORPUS

The process for filing a Petition for Writ of Habeas Corpus is described in detail in the attached rule. The Law Offices of the Public Defender has prepared a copy of the court-approved habeas form for your use. This version of the forms includes instructions that will help you complete it correctly.

No attorney will be assigned to assist you in preparing your habeas corpus petition. You must prepare it yourself. If the court thinks your petition has possible merit, it should then order the Law Offices of the Public Defender to represent you. See the attached Rule.

### WHEN YOU PREPARE YOUR STATE HABEAS CORPUS PETITION, REMEMBER THESE RULES:

1. If you are challenging anything that happened at the trial level, you must file your habeas corpus petition in the district court in the county where you were convicted. Do not file a habeas corpus petition until the court of appeals (or in the case of a 1<sup>st</sup> degree murder conviction, the supreme court) has ruled on your direct appeal, if one was filed. You are not usually entitled to a direct appeal if you plead guilty, but you may file a habeas corpus petition.
2. If you are challenging conditions of confinement, then you must file the petition in the district court in the county in which you are now being confined. An inmate must file the petition challenging a disciplinary decision within one (1) year of the inmate's receipt of NMCD's final disciplinary decision.
3. If you believe you are being denied good time credits because of improper certification of your sentence as a "serious violent offense" (4 day EMD only) by your sentencing judge or because of a problem interpreting your Judgment and Sentence, then you should file your petition in the **district court where you were tried**.
4. If you believe the **New Mexico Department of Corrections** is doing something to deny you good time credit, then you should file in the district court **nearest the prison**.
5. Use plain English. Do not try to use *legalese*.

6. Tell the court exactly what happened, step by step, as if you were telling a story to a friend. Attach all necessary documentation, such as your Judgment and Sentence, disciplinary forms, etc. Remember, your habeas petition will be assigned to the judge who heard your case, so usually you should not attack the judge. Tell him what went wrong at your trial and in preparing for your trial. Do not repeat claims raised in your direct appeal. Those claims were already ruled on by the appellate court and the district court cannot change the ruling of a higher court. (Note: **IF** the Appellate opinion ruled that a claimed error was not “preserved” for review and the Court did not in fact review it, then you may be able to use a habeas petition to present that issue to the trial court.)
7. If possible and if applicable, refer to the statutes, cases or sections of the law. Tell how these rules were violated and how you were injured as a result of this violation. If you are complaining about a New Mexico Department of Corrections disciplinary hearing, tell the judge what happened at this hearing, and how your right to a fair hearing was denied.
8. Check carefully for spelling and grammatical errors. See if a friend can understand your Petition without asking questions. If so, this means it was written clearly.
9. You must serve a copy of the petition to the district attorney in the county where you are filing and to the Warden of the institution where you are incarcerated.
10. If you are incarcerated at the time of filing the petition, you need not file a motion for free process and may file the petition without payment of the applicable filing fee. See Rule 5-802(D)(2) NMRA. However, if you are no longer in custody, an affidavit attesting to your indigency and motion to proceed in Forma Pauperis. See form 9-403.

After the court receives the Petition, it will decide if the petition has merit. If the court is unable to determine from the face of the petition whether the petitioner is entitled to relief as a matter of law, the court may return the petition to you for additional factual information or restatement of legal claims. If the court returns the petition to you, you have 45 days to

resubmit a revised petition. If the court does not receive a revised petition, it may dismiss the petition.

If, after reviewing the petition, the court does not order a summary dismissal, the Court will appoint counsel with the Post Conviction/Habeas Unit of the Law Offices of the Public Defender to represent you. This appointment is subject to the standards in the Indigent Defense Act, Section 31-16-3, NMSA 1978, which states "... represented in any other postconviction proceeding that the attorney or the needy person considers appropriate unless the court in which the proceeding is brought determines that it is not a proceeding that a reasonable person with adequate means would be willing to bring at his own expense."

If the district court denies your petition for writ of habeas corpus, you must file a petition for certiorari to the State Supreme Court. In this petition, you would ask the Supreme Court to review the decision. This is not an appeal of right. These petitions for review are rarely granted. But you must file this petition in the state Supreme Court before you can file your claim in the federal courts. This petition for review (a.k.a. certiorari) must follow the format required by Rule 12-501. Rule 12-501 is included in this packet, along with Rule 5-802.

If you lose in the state court, you could next file a petition for writ of habeas corpus in the federal district court. You can get a packet of information and instructions from the Federal Public Defender. There are strict deadlines for filing a federal habeas corpus petition. Under AEDEPA, you have one year to file your federal habeas from the last decision on the direct appeal becomes final and non-appealable. The time "tolls" for the period your habeas petition is pending in state court, but starts again when a final mandate is issued. If you have questions about federal habeas, you can call the Federal Public Defender at (505) 346-2489.

**5-802. Habeas corpus.**

A. **Scope of rule.** This rule governs the procedure for filing a writ of habeas corpus by persons in custody or under restraint for a determination that such custody or restraint is, or will be, in violation of the constitution or laws of the State of New Mexico or of the United States; that the district court was without jurisdiction to impose such sentence; that the sentence was illegal or in excess of the maximum authorized by law or is otherwise subject to collateral attack.

B. **Petition.** The petition shall contain the following:

(1) the respondent's name and title. The respondent shall be the petitioner's immediate custodian, who shall have the power to produce the body of the petitioner before the court and shall have the power to discharge the petitioner from custody if the petition is granted;

(2) a statement naming the place where the person is confined or restrained;

(3) a statement of the steps taken to exhaust all other available remedies, including a statement of the name of the case, the docket number of the case, the court, administrative agency or institutional grievance committee from which relief was sought and the result of each judicial or administrative proceeding;

(4) a statement of whether an appeal or prior petitions for habeas corpus or other relief have been filed, including a statement of the case name, the docket number of the case, the grounds upon which relief was sought, the court from which relief was sought, the result of each proceeding and, if appropriate, a statement of why the claim now being raised was not raised in such prior proceedings or how the claim now being raised differs from a claim raised in those proceedings;

(5) if the Petitioner has previously filed a petition seeking relief under this rule, a statement explaining why the petition should not be dismissed under Paragraph H;

(6) a statement as to whether:

(a) the petition seeks to vacate, set aside or correct the sentence or order of confinement; or

(b) the petition challenges conditions of confinement or matters other than Subparagraph (a) of this subparagraph;

(7) a concise statement of the facts and law upon which the application is based; and

(8) a concise statement of the relief sought.

C. **Time and other limitations pertaining to petitions challenging the conditions of confinement within the New Mexico Corrections Department.**

(1) A New Mexico Corrections Department (NMCD) inmate may file a petition challenging any misconduct or disciplinary report or decision received while incarcerated in a NMCD correctional facility, provided that:

(a) no court of this state shall acquire subject-matter jurisdiction over any complaint, petition, grievance or civil action filed by any inmate of the corrections department with regard to any cause of action pursuant to state law that is substantially related to the inmate's incarceration by the corrections department until the inmate exhausts the corrections department's internal grievance procedure; and

(b) the inmate files the petition challenging the disciplinary decision within one (1) year of the inmate's receipt of NMCD's final disciplinary decision; and

(c) the NMCD shall inform the inmate of the provisions of Paragraph

C at the time of its decision. Should the NMCD fail to inform the inmate of the provision of Paragraph C at the time of its decision, the time limitations of Paragraph C(1)(b) shall be waived.

(2) A NMCD inmate may file a petition challenging any other condition of his confinement while incarcerated in a NMCD correctional facility, provided that:

(a) no court of this state shall acquire subject-matter jurisdiction over any complaint, petition, grievance or civil action filed by any inmate of the corrections department with regard to any cause of action pursuant to state law that is substantially related to the inmate's incarceration by the corrections department until the inmate exhausts the corrections department's internal grievance procedure.

D. **Papers attached to petition.** The following shall be attached to the petition:

(1) any opinion, order, transcript or other written material indicating any court's, agency's or institutional grievance committee's position or ruling on the petitioner's custody or restraint;

(2) if the petitioner is indigent, an affidavit attesting to the petitioner's indigency and containing a statement of the petitioner's available assets and a motion for permission to proceed in forma pauperis, provided that a petitioner who is incarcerated at the time of filing the petition need not file a motion for permission to proceed in forma pauperis and may file the petition without payment of the applicable filing fee; and

(3) a certificate of service showing service on the respondent and the district attorney in the district in which the application is filed.

E. **Venue.** If the petition:

(1) seeks to vacate, set aside or correct the sentence or order of confinement, correct the Department of Corrections' interpretation or application of the sentence or order of confinement, or challenge the conviction, it shall be filed in the county of the court in which the matter was adjudicated, or, if the matter has not been adjudicated, in the county of the court that ordered the contested confinement. The petition shall be assigned to the judge that originally heard the matter, or if that judge is no longer serving on the bench, the successor criminal division; or

(2) challenges conditions of confinement or matters other than those set forth in Subparagraph (1) of this paragraph, it shall be filed in the county where the petitioner is confined or restrained.

F. **Filing of the petition.** A writ of habeas corpus will be issued only upon filing with the clerk of the court a petition on behalf of the party seeking the writ. The clerk of the court shall immediately stamp "received for review" on the prospective petition upon receipt and shall also forward a copy of the petition and any attachments to the district attorney, attorney general, and the public defender department post-conviction unit. The court shall have thirty (30) days to review for filing the prospective petition and any attachments. Upon acceptance by the court, a petition shall be deemed properly filed and effective as of the previous date of receipt, and a copy of the petition shall be served on the respondent by the clerk of the court in accordance with Rule 5-103, 5-103.1 or 5-103.2 NMRA. If the petition is filed by a petitioner who is not represented by an attorney and who is confined to an institution, the petition is deemed to be filed with the clerk of the court on the day the petition is deposited in the institution's internal mail system for forwarding to the court provided that the petitioner states within the petition, under penalty of perjury, the date on which the petition was deposited in the institution's internal mail system.

G. **Procedure in non-death penalty cases.** If a sentence of death has not been imposed, upon presentation of the petition the court shall proceed in the following manner:

(1) **Initial review; appointment of counsel.** Within thirty (30) days after receipt of the petition and attachments from the district court, the public defender department may file a statement indicating that the petition is not a proceeding that a reasonable person would be willing to bring at a person's own expense and provide sufficient detail for further judicial review. Within forty-five (45) days after the petition is accepted and filed, the court shall examine the petition together with all attachments. If it plainly appears from the face of the petition, any attachments and the prior proceedings in the case that the petitioner is not entitled to relief as a matter of law, the court shall order a summary dismissal of the petition, state the reasons for the dismissal, and promptly serve a copy of said order on petitioner, district attorney, attorney general, and the public defender department post-conviction unit.

If the court is unable to determine from the face of the petition whether petitioner is entitled to relief as a matter of law, the court may return a copy of the petition to the petitioner for additional factual information or a restatement of the legal claims. If the petition is returned to the petitioner, the petitioner has forty-five (45) days to resubmit a revised petition. Upon receipt of the revised petition, the court has forty-five (45) days to examine the petition together with all attachments. If no revised petition is filed, the judge may dismiss the petition.

If, after reviewing any statement filed by the public defender department, the court does not order a summary dismissal, the court shall appoint counsel to represent the petitioner, subject to the standards of the Indigent Defense Act, Section 31-16-3 NMSA 1978, unless the petitioner has filed a waiver of counsel or has retained counsel. A copy of said order shall be served on petitioner, respondent, and the public defender department;

(2) **Procedure; time limits.** Within ninety (90) days after appointment, counsel for the petitioner shall file either an amended petition or a notice that counsel does not intend to amend the petition. Within thirty (30) days after the filing of an amended petition or a notice of non-intent to amend the petition, the court may dismiss some or all of the claims in the petition pursuant to Subparagraph (1). Within one-hundred and twenty (120) days after filing of the amended petition or notice not to amend, the respondent shall file a response to any claims not dismissed;

(3) **Preliminary disposition hearing.** After the response is filed, at the request of a party or upon its own motion, the court may conduct a preliminary disposition hearing for the purpose of clarifying the issues and petitioner's evidence in support of the claims in the petition. At the preliminary disposition hearing, the court will attempt to resolve any of the issues presented by the petition based on the filings by counsel for the parties. The court shall then determine whether an evidentiary hearing is required. If it appears that an evidentiary hearing is not required, the court shall dispose of the petition without a evidentiary hearing, but may ask for briefs and/or oral arguments on legal issues;

(4) if an evidentiary hearing is required, the court shall conduct a hearing as promptly as practicable.

H. **Second and successive petitions.** If the petitioner has previously filed a petition seeking relief under this rule, the court shall have the discretion to:

(1) dismiss any claim not raised in a prior petition unless fundamental error has occurred, or unless an adequate record to address the claim properly was not available at the time of the prior petition; and

(2) dismiss any claim raised and rejected in a prior petition unless there has been an intervening change of law or fact or the ends of justice would otherwise be served by rehearing the claim.

I. **Discovery procedures.**

(1) **Discovery procedures for parties represented by counsel.** At any time, counsel for a party may make a formal written request to opposing counsel for production of documents and other discovery materials that are available under Rules 5-501 or 5-502 NMRA. The written request shall describe the good faith efforts by counsel to obtain the discovery materials from previous counsel or any other sources and shall show that these efforts were unsuccessful. Counsel for the opposing party shall comply with the request within thirty (30) days after service or notify the court in writing of any objection to the request. Any objection based on privilege should clearly identify the material withheld and the basis of the privilege claim. The court shall then hold a hearing to rule on any objection to the discovery request. The court shall grant a challenged request for discovery when the requesting party demonstrates that the materials are relevant either to advance the claims that are alleged in the petition or to defend against the claims that are alleged in the petition.

(2) For purposes of this rule, “discovery materials” are:

(a) materials in the possession of a party;

(b) materials in the possession of law enforcement authorities to which the petitioner would have been entitled to at the time of trial; or

(c) materials in the possession of the New Mexico Corrections

Department.

(3) Counsel for a party may make use of any other discovery procedure under the Rules of Criminal Procedure only after notice to opposing counsel and prior written authorization from the court. In determining whether to authorize such proceedings, the court may consider any of the factors contained in Paragraph A of Rule 5-507 NMRA.

(4) **Discovery procedures for pro-se petitioners.** Petitioners not represented by counsel shall petition the court before requesting discovery under this rule and the Rules of Criminal Procedure for the District Courts. In determining whether to authorize a discovery request, the court may consider any of the factors contained in Paragraph A of Rule 5-507.

(5) **Motions to compel.** If the state or the petitioner fails to comply with any of the provisions of this rule, the court may enter an order under Rule 5-505 or Rule 5-112 NMRA.

J. **Death penalty cases.** If a sentence of death has been imposed:

(1) upon issuance of the mandate of the Supreme Court affirming the sentence of death, the district court shall promptly appoint counsel to represent the defendant;

(2) following the issuance of the mandate the execution shall be stayed pending further proceedings under this paragraph;

(3) unless an extension of time is granted for good cause shown, within one hundred eighty (180) days after appointment, the defendant shall file a petition for writ of habeas corpus;

(4) unless an extension of time is granted for good cause shown, within one hundred eighty (180) days after service of a petition for writ of habeas corpus, the respondent shall file a response to the petition;

(5) within thirty (30) days after service of the response, the court shall



schedule a hearing on the petition. In considering the petition, the court may hear evidence, require briefs or schedule arguments;

(6) within thirty (30) days after the filing of the district court's order on the petition:

- (a) if the writ is granted, the state may appeal; or
- (b) if the writ is denied, the petitioner may appeal;

(7) the Rules of Appellate Procedure shall govern the appeal to the Supreme Court.

**K. Procedure on petition remanded by the Supreme Court.** A petition originally filed in the Supreme Court may be remanded by the Supreme Court to the district court. If the petition is remanded by the Supreme Court, the district court shall proceed as if the petition had been filed in the district court in the first instance.

**L. Appeal; non-death penalty proceedings.** Within thirty (30) days after the district court's decision:

(1) if the writ is granted, the state may appeal as of right pursuant to the Rules of Appellate Procedure;

(2) if the writ is denied, a petition for certiorari may be filed with the Supreme Court.

[As amended, effective March 1, 1986; March 16, 1998; June 1, 2002; 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.]

**Committee commentary for 2014 amendments.** — Rule 5-802 NMRA was amended in 2014 following an extensive review by the Court and its Ad-hoc Habeas Corpus Review Committee. Rule 5-802 is designed to address petitions filed after the entry of a final judgment, however styled, in a criminal case. For example, motions to vacate a sentence and motions to withdraw a plea after the entry of a final judgment should be treated as habeas petitions to be adjudicated under Rule 5-802 as opposed to motions to modify or reduce a sentence filed under Rule 5-801.

Paragraph B(5) is amended to clarify that it applies to successive petitions for habeas relief. District courts should ordinarily dismiss petitions that do not comply with the provisions of Paragraph B(5).

Paragraph E(1) is amended to ensure that a habeas petition is assigned to the judge that originally heard the matter. This is the current practice in most district courts and reflects a policy that the judge that originally heard the matter is in a better position to rule on a petition for habeas corpus because that judge is familiar with the petitioner's case. Therefore, even if the judge that originally heard the case has transferred to a different division within the same court, the case should still be assigned to that judge. Should that judge no longer be serving on the bench, the criminal, as opposed to civil division of the court, should handle the matter. The criminal division is more familiar with the types of claims likely to be raised in a petition for a writ of habeas corpus.

The Committee added a new Paragraph F and substantially amended former Paragraph E (now Paragraph G). Paragraphs F and G are designed to help the district court screen out frivolous petitions while making sure meritorious petitions are properly addressed. First, Paragraph F gives the district courts more flexibility in processing petitions for habeas corpus. Oftentimes, habeas petitions are difficult to recognize when received by the district court.

Paragraph F gives the district court time to determine what the petition is, whether it should be accepted as a habeas petition, and how it should be filed without prejudicing the rights of the petitioner. Paragraph F also ensures that the proper parties i.e. the district attorney, attorney general and the public defender are given notice of a filing of a petition for a writ of habeas corpus. By receiving notice, these parties will be able to keep track of the petitions and will be ready to respond if called upon by the district court.

Second, Paragraph G(1) gives the Public Defender Department the opportunity to file a statement regarding the filed petition for habeas corpus before counsel is appointed and/or a final order is rendered by the district court. Under the Indigent Defense Act, a person has the limited right to appointed counsel representation in post-conviction matters “unless the court in which the proceeding is brought determines that it is not a proceeding that a reasonable person with adequate means would be willing to bring at his own expense.” NMSA 1978, § 31-16-3(B)(3) (1968). Therefore, the Public Defender may not be able to represent a petitioner in all cases. In addition, allowing the Public Defender an opportunity to file a statement regarding the petition may also help the district court screen out potentially frivolous claims.

Third, Paragraph G(1) imposes a deadline on the district court to either summarily dismiss the petition, return the petition to petitioner for further information, or appoint counsel. By allowing the court to return a petition to petitioner for further development, the court may be able to clarify issues that are vague or ambiguous. Once the district court returns a petition to a petitioner for further development, the burden is on petitioner to file a revised petition. When a petitioner fails to file an amended petition when directed by the court under Paragraph G(1), the judge shall ordinarily dismiss the petition except in rare cases.

Paragraph G(2) makes clear that a district court may dismiss some or all of the claims in a petition much like a court in a civil matter could enter summary judgment on some claims while allowing other claims to proceed to trial. Under Paragraph F(2), a response must be filed by the state to any claims that are not dismissed.

Paragraph G(3) adds in one final opportunity for the district court to clarify issues. The court may hold a “preliminary disposition hearing” or status conference at which it will clarify the issues and attempt to resolve the issues based upon the written filings of the parties. If the court is unable to resolve the issues based upon the written filings an evidentiary hearing under Paragraph G(4) may be necessary.

Paragraph H gives the district court guidance as to the handling of successive petitions for habeas relief. The standard is higher for a petitioner raising a claim rejected in a previous habeas petition than a claim rejected on direct appeal. Standard notions of claim and issue preclusion generally do not apply in habeas cases. *Campos v. Bravo*, 2007-NMSC-021, ¶ 5, 141 N.M. 801, 161 P.3d 846. Courts have some discretionary capacity to dismiss habeas claims when a prior petition has been filed. According to *Duncan v. Kerby*, 1993-NMSC-011, 115 N.M. 344, 851 P.2d 466:

The successive-writ petitioner has already enjoyed the opportunity to fully explore his constitutional claims in the postconviction setting, whereas the petitioner who makes his initial claim on direct appeal has not, and consequently, the successive writ petitioner is in a weaker position to argue that equity confers yet another postconviction opportunity to make his claim. *Id.* ¶ 5. In exercising its discretion, the court should consider whether the prior petition was pro se or the petitioner was represented by counsel. Petitioners proceeding pro se will often not have developed their claims as fully as petitioners represented by counsel.

In *Allen v. LeMaster*, 2012-NMSC-001, 267 P.3d 806, the New Mexico Supreme Court ruled that the state could not depose a habeas petitioner due to Rule 5-503's prohibition on the compelled statements of defendants. Although the opinion did not address the totality of discovery in the habeas context, it marked the starting point for the Committee's addition of Paragraph I on discovery. As habeas cases become more complex it is important to have rules in place for when discovery is needed or requested.

Paragraph I operates from the perspective that discovery in the habeas context should only occur when necessary and with supervisory control from the district court. Consistent with *Allen*, petitioners represented by counsel and the state may request discovery pursuant to Rules 5-501 and 5-502 NMRA. *See id.* ¶ 15 ("The placement of habeas corpus regulation within our Rules of Criminal Procedure demonstrated this Court's recognition that postconviction motions challenging a conviction or sentence in a criminal case are in reality part of a criminal proceeding."). However, other discovery devices under the Rules of Criminal Procedure must be approved by the court. Discovery is limited to the items listed in Paragraph I(2). Among the reasons for requiring pro-se petitioners to get court approval before requesting discovery are to discourage abuse and protect victims of crime. Therefore, the court should proceed cautiously on any discovery request of a victim.

**Committee commentary for 2009 amendments.** — The 2009 amendments to this rule make five changes to the procedures governing petitions for writs of habeas corpus. First, Paragraph B is amended to provide that a petition filed by an unrepresented inmate is deemed to be filed on the date that the petition is deposited in the institution's internal mail system. The amendment further provides that the inmate must state in the petition, under penalty of perjury, the date on which the petition was deposited for mailing. A corresponding amendment to Form 9-701 NMRA includes this statement.

The purpose of the amendment to Paragraph B is to eliminate uncertainty regarding the date when the petition is filed in the district court. Although there is no time limit for filing a state petition for a writ of habeas corpus, the date of filing can have an impact on the deadline for filing a petition for a writ of habeas corpus in federal court. Currently, defendants convicted in state court have one (1) year to file a petition for a writ of habeas corpus in federal court, and the one (1) year period begins to run from the date of the final judgment on a guilty plea, or one (1) year from a final decision of the highest state court ruling on a direct appeal after trial. However, under federal law, the filing of a state habeas petition tolls the one (1) year limitations period for filing a habeas petition in federal court.

While a state petition can toll the federal limitations period, disputes often arise concerning when the state petition was actually filed in state court. In some instances, unforeseen mailing delays beyond the control of the inmate prevent the receipt of a state habeas petition to toll the one (1) year federal limitations period before it expires. Moreover, the practices among the various state judicial districts for processing state habeas petitions can vary greatly and, as a result, impact the application of the federal tolling provision. For example, some districts apparently refer habeas petitions to a district court judge for fairly swift review before actually filing, with filing by the clerk soon thereafter. In other districts, however, clerks sometimes hold petitions for sixty (60) days or more before they are reviewed by a judge and officially filed with the court. But in virtually none of these districts are the petitions actually file-stamped on the date of receipt by the clerk.

The uncertainties inherent in mailing documents from prison, and the existing

inconsistent filing procedures in the district courts, have the potential to drastically affect an inmate's right to toll the federal limitations period while state post-conviction remedies are exhausted. *See Adams v. LeMaster*, 223 F.3d 1177 (10th Cir. 2000) (holding that New Mexico inmate's federal habeas petition was not timely filed because the one (1) year limitation period expired before state petition was file-stamped by state district court clerk). The amendments to Paragraph B are intended to eliminate confusion and avoid the unfair application of federal tolling provisions that may result from inconsistent filing practices in state district courts or unforeseen mailing delays beyond the control of an incarcerated petitioner.

Because there are no filing deadlines for filing state habeas petitions by unrepresented inmates in New Mexico, the changes to Paragraph B will not affect the substantive or procedural rights of the parties to a state post-conviction proceeding. State district courts, however, may want to revise their procedures so that the date file-stamped on a petition filed under this rule reflects the date of mailing set forth in the petition. If the State has reason to believe that the mailing date set forth in the petition is not accurate, the State may file a motion with the district court asking for a correction to the filing date.

The amendments to Paragraph C are intended to eliminate the inordinate amount of paperwork necessary to prepare and process requests for free process in post-conviction proceedings, which seems particularly unnecessary given the undeniable right of access to the courts by persons, indigent or not, who seek to correct an unlawful confinement. Moreover, the processing of this paperwork appears to lead to many of the delays in the actual filing of habeas petitions discussed above. The amendment to Paragraph C therefore seeks to eliminate these problems by allowing an incarcerated petitioner to file a petition without payment of a filing fee.

The amendments to Paragraph D are intended to clarify the place of filing for habeas petitions. The first change to Subparagraph (1) of Paragraph D provides that petitions challenging the Department of Correction's interpretation of a sentence should be filed with the court that imposed the sentence. As Rule 5-802.D(1) is currently written, the Department's interpretation and application of a sentence fall within "matters other than [those set forth in] Subparagraph (1)," thereby requiring the petition to be filed in the judicial district where the petitioner is confined or restrained. The rationale for the proposed amendment is that, much like petitions that seek to correct a sentence, the court that sentenced the inmate is better qualified to interpret its own sentence than a court of the judicial district in which the institution is located. The second change to Subparagraph (1) of Paragraph D also clarifies that the petition should be filed with the court that adjudicated the petitioner's confinement rather than focusing on the county where the offense was committed.

The amendments to Subparagraph (2) of Paragraph E expands the filing deadlines for amended petitions and responses ordered by the district court. Currently, if counsel is appointed to represent a petitioner, the attorney has thirty (30) days to file an amended petition. In situations where counsel is appointed, the issues involved and the need for further investigation by counsel often make the 30-day filing deadline for an amended petition unrealistic. As a result, motions to extend the filing deadline are routinely made and granted. The amendment to the filing deadline seeks to recognize this reality and eliminate unnecessary motion practice by expanding the filing deadline to ninety (90) days. As a matter of fairness and consistency, the amendments also increase the filing deadline to ninety (90) days in those instances when the State is ordered to file a response to the amended petition.

Finally, the amendment to Paragraph H eliminates the deemed denied provision that

previously governed the Supreme Court's review of the denial of habeas corpus petitions under Rule 12-501 NMRA. With this amendment, an express order by the Supreme Court is required to deny a petition for review filed under Rule 12-501 regardless of the length of time the petition for review is pending in the Supreme Court. The amendment is intended to conform to similar amendments to Rules 5-614, 5-801, and 5-121 NMRA eliminating the application of other deemed denied provisions during other stages of a criminal proceeding.

[Adopted, effective December 1, 1998; 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.]

STATE OF NEW MEXICO  
COUNTY OF \_\_\_\_\_  
IN THE DISTRICT COURT

*For Official Use Only*  
No. \_\_\_\_\_  
*(To be supplied by the  
clerk of the court)*

\_\_\_\_\_,  
*(Full name of prisoner)*

Petitioner,

v.

\_\_\_\_\_,  
*(Name of warden, jailor  
or other person having  
power to release the  
petitioner)*

Respondent.

*Instructions — Read Carefully*

Make sure that all information provided in this form is true and correct. Make sure that all necessary documents are attached, or explain why the documents are not being included. If you are currently incarcerated, you may file the petition without payment of the filing fee. If you are not incarcerated and are seeking free process, complete Form 9-403.

Finally, you must complete the certificate of service and mail or otherwise serve copies of this petition on the respondent and the district attorney in the county in which the petition is filed. You must file the original petition and one copy with the Clerk of the District Court. You should keep a copy for your own records.

**PETITION FOR WRIT OF HABEAS CORPUS<sup>1</sup>**

1. \_\_\_\_\_ *(name of person in custody)* is imprisoned or otherwise restrained at \_\_\_\_\_ *(name of facility and county of detention)* by \_\_\_\_\_ *(name and title of person having custody)*.

2. This petition  
[ ] seeks to vacate, set aside or correct an illegal sentence or order of confinement (i.e., ineffective assistance of counsel, illegal search and seizure, involuntary confession, or other matters relating to the trial or sentence the confined person received).

[ ] challenges confinement or conditions of confinement or matters other than the sentence or order of confinement. *(This applies only to matters arising after the confined person arrived at the institution, i.e., county jail confinement, mental hospital confinement, detention facility confinement, good time credit, misconduct report, prison due process violation or parole).*

3. State concisely the facts upon which the confined person bases the claim:

\_\_\_\_\_  
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4. State concisely the grounds and law, or other legal authorities on which the confined person bases the claim:

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5. Have the grounds being raised in this petition been raised previously in your direct appeal? If so, explain the result. If not, explain why not:

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6. Have the grounds raised in this petition been raised previously in another petition for a writ of habeas corpus? If so, explain the result. If not explain why not:

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7. Briefly describe the relief requested:

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8. State the nature of the court proceeding resulting in the confinement (*i.e., criminal prosecution, civil commitment, etc.*), including:

(a) case name:

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(b) docket number:

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(c) name of judge:

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(d) name and location of the court in which the proceeding was held:

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9. State the date of the final judgment, order or decree for confinement:

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10. Attach a copy of the judgment, order or decree. If not, describe your sentence.

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11. Was the conviction the result of:

\_\_\_\_\_ Guilty plea

\_\_\_\_\_ No Contest plea (*nolo contendere*)

\_\_\_\_\_ Finding of guilty by judge or jury

12. Was the confined person represented by an attorney during the proceedings resulting in the confinement?

\_\_\_\_\_ Yes

\_\_\_\_\_ No

13. If you answered "yes" to (12), list the name and address of each attorney who represented the confined person:

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14. Did you appeal your conviction?

\_\_\_\_\_ Yes (*Go to 15*)

\_\_\_\_\_ No (*Go to 16*)

15. If you answered "yes" to (14), list:

(a) The name of each court to which an appeal was taken:

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(b) The case name and docket number for each appeal:

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(c) The date each appeal was filed and decided: (*Attach a copy of each opinion or order*)

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(d) A summary of the grounds upon which each appeal was based:

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(e) The result of each appeal:

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(f) The name and address of the attorney on appeal:

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16. If you answered "no" to (14), state the reasons for not appealing:

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17. Apart from any appeals listed in (15), have any other post conviction applications, petitions or motions, been filed with regard to this same imprisonment or restraint?

\_\_\_\_\_ Yes (*Go to 18*)

\_\_\_\_\_ No (*Go to 19*)

18. If you answered "yes" to (15), list with respect to each such petition or motion:

(a) The type of proceeding:

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(b) The name and date of each case:

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(c) the docket number:

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(d) the court, the administrative agency, or institutional grievance committee from which relief was sought:

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(e) the result of each proceeding. (*Attach a copy of each decision.*)

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(f) The issues raised in each proceeding:

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(g) State whether a hearing was held in connection with each of these proceedings:

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(h) State whether the confined person was represented by an attorney in each proceeding and, if so, the attorney's name and address:

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19. Do you seek the appointment of counsel to represent you?<sup>2</sup>  
 Yes  
 No

**VERIFICATION**

STATE OF NEW MEXICO  
 COUNTY OF \_\_\_\_\_

I, the undersigned, being first duly sworn upon my oath, state that I am the petitioner in this action. I have read the foregoing petition and know and understand its contents, and the information contained herein is true and correct to the best of my knowledge, information and belief. On \_\_\_\_\_, \_\_\_\_\_ (*date*), I deposited this petition in the internal mail system of the institution in which I am confined, properly addressed with any necessary postage prepaid, for forwarding to the district court at the following address:

\_\_\_\_\_ Court (*name of court*)  
 \_\_\_\_\_ (*city*), New Mexico, \_\_\_\_\_ (*zip code*).

\_\_\_\_\_  
 (*Signature*)  
 \_\_\_\_\_  
 (*Address*)  
 \_\_\_\_\_

PNM No., if applicable

SUBSCRIBED AND SWORN TO before me this \_\_\_\_\_ day of

\_\_\_\_\_, \_\_\_\_\_, by

\_\_\_\_\_  
*(Name of petitioner)*

\_\_\_\_\_  
Notary Public

\_\_\_\_\_  
My Commission Expires:

**CERTIFICATE OF SERVICE**

I hereby certify that true copies of the foregoing petition were served upon the respondent and the district attorney in the county in which the petition is filed by

\_\_\_\_\_ (*describe manner of service*), this \_\_\_\_\_ day of

\_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
*(Signature of petitioner)*

**USE NOTE**

1. After this petition is reviewed by the Court, the Court will enter the order granting or denying the writ or ordering a response before further action. The order shall be prepared by the Court.

2. Petitioners who are incarcerated at the time of filing the petition need not file a motion for free process and may file the petition without payment of the applicable filing fee. *See* Rule 5-802(D)(2) NMRA

[Adopted, effective August 1, 1989; as amended by Supreme Court Order No. 09-8300-008, 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.]



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2. **RETURN OF PETITION FOR FURTHER INFORMATION:**

The petition is returned to petitioner for additional information on the following issues/claims: \_\_\_\_\_

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Pursuant to Rule 5-802(G) NMRA, a revised petition shall be filed within forty-five (45) days after service of this order.

3. **FREE PROCESS AND APPOINTMENT OF COUNSEL:**

Petitioner is granted permission to proceed *in forma pauperis* based on Form 9-403 NMRA or because petitioner is an inmate of a correctional facility.

Petitioner is not granted permission to proceed *in forma pauperis*.

The Public Defender Department is appointed to represent petitioner based on the court's finding that this is a proceeding which a reasonable person would bring at that person's own expense. Upon being properly appointed, the Public Defender Department shall either file an amended petition or a notice of non-intent to file an amended petition within ninety (90) days of this appointment.<sup>2</sup>

4. **RESPONSE<sup>3</sup>:**

The respondent is directed to file a response within one-hundred and twenty (120) days after the service of an amended petition or a notice that no amended petition will be filed.

The court, having received an amended petition or a notice that no amended petition will be filed, and based upon a review of the files, pleadings, and records, including the amended petition, hereby summarily dismisses the petition.

(*statement of reasons required*)

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The court, having received an amended petition or a notice that no amended petitioner will be filed, and based upon a review of the files, pleadings, and records, including the amended petition, hereby dismisses the following claims:  
*(statement of reasons required)*

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AND

orders a response from respondent on the following claims:

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5. **HEARING SCHEDULE:**

- A status conference will be held on \_\_\_\_\_ (date), at \_\_\_\_\_ (time).
- A preliminary disposition hearing will be held on \_\_\_\_\_ (date), at \_\_\_\_\_ (time).
- An evidentiary hearing will be held on \_\_\_\_\_ (date), at \_\_\_\_\_ (time).
- An evidentiary hearing is not required, but legal argument will be heard on this matter on \_\_\_\_\_ (date), at \_\_\_\_\_ (time).

\_\_\_\_\_  
*(District Judge)*

USE NOTE

1. Paragraph 1 should only be used prior to the appointment of counsel and before the filing of any amended petition.
2. See NMSA 1978, § 31-16-3(B)(3) (1968).

3. After receiving the amended petition or notice that no amended petition will be filed, the court will then decide if a response will be ordered, and whether a status conference, a preliminary disposition hearing, or evidentiary hearing are required, and will send the parties notice. Paragraph 5 should be used when ordering a response at the time of appointment of counsel or after reviewing the amended petition or notice that no amended petition will be filed. [Adopted by Supreme Court Order No. 14-8300-014, effective for all cases filed on or after December 31, 2014.]

**12-501. Certiorari to the district court from denial of habeas corpus.**

A. **Scope of rule.** This rule governs petitions for the issuance of writs of certiorari seeking review of denials of habeas corpus petitions by the district court pursuant to Rule 5-802 of the Rules of Criminal Procedure.

B. **Time.** Petitions for writs of certiorari shall be filed with the Supreme Court clerk within thirty (30) days of entry of the district court's order denying the petition. Subject to the provisions of Rule 12-304 NMRA and Rule 23-113 NMRA, the petition shall be accompanied by the docket fee. The three (3) day mailing period set forth in Rule 12-308 NMRA does not apply to the time limits set by this paragraph.

C. **Extensions of time to file petition.**

(1) Before the time for filing a petition has expired, upon a showing of good cause, the Supreme Court may extend the time for filing the petition for a period not to exceed thirty (30) days from the expiration of the time otherwise prescribed by this rule.

(2) After the time has expired for filing a petition, upon a showing of excusable neglect or circumstances beyond the control of the petitioner, the Supreme Court may extend the time for filing a petition for a period not to exceed thirty (30) days from the expiration of time otherwise provided by this rule.

(3) After sixty (60) days from the time of the order denying the petition, the Supreme Court may extend the time for filing the petition upon a showing of good cause and circumstances beyond the control of the petitioner.

(4) In computing time, pursuant to this paragraph, the three (3) days mailing period set forth in Rule 12-308 NMRA does not apply.

D. **Petition; contents.** The petition, not exceeding ten pages, shall have attached a copy of the petition for writ of habeas corpus and attachments filed in district court, the response, if any, and a copy of the district court's denial thereof, and shall contain:

(1) a description of the proceedings in district court relating to the petition, showing whether an evidentiary hearing was held in district court, and if so, a summary of the evidence presented therein;

(2) a direct and concise argument showing that the district court's decision was erroneous; and

(3) a prayer for relief.

E. **Briefs, records and transcripts.** In the event the writ of certiorari is issued, additional briefs, the record and transcripts may be filed only as directed by the appellate court.

F. **Service.** Service of any paper shall be made and proof thereof accomplished in accordance with Rule 12-307 NMRA.

G. **Copies.** If the petition for writ of certiorari has been filed pro se by a petitioner adjudged indigent, only the original petition shall be filed. In all other cases, copies shall be filed in accordance with Rule 12-306 NMRA.

[As amended by Supreme Court Order No. 09-8300-10, 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.]

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

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Defendant-Petitioner,

S.Ct. No. \_\_\_\_\_  
*(leave blank; court will assign)*

vs.

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*(Name of Warden)*

District Ct. No. \_\_\_\_\_

Respondent.

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**PETITION FOR WRIT OF CERTIORARI  
TO THE \_\_\_\_\_ DISTRICT COURT OF NEW MEXICO**

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Defendant-Petitioner pro se

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*(address information)*



**PETITION FOR WRIT OF CERTIORARI  
TO THE \_\_\_\_\_ DISTRICT COURT OF NEW MEXICO**

Defendant-Petitioner, appearing pro se and pursuant to the provisions of the New Mexico Constitution, Rule 5-802, and Rule 12-501 NMRA; petitions this Court to issue its Writ of Certiorari to review the order in:

\_\_\_\_\_ (*your name v. Warden's name*),

District Court No. \_\_\_\_\_ filed on \_\_\_\_\_.

**QUESTIONS PRESENTED FOR REVIEW**

Whether the district court erred in:

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*(Complete only for issues relevant to the petition. Attach additional sheets if necessary.)*

**DESCRIPTION OF THE PROCEEDINGS**

1. Please list the conviction being challenged:

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2. Please list any other petitions you have filed in the New Mexico Supreme Court challenging this conviction (*please include docket numbers and dates*):

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3. Tell the story of what happened in your court case:

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**BASIS FOR GRANTING THIS PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT**

The decision of the district court on my petition for writ of habeas corpus, filed pro se, raises significant questions of law under state and federal constitutions: whether the errors below deprived petitioner's rights guaranteed by the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments and by New Mexico Constitution, art. II, §§ 13, 14, 15, and 18.

**ARGUMENT**

*(Describe your legal claim and cite the law (cases, statutes, constitutional sections) that supports your position. Use plain language.)*

POINT 1:

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POINT 2:

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POINT 3:

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(Attach additional sheets, if necessary.)

**REQUEST FOR RELIEF**

Defendant-petitioner requests that this Court issue its writ of certiorari to the district court, and:

- remand to the district court for a full hearing on the petition, **OR**
- reverse the conviction, **OR**
- remand to the district court to correct the sentence, **OR**
- (other) \_\_\_\_\_.

Petitioner asks this Court to grant such relief as may be appropriate. As required by Rule 12-501 NMRA, I am filing **only the original copy** of this petition and I have attached the following:

- a copy of my petition for writ of habeas corpus filed in district court, **AND**
- a copy of the state's response, if one was filed, **AND**
- a copy of the district court's order.
- I have not attached the required documents because

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and ask the Supreme Court to accept this petition without the attachments.

Respectfully submitted,

\_\_\_\_\_  
Defendant-Petitioner, pro se

I hereby certify that a copy of this petition was mailed to the Attorney General's Office, P.O. Box 1508, Santa Fe, New Mexico 87504-1508 on this \_\_\_\_\_ day of \_\_\_\_\_.

\_\_\_\_\_  
Defendant-Petitioner, pro se

[Adopted by Supreme Court Order No. 14-8300-014, effective for all cases filed on or after December 31, 2014.]