

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, 2017**

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 1st 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. 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 will have at least 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; or 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 may be submitted using Form 9-701 NMRA and shall contain the following required information:

- (1) the petition shall clearly state whether either
 - (a) the petition 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; or
 - (b) the petition challenges conditions of confinement or matters other than those set forth in Subparagraph (B)(1)(a) of this rule;
- (2) 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;
- (3) a brief statement naming the place where the person is confined or restrained;
- (4) a brief 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;
- (5) a brief 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;
- (6) if the petitioner has previously filed a petition seeking relief under this rule, a brief statement explaining why the petition should not be dismissed under Paragraph H of this rule;
- (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 NMCD with regard to any cause of action under state law that is substantially related to the inmate's incarceration by the NMCD until the inmate exhausts the NMCD's internal grievance procedure;

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

(c) the NMCD shall inform the inmate of the provisions of Paragraph C of this rule

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

(2) A NMCD inmate may file a petition challenging any other condition of the inmate's confinement while incarcerated in a NMCD correctional facility, provided that no court of this state shall acquire subject-matter jurisdiction over any complaint, petition, grievance, or civil action filed by any inmate of the NMCD with regard to any cause of action under state law that is substantially related to the inmate's incarceration by the NMCD until the inmate exhausts the NMCD'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; and

(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 may file the petition without payment of the applicable filing fee or a motion for permission to proceed in forma pauperis.

E. Venue. If the petition

(1) seeks to vacate, set aside, or correct the sentence or order of confinement, correct the NMCD's 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; or

(2) challenges conditions of confinement or matters other than those set forth in Subparagraph (E)(1) of this rule, 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. Upon the filing of the petition, the clerk of the district court shall file-stamp the petition with the date of receipt ("file-stamp" date). 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. A notation with a "deemed filed" date shall also be made on the petition and in the court's database.

G. Court's classification and case assignment.

(1) If the petitioner indicates that the petition challenges matters contained in Subparagraph (E)(1) of this rule, the clerk shall file the petition in the original criminal case, thereby reopening the original criminal case, and shall assign the petition to the judge that originally heard the criminal case, or if that judge is no longer serving on the bench, to a judge presiding in the criminal division. Upon receipt of the petition or revised petition, the clerk of the court shall immediately forward a file-stamped copy of the petition and any attachments to the district attorney and to the public defender department post-conviction unit or, if the petition is filed on behalf of the petitioner by private legal counsel, to that legal counsel. Mailing copies of the petition in accordance with this subparagraph and with a completed certificate of mailing shall

constitute service on the respondent by the clerk of the court in accordance with Rule 5-103, 5-103.1, or 5-103.2 NMRA.

(2) If the petitioner indicates that the petition challenges matters contained in Subparagraph (E)(2) of this rule, a new habeas corpus case shall be opened and the matter shall be assigned to a judge who addresses criminal matters in accordance with the court's assignment practices. Upon receipt of the petition or revised petition, the clerk of the court shall immediately forward a file-stamped and dated copy of the petition and any attachments to the attorney general and to the public defender department post-conviction unit or, if the petition is filed on behalf of the petitioner by private legal counsel, to that legal counsel. Mailing copies of the petition in accordance with this subparagraph and with a completed certificate of mailing shall constitute service on the respondent by the clerk of the court in accordance with Rule 5-103, 5-103.1, or 5-103.2 NMRA.

H. **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) **Pre-appointment review.** For petitions not filed by an attorney, within forty-five (45) days of the file-stamp date on the petition, the public defender department may file a statement recommending that the court order a revised petition under Subparagraph (I)(2)(a) of this rule or indicating whether the petition is a proceeding that a reasonable person of adequate means would be willing to bring at a person's own expense and provide sufficient detail for further judicial review of the public defender's assessment. The court ordinarily should not appoint the public defender during the pre-appointment review period.

(2) **Initial court review.** Within one-hundred twenty (120) days of the file-stamp date on the petition, the court shall examine the petition together with all attachments and statement of the public defender department, if any. Within this initial one-hundred twenty (120) day court review

(a) **Petitioner's opportunity to revise.** If the court is unable to determine from the face of the petition whether the petition should be allowed to go forward on the merits or dismissed under this rule, 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 court shall set a date certain within the one-hundred twenty (120)-day initial review period, but no less than forty-five (45) days from the date of returning the copy to the petitioner, for the petitioner to resubmit a revised petition. If no revised petition is filed under this subparagraph by the date specified by the court, the judge may dismiss the petition.

(b) **Summary dismissal.** 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 the order on petitioner, district attorney if the petition challenges matters contained in Subparagraph (E)(1) of this rule, attorney general if the petition challenges matters contained in Subparagraph (E)(2) of this rule, and the public defender department post-conviction unit or, if the petition is filed on behalf of the petitioner by private legal counsel, to that legal counsel.

(c) **Appointment of counsel.** If, after reviewing the petition, any statement filed by the public defender department, and revised petition, if any, 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 the order of appointment shall be provided to the petitioner, respondent, and the public defender department post-conviction unit;

(3) **Procedure; time limits.** Within ninety (90) days after the date of appointment, counsel for the petitioner shall file either an amended petition or a notice that counsel does not intend to amend the petition and provide a copy of the amended petition or notice directly to the assigned judge. 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 under Subparagraph (H)(2) of this rule. Within one-hundred 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 and provide a copy of the response directly to the assigned judge, without further order of the court;

(4) **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 an evidentiary hearing, but may ask for briefs and oral arguments on legal issues;

(5) **Evidentiary hearing.** If an evidentiary hearing is required, the court shall conduct a hearing as promptly as practicable.

I. **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.

J. **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 and 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 NMCD.

(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 Rule 5-507(A) 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 Rule 5-507(A) NMRA.

(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.

K. Transportation of incarcerated petitioners. If the presence of the petitioner is required at a hearing it shall be the responsibility of counsel for the petitioner to submit a transportation order for petitioners who are incarcerated. It shall be the responsibility of the respondent to facilitate the transportation of the petitioner if needed.

L. 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.

M. 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.

N. 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 under the Rules of Appellate Procedure;

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

History

[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; as amended by Supreme Court Order No. 17-8300-025, effective for all cases pending or filed on or after December 31,

2017.]

Associations

Committee commentary for 2017 amendments. — Rule 5-802 NMRA was amended in 2017 to streamline the administrative processing of petitions for a writ of habeas corpus in the district courts.

The amendments eliminate the thirty (30)-day review and acceptance period under Paragraph F and instead require that all petitions for a writ of habeas corpus be filed immediately upon receipt by the district court. Paragraph F establishes two important dates, the “file-stamp” date and the “deemed filed” date. The “deemed filed” date incorporates the prison mailbox rule allowing a petition for a writ of habeas corpus to be deemed filed the date it is deposited in the institution’s internal mail system. See Rule 5-103(I) NMRA (Filing and service by an inmate). The deemed filed date will mainly affect the one (1)-year time limitation to file a petition for a writ of habeas corpus in federal court following a state court conviction. See Committee commentary for 2009 amendments. However, the deemed filed date may also affect the one (1)-year time limitation for filing a petition challenging a disciplinary decision of the New Mexico Corrections Department under Paragraph C. The “file-stamp” date is the date the district court actually receives the petition. All the deadlines in Rule 5-802 run from the “file-stamp” date.

Paragraph G provides guidance to the district court as to how classify and assign petitions challenging the underlying conviction versus petitions challenging the conditions of confinement. Petitioners who wish to raise both types of claims must file two separate petitions and submit each petition in the venue required by Paragraph E. See Form 9-701 NMRA.

While the district court may deny a petition for a writ of habeas corpus on appropriate grounds during the pre-appointment review period under Subparagraph (H)(1), the committee recommends that district courts consider the information provided in the pre-appointment review before denying a petition for a writ of habeas corpus.

Under Subparagraph (H)(2), within one-hundred twenty (120) days of the “file stamp date,” the district court must either return the petition to petitioner for further information, summarily dismiss the petition, or appoint counsel. If the district court fails to take one of the foregoing actions within that designated time period, the petitioner may request a hearing.

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 and all direct appeals, 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 and all direct appeals 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 of 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; as amended by Supreme Court Order No. 17-8300-025, effective for all cases pending or filed on or after December 31, 2017.]

COMPILER'S AMENDMENT NOTES

The 2017 amendment, approved by Supreme Court Order No. 17-8300-025, effective December 31, 2017, eliminated the thirty (30)-day review and acceptance period and instead required that all petitions for a writ of habeas corpus be filed immediately upon receipt by the clerk of the district court, required the clerk of the district court to make a notation on the petition with a "deemed filed" date if the petition is filed by a petitioner who is not represented by an attorney and who is confined to an institution, provided guidance to the district court as to how to classify and assign petitions based on whether the petition challenges the underlying conviction or challenges the conditions of confinement, required the clerk of the district court to serve a file-stamped copy to the appropriate counsel, required the district court, within one-hundred twenty (120) days of the date of receipt of the petition, to examine the petition and to either return the petition to petitioner for further information, summarily dismiss the petition, or appoint counsel for the petitioner, set a procedure to ensure that incarcerated petitioners are transported for hearings, and revised the Committee commentary; in Paragraph A, after the semicolon, added "or"; in Paragraph B, in the introductory clause, after "The petition", added "may be submitted using Form 9-701 NMRA and", and after "following", added "required information", added new Subparagraph B(1) and redesignated former Subparagraphs B(1) through B(5) as Subparagraphs B(2) through B(6), respectively, in Subparagraphs B(3), B(4), B(5), and B(6), added "brief" prior to "statement", in Subparagraph B(6), after "Paragraph H", added "of this rule", and deleted former Subparagraph B(6), which required a statement regarding the purpose of the petition; in Paragraph C, in Subparagraph C(1)(a), replaced "corrections department" with "NMCD" throughout the subparagraph, and after the semicolon, deleted "and", in Subparagraph C(1)(c), added "of this rule in writing" prior to each occurrence of "at the time of its decision", and after "time limitations of", deleted "Paragraph C(1)(b)" and added "Subparagraph C(1)(b) of this rule", in Subparagraph C(2), replaced "his" with "the inmate's", deleted the subparagraph designation "a", and replaced "corrections department" with "NMCD" throughout the subparagraph; in Paragraph D, in Subparagraph D(1), after the semicolon, added "and", in Subparagraph D(2), after "filing the petition", deleted "need not file a motion for permission to proceed in forma pauperis and", after "applicable filing fee", deleted "; and" and added "or a motion for permission to proceed in forma pauperis", and deleted former Subparagraph D(3), which required that a certificate of service be attached to the petition; in Paragraph E, in Subparagraph E(1), replaced "Department of Corrections" with "NMCD's", and after "contested confinement", deleted ". 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", and in Subparagraph E(2), after "Subparagraph", added "(E)", and after "of this", deleted "paragraph" and added "rule"; in Paragraph F, after the first sentence, deleted "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." and added "Upon the filing of the petition, the clerk of the district court shall file-stamp the petition with the date of receipt ('file-stamp' date).", and added the last sentence of the paragraph; added new Paragraph G and redesignated former Paragraphs G through I as Paragraphs H through J, respectively; in Paragraph H, in Subparagraph H(1), in the subparagraph heading, deleted "Initial review; appointment of counsel" and added "Pre-appointment review", after the subparagraph heading, deleted "Within thirty (30) days after receipt" and added "For petitions not filed by an attorney, within forty-five (45) days", after "of the", added "file-stamp date on the", after the next occurrence of "petition", deleted "and attachments from the district court", after "file a statement", added "recommending that the court order a revised petition under Paragraph (1)(2)(a) of this rule or", after "indicating", deleted "that" and added "whether", after "the petition is", deleted "not", after "reasonable person", added "of adequate means", after "further judicial review", added "of the public defender's assessment", and added the last sentence of Subparagraph H(1), added new subparagraph designation "(2)" and redesignated former Subparagraphs H(2) through H(4) as Subparagraphs H(3) through H(5), respectively, in Subparagraph H(2), added the subparagraph heading "Initial court review.", after "Within", deleted "forty-five (45)" and added "one-hundred twenty (120)", after "days", deleted "after the petition is accepted and filed" and added "of the file stamp date on the petition", and after "with all attachments", added "and statement of the public defender department, if any. Within this initial one-hundred twenty (120) day court review:", added new Subparagraph H(2)(a), added new subparagraph designation "(b)", in Subparagraph H(2)(b), added the subparagraph heading "Summary dismissal.", after "district attorney", added "if the petition challenges matters contained in Subparagraph E(1) of this rule", after "attorney general", added "if the petition challenges matters contained in Subparagraph E(2) of this rule", after "post-conviction unit", added "or, if the petition is filed on behalf of the petitioner by private legal counsel, to that legal counsel", and deleted the last paragraph of Subparagraph H(2)(b), which provided for a revised petition when the court was unable to determine whether the petitioner was entitled to relief as a matter of law, added subparagraph designation "(c)", in Subparagraph H(2)(c), added the subparagraph heading "Appointment of counsel.", after "reviewing", added "the petition", after "public defender department", added "and revised petition, if any.", after "the order", added "of appointment", after "shall be", deleted "served on" and added "provided to the", and after "public defender department", added "post-conviction unit", in Subparagraph H(3), after "(90) days after", added "the date of", after "amend the petition", added "and provide a copy of the amended petition or notice directly to the assigned judge", after "Subparagraph", deleted "(1)" and added "(H)(2) of this rule", and after "any claims not dismissed", added "and provide a copy of the response directly to the assigned judge, without further order of the court", in Subparagraph H(4), after "may ask for briefs", deleted "and/or" and added "and", in Subparagraph H(5), added the subparagraph heading "Evidentiary hearing."; in Paragraph J, in Subparagraph J(1), after "Rules 5-501", deleted "or" and added "and", in Subparagraph J(2)(c), replaced "New Mexico Corrections Department" with "NMCD", in Subparagraph J(3), after "contained in", deleted "Paragraph A of", and after "Rule 5-507", added "(A)", in Subparagraph J(4), after "factors contained in", deleted "Paragraph A of", and after "Rule 5-507", added "(A) NMRA"; and added new Paragraph K and redesignated former Paragraphs J through L as Paragraphs L through N, respectively.

The 2014 amendment, approved by Supreme Court Order No. 14-8300-014, effective December 31, 2014, clarified that the rule is addressed to petitions filed after entry of a final judgment and that it applies to successive petitions; provided for Corrections Department inmates to file a petition challenging misconduct or disciplinary reports; ensured that a petition is assigned to the judge who originally heard the matter; provided the means for the district court to screen out frivolous petitions; gave the Public Defender the opportunity to file a statement regarding the petition before counsel is appointed for the petitioner; imposed a deadline on the district court to dismiss the petition, return the petition for additional information, or appoint counsel; authorized the district court to dismiss some of the claims in a petition; in Paragraph B, deleted the former first and second sentences which provided that a writ would only be issued upon the filing of a petition and that the petition filed by an inmate of an institution was deemed filed when it was deposited in the institution's internal mailing system; in Paragraph B (5), after "is the", deleted "claim has been raised in prior proceedings", and added "Petitioner has previously filed a petition seeking relief under this rule", after "explaining why the", deleted "ends of justice require consideration of the", and after "why the petition", added "should not be dismissed under Paragraph H"; in Paragraph B (6)(b), after "challenges", added "conditions of"; added Paragraph C; in Paragraph E (1), added the last sentence; in Paragraph E (2), after "challenges", added "conditions of"; added Paragraph F; in Paragraph G, in the introductory sentence, after "the court shall", deleted "promptly" and added "proceed in the following

manner", in Paragraph G (1), added the title of the subparagraph and in the first unnumbered paragraph, added the first sentence, in the third sentence, added "Within forty-five (45) days after the petition is accepted and filed, the court shall", and in the third sentence, after "fact of the" deleted "motion" and added "petition", after "face of the petition, any", deleted "annexed exhibits" and added "attachments", after "in the case that the", deleted "movant" and added "petitioner", and after "dismissal of the petition", added the remainder of the sentence; in Paragraph G (1), added the second unnumbered paragraph, in the third unnumbered paragraph, in the first sentence, after "If", added "after reviewing any statement filed by the public defender department", after "summary dismissal", deleted "unless the petitioner has filed a waiver of counsel or has retained counsel", and after "to represent the petitioner", added the remainder of the sentence, and added the second sentence; in Paragraph G (2), added the title of the subparagraph, in the first sentence, after "for the petitioner", deleted "may" and added "shall", after "petitioner shall file", added "either", after "an amended petition or", deleted "if no amended petition is filed", and added "a notice that counsel does not intend to amend", after "intend to amend the petition", deleted "originally filed by the petitioner is deemed accepted", deleted the former second sentence which required the court to order the respondent to file a response within thirty days after the petition was filed; added the second sentence; deleted the former third sentence which provided that if a response was ordered, the clerk of the court was required to serve a copy of the petition and order be served on the respondent, deleted the former fourth sentence which required the respondent to file a response within ninety days after service of the petition, and added the third sentence; in Paragraph G (3), added the title, in the first sentence, deleted "if the court directs the respondent to file a response", after "After the petition is filed", added "at the request of a party or upon its own motion", after "upon its own motion, the court" deleted "shall" and added the remainder of the sentence, added the second sentence, and in the third sentence, added "The court shall then", after "the petition without a", added "evidentiary", after "ask for briefs and", added "/or", and after "oral arguments", added "on legal issues"; and added Paragraphs H and I.

The 2009 amendment, approved by Supreme Court Order 09-8300-006, effective May 6, 2009, in Paragraph B, added the second sentence; in Subparagraph (2) of Paragraph C, after "forma pauperis" added the proviso; in Subparagraph (1) of Paragraph D, after "sentenced or order of confinement", added "correct the Department of Corrections' interpretation or application of the sentence or order of confinement, or challenge the conviction" and after "county of the court in which the", deleted "offense was committed" and added the remainder of the sentence; in Subparagraph (2) of Paragraph D, after "matters other than", added "those set forth in" and after "it shall be filed in the", deleted "judicial district" and added "county"; in Subparagraph (2) of Paragraph E, in the second and fifth sentences, changed thirty days to ninety days; and in Paragraph H, deleted former Subparagraph (3) which provided that if the petition for certiorari is not granted by the Supreme Court within thirty days after filing, it shall be deemed denied.

The 2002 amendment, effective June 1, 2002, in Paragraph D(1), substituted "county in which the offense was committed" for "judicial district in which petitioner was convicted"; in Paragraph G, inserted "in non-death penalty cases" in the bold heading and "If a sentence of death has not been imposed" at the beginning; redesignated Paragraphs F and G as present Paragraphs G and H and added Paragraph F.

The 1998 amendment, effective March 16, 1998, inserted "If the petition:" after the paragraph heading in Paragraph D, and deleted "If the petition" at the beginning of Subparagraphs D(1) and (2), deleted "do the following" at the end of Paragraph E, inserted "promptly examine" and deleted "shall be examined promptly by the court" in Subparagraph E(1), rewrote Subparagraph E(2), deleted "may appoint counsel for an indigent petitioner and" following "court" and substituted "a" for "the" in Subparagraph E(4), inserted "Within thirty (30) days" following the paragraph heading in Paragraph G, deleted "within thirty (30) days" following "if the writ is denied", and inserted "after filing" following "days" in Subparagraph G(3).

9-701. Petition for writ of habeas corpus.

[For use with District Court Criminal Rule 5-802 NMRA]

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. If more space is required, attach additional pages as needed. 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 CORPUS¹

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 (**SELECT ONLY ONE**. *If you wish to raise both types of claims, you must file two separate petitions and submit each petition in the location required by Rule 5-802(E)*):

[] 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, interpretation of the sentence by the institution or other matters relating to the trial or sentence the confined person received).
NOTE: If the petition seeks to vacate, set aside or correct the sentence or order of confinement, correct the Corrections Department's 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, it must be filed in the county of the court that ordered the contested confinement. See Rule 5-802(E)(1) NMRA.)

[] 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.) NOTE: If the petition challenges conditions of confinement or matters other than challenges to the sentence or order of confinement (those set forth in the first option), it shall be filed in the county where the petitioner is confined or restrained. See Rule 5-802(E)(2) NMRA.*

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

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

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:

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:

7. Briefly describe the relief requested:

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

(a) case name:

(b) docket number:

(c) name of judge:

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

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

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

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:

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:

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

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

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

(e) The result of each appeal:

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

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

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:

(b) The name and date of each case:

(c) The docket number:

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

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

(f) The issues raised in each proceeding:

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

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

19. Do you seek the appointment of counsel to represent you?²
_____ Yes
_____ No

VERIFICATION

STATE OF NEW MEXICO
COUNTY OF _____

I, the undersigned, 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. I affirm under penalty of perjury under the laws of the State of New Mexico that 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

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; as amended by Supreme Court Order No. 17-8300-025, effective for all cases pending or filed on or after December 31, 2017.]

9-403. Eligibility determination for indigent defense services.

[Section 31-15-7 NMSA 1978. For use in the
District Court, Magistrate Court and Metropolitan Court]

STATE OF NEW MEXICO

COUNTY OF _____
_____ COURT

KEY _____

[STATE OF NEW MEXICO]

[COUNTY OF _____]

v. No. _____

_____, Defendant

ELIGIBILITY DETERMINATION FOR INDIGENT DEFENSE SERVICES

Name: _____ DOB: _____ Age: _____
AKA: _____ Sex: Male Female SSN: _____
Address: _____ Phone: _____
Charges: _____
Lives alone: ___ Lives with: Spouse ___ Children ___ Parent ___ Friend ___ Other ___
Marital status: Single ___ Married ___ Divorced ___ Separated ___ Widowed ___
Number of dependents in household: _____
 Defendant is in jail. Defendant is not in jail.

PRESUMPTIVE ELIGIBILITY:

___ I currently DO NOT receive public assistance.
___ I currently receive the following type of public assistance in _____ County:
DEPARTMENT OF HEALTH CASE MANAGEMENT SERVICES (DHMS) \$ _____
TANF/GA \$ _____ Food Stamps \$ _____ Medicaid \$ _____
Public Housing \$ _____ SSI/SSDI \$ _____
VA Disability _____
___ Unable to complete application because of possible Mental Health/Developmental Issue of applicant.

NET INCOME:	SELF	SPOUSE
Employer's Name	_____	_____
Employer's Phone	_____	_____
Pay Period (weekly, every second week, twice monthly, monthly)	_____	_____
Net take home pay (salary wages minus deductions required by law)	\$ _____	\$ _____
Other income sources (please specify)	\$ _____	\$ _____

SCREENING USE ONLY

TOTAL ANNUAL INCOME \$ _____ + _____ = ____ / ____ / ____ **A**

ASSETS:

CASH ON HAND	\$ _____	\$ _____
BANK ACCOUNTS	\$ _____	\$ _____
REAL ESTATE (equity)	\$ _____	\$ _____
	\$ _____	\$ _____
MOTOR VEHICLES(equity)	\$ _____	\$ _____
	\$ _____	\$ _____
OTHER PERSONAL PROPERTY (equity):		
(describe and set forth equity)		
_____	\$ _____	\$ _____
_____	\$ _____	\$ _____

TOTAL ASSETS \$ _____ + _____ = ____ / ____ / ____ **B**

SCREENING USE ONLY

EXCEPTIONAL EXPENSES (total exceptional expenses of dependents):

MEDICAL EXPENSES (not covered by insurance)	\$ _____
MEDICAL INSURANCE PAYMENTS (receipts required)	\$ _____
COURT-ORDER SUPPORT PAYMENTS/ALIMONY	\$ _____
CHILD-CARE PAYMENTS (e.g. day care).....	\$ _____
OTHER (describe) _____	\$ _____
_____	\$ _____

SCREENING USE ONLY

TOTAL EXCEPTIONAL EXPENSES \$ _____ = ____ / ____ / ____ **C**

I UNDERSTAND THAT IF IT IS DETERMINED THAT I AM NOT INDIGENT, I MAY APPEAL TO THE COURT WITHIN TEN (10) DAYS AFTER THE DATE I AM ADVISED OF THIS DECISION.

_____ I wish to appeal.
_____ I do not wish to appeal.

STATE OF NEW MEXICO
COUNTY OF _____

This statement is made under oath. I hereby state that the above information regarding my financial condition is correct to the best of my knowledge. I hereby authorize the screening agent, district defender and the court to obtain information from financial institutions, employers, relatives, the federal internal revenue service and other state agencies.

Date

Signature of applicant

State of _____)
) ss

representation. *The interviewer will determine if the financial circumstances of the applicant are such that the fee would pose an exceptional hardship, and will recommend to the District office Administrator or Eligibility Supervisor if the fee should be waived. The interviewer will document on the application the reason for the fee waiver.*

II. PRESUMPTION OF INDIGENCY

An applicant is presumed indigent if the applicant is a current recipient of state or federally administered public assistance programs for the indigent: temporary assistance for needy families (TANF), general assistance (GA), supplemental security income (SSI), social security disability income (SSDI), Veteran's disability benefits (VA) if the benefit is the sole source of income, food stamps, medicaid, public assisted housing or Department of Health, Case Management Services (DHMS). Proof of assistance must be attached to the application and no further inquiry is necessary. The document submitted as proof must clearly identify the applicant as currently receiving the qualifying benefit. Benefit cards without other supporting documents will not be accepted as proof of benefit. If the applicant is not receiving Medicaid benefits, but has dependants in the household for whom Medicaid eligibility has been determined, the applicant will be presumed indigent. Home equity, *etc.* is not to be taken into account if the applicant is a current recipient of one of the six programs described above.

If the interviewer is unable to complete the indigency application or believes the information to be unreliable because of communication or other problems associated with a mental or developmental disability of the applicant, indigency will be presumed. When this is the case the *Mental Health/Communication* section of the application should be checked. Where available, the designated attorney for mental health issues is to be immediately notified, and if that person is not available the duty attorney is to be immediately notified.

III. FINANCIAL RESOURCES

If the applicant is not presumptively indigent, the screening agent shall examine the financial resources of the applicant with consideration given to:

Net Income, Paragraph A;
Assets, Paragraph B; and
Exceptional Expenses, Paragraph C.

A. **Net Income.** The screening agent shall include total salary and wages for the applicant and the applicant's spouse minus deductions required by law (*FICA, state and federal withholding*). Child support deductions and *medical* insurance deductions will also be considered if already deducted from salary, but will not be recounted in the *Exceptional Expenses* section if counted here. Savings deductions and non-mandatory retirement deductions will be added to the net income. In order to calculate the salary of an individual,

the screening agent shall use one of the two methods:

(1) if the individual is presently unemployed, the screening agent shall ask about employment during the twelve (12) months preceding the interview date and calculate the amount of money earned during such twelve (12) months. Proof of this income must be attached to the application; or

(2) if the individual is presently employed, the screening agent shall project the current income for twelve (12) months into the future. Proof of this income must be attached to the application. If the applicant is unemployed and has no income, the screening agent shall inquire as to how the applicant "gets by". Proof of income is not required but responses must be documented on the eligibility form (*i.e.* eats on soup line, street person, sleeps in car, *etc.*) and some proof of how the individual lives must be provided if available, *i.e.*, lives with someone providing support, lives on the street (*must provide some proof of assistance from homeless shelters or other street assistance providers*). If the applicant gets by on "odd jobs", the income from the odd jobs must be verified. Zeros will not be accepted for income. If there is no income, an explanation is needed as to why there is no income and documentation is needed that sets forth the reason for no income.

(3) Any person that has been incarcerated for six (6) months or more is also presumed to be indigent. Proof must be provided, *i.e.*, proof of incarceration, jail release form. An individual incarcerated in a Department of Corrections facility in any state automatically qualifies.

Net income shall include, but is not limited to social security payments, union funds, veteran's benefits, worker's compensation, unemployment benefits, regular support from any absent family member, public or private employee pensions, or income from dividends, interests, rents, estates, trusts or gifts. If the applicant lives alone but receives rent from a family member, the rent shall be considered as regular support from the applicant's family and shall be included as income.

The income of a spouse must be included in the calculation of income even though the applicant and the applicant's spouse are not living in the same household unless:

(a) the applicant and the spouse are legally separated (*must provide proof of legal separation*);

(b) the applicant and the spouse have not resided together within the last 12 months and the applicant can provide a notarized statement from an adult family member verifying that fact; or

(c) the spouse is an alleged victim of the applicant or complaining witness against the applicant.

B. Assets. The screening agent shall consider all assets of the applicant and the applicant's spouse that are readily convertible into cash within a reasonable period of time.

Assets include all cash on hand as well as in checking and savings accounts, stocks, bonds, certificates of deposit and tax refunds. Real estate other than the primary residence shall be valued at the current full valuation on the county property tax rolls less any outstanding obligations against the property. Written documentation of both the value and the outstanding obligations will be attached to the application.

C. **Exceptional Expenses.** The screening agent shall consider any unusual expenses of the applicant and the applicant's legal dependents that would, in all probability, prohibit the applicant from being able to secure private counsel. The following expenses are *not* exceptional expenses: rent, food, utilities, gas money, consumer loans and student loans. Exceptional expenses shall include, but not be limited to, costs for medical care or medical insurance, family support obligations and child care payments.

In order to be included as an exceptional expense:

- (1) the cost of medical care cannot be covered by insurance;
- (2) family support expense obligations must be verified by court order or a notarized statement from the person to whom the support is paid. The support must actually be paid on a regular basis; and must be verified by written documentation such as receipts or cancelled checks;
- (3) child care must be paid on a regular basis. If the applicant says that child support is paid when the applicant can, the payments do *not* qualify as exceptional expenses.

The applicant must provide proof of the exceptional expense incurred and proof that payment is being made on a regular basis. If proof is provided, the regular monthly payment for the exceptional expense is multiplied by twelve (12) months and the calculated amount can be deducted from total income.

Other exceptional expenses shall include: payroll garnishments, internal revenue service claims, court ordered attorney fees or other court ordered payments and funeral expenses not covered by insurance.

An approved filing from a pending bankruptcy proceeding of a potential client can be considered in determining indigency.

IV. INDIGENCY FORMULA

An applicant is indigent if the applicant's available funds do not exceed one hundred fifty percent (150%) of the current federal poverty guidelines established by the United States Department of Labor.

The screening agent shall calculate the amount of available funds by adding the total for net income for the household (Column A) together with the total for assets for the household (Column B) and subtracting the total for exceptional expenses (Column C). If the available funds exceed one hundred fifty percent (150%) of the applicable federal poverty level guideline, the applicant is not indigent.

If the applicant does not know the applicant's spouse's income or assets the applicant is presumed not indigent and is not eligible for free representation unless the applicant produces the necessary information within two (2) working days after the interview.

V. APPEAL

If the applicant is found by the screening agent or the court not to be indigent, the applicant may appeal the decision to the district defender in those districts with public defender offices. If the applicant wishes to appeal the decision of the district defender, the applicant shall appeal to the district court. In those districts without public defender offices, the applicant may appeal directly to the court. If the applicant wishes to appeal a finding that the applicant is not indigent:

(1) in those districts with district public defender offices, the screening agent shall notify the public defender of the appeal;

(2) in those districts without public defender offices, the screening agent shall notify the court of the appeal.

All appeals shall be filed within ten (10) working days after the date of the decision.

VI. REIMBURSEMENT

Any applicant who is ineligible for free representation but is unable to hire private counsel may sign a contract for public defender representation on a reimbursement basis. The reimbursement cost shall cover all charges for legal fees, expert witness, and private investigation costs. Reimbursement fees shall be governed by the schedule adopted by the Public Defender Department.

First payment under a reimbursement contract shall be due thirty (30) days from the date of execution of the contract. If the applicant is incarcerated on the date of execution of the contract, the date of payment shall be thirty (30) days from the date of the applicant's release from incarceration.

If a court enters an order appointing the Public Defender Department to represent a defendant and ordering the defendant to reimburse the state for representation, the defendant shall execute a contract for reimbursement in the appropriate amount under the department's schedule. If the defendant fails to execute a reimbursement contract, the order of

appointment shall be forwarded to Public Defender administration for collection along with the documentation stating the amount owing for representation. If the defendant refuses to provide information necessary to determine net income or eligibility, the reimbursement fee shall be the maximum contract rate allowable for the crimes charged under the schedule set by the department.

VII. NEW CHARGES

If an applicant has applied for public defender services within six (6) months prior to the filing of new charges or a probation violation, completion of a new eligibility determination form is not necessary, but the applicant shall be required to pay the application fee. A printout of the CDMS entry for the original application with the new referral should be placed in the new file being opened. If an applicant has applied for public defender services and been found eligible more than six (6) months prior to the filing of new charges or a probation violation, completion of a new eligibility determination form is necessary. An applicant must pay the application fee for each case for which the applicant seeks representation regardless of whether completion of a new eligibility documentation form is required, unless the fee has been waived.

[Adopted, effective September 24, 1986; as amended, effective August 1, 1989; December 1, 1993; February 14, 1997; November 1, 2004; as amended by Supreme Court Order No. 09-8300-039, effective October 26, 2009.]

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)

AND

orders a response from respondent on the following claims:

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.]

9-702. Petition for writ of certiorari to the district court from denial of habeas corpus.

[For use with Appellate Rule 12-501 NMRA]

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Defendant-Petitioner,

S.Ct. No. _____
(leave blank; court will assign)

v.

(Name of Warden)

District Ct. No. _____

Respondent.

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

Defendant-Petitioner pro se

(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:

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

DESCRIPTION OF THE PROCEEDINGS

1. Please list the conviction being challenged:

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

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

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:

POINT 2:

POINT 3:

(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
-

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

Respectfully submitted,

Defendant-Petitioner, pro se

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 New Mexico Supreme Court at the following address:

New Mexico Supreme Court
P.O. Box 848
Santa Fe, New Mexico, 87504-0848.

(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 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; as amended by Supreme Court Order No. 17-8300-025, effective for all cases pending or filed on or after December 31, 2017.]