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HABEAS CORPUS IN NEW MEXICO

Max Minzner

ABSTRACT

In January 2015, the New Mexico Supreme Court implemented major revisions to the procedural rules governing petitions for habeas corpus and post-conviction relief. These changes clarified the limits on post-conviction relief, expanded and altered the process, and adopted a new rule to clarify the relief available to petitioners who have completed their sentence. This Article, written by the Chair of the Ad Hoc Committee on Habeas Corpus, describes the changes to assist judges and lawyers in implementing the new rules.

The amendments have three major components. First, the rules now include a clear path for petitioners seeking to vacate their conviction after their sentence is complete. Second, the rule amendments expanded the case processing options for district judges presented with post-conviction petitions and also provide increased discovery rights to litigants in these cases. Third, the rules codify and clarify the exhaustion rules, the time limitations, and the preclusion doctrines for such petitions. Taken together, these changes are designed to simplify and expedite the resolution of post-conviction challenges in New Mexico.

INTRODUCTION

The United States Supreme Court often describes the federal writ of habeas corpus with sonorous phrases. The Court has repeatedly emphasized the importance of the right to bring post-conviction challenges to free those held in violation of the constitution. A petitioner for a writ of habeas corpus seeks release from confinement on the grounds of an alleged constitutional defect in the original conviction. Whether filed in state or federal court, a habeas petition represents a collateral attack on the

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For all substantive law, though, procedure is the medium through which claims must travel in order to reach their goal. Habeas process is the mechanism for habeas petitioners to convert a constitutional claim into an order requiring release. Unfortunately, at least at the federal level, habeas process has become famously complex and unwieldy.4

Prior to filing for federal habeas corpus relief, state prisoners can (and usually must) seek habeas corpus relief from state courts. In New Mexico, the primary procedural rule governing habeas corpus claims, Rule 5-802, was adopted in the mid-1980s and had stood largely unchanged since that time. As outlined in the remainder of this Article, I see two major developments since the last set of rule changes that placed pressure on state court habeas corpus. First, the relative importance of state habeas has grown as federal relief has become more difficult to obtain. As a result of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), federal habeas corpus relief became a much more remote possibility. State habeas, then, has risen in relative significance. Second, federal efforts to deport non-citizens convicted of crimes have intensified in recent years. Once an immigration action based on a final conviction begins, habeas corpus relief is frequently the only path to avoiding deportation. These efforts at the federal level increased both the quantity and significance of habeas corpus relief in state court. In 2012, the New Mexico Supreme Court appointed a committee to closely consider the adequacy of the rules and to recommend revisions and amendments.

In January 2015, the Supreme Court adopted significant changes to the procedural rules governing habeas and post-conviction relief in New Mexico. The amendments included major revisions to Rule 5-802 and more minor revisions to Rules 5-801 and 12-501. The Court also adopted a new rule, Rule 5-803, which governs post-conviction collateral attacks to criminal convictions after the petitioner’s sentence is complete. The Court also adopted four new forms in connection with these proposed rule changes and a modification of Form 9-701, the petition for habeas corpus.

I had the good fortune to serve as the Chair of the Ad Hoc Committee on Habeas Corpus that drafted and proposed these rule changes. This Article is designed to serve as a guide to the rule changes and to assist in their implementation. In my view, two animating principles guide the rule amendments. First, the changes are designed to funnel cases into the appropriate procedural pathway given the nature of claims. Similar cases should be handled through similar procedural mechanisms. Second, the proposals seek to adopt procedural reforms that aid in the rapid and accurate resolution of habeas petitions. Petitions that lack merit should be dismissed

3. As a practical matter, ineffective assistance of counsel is certainly among the most common claims underlying a habeas petition. See Strickland v. Washington, 466 U.S. 668, 687–99 (1984) (outlining the constitutional test for ineffective assistance).

as early as possible in the process while potentially meritorious petitions should be
developed as fully as possible.

This Article has the following structure. Section I discusses the new Rule 5-803 and its approach to provide a path for relief to individuals who have finished serving their sentence. Section II describes the rule amendments relating to case processing. These amendments alter the process for filing petitions and assigning them to judges, the mechanisms for district judges to grant or deny petitions, and the process for the parties to engage in discovery. Section III examines three significant limitations in the amended rules on the right to habeas and post-sentence relief: exhaustion, time limitations, and preclusion. Section IV describes the changes to the other two Rules, 5-801 and 12-501.

I. RULE 5-803: POST-SENTENCE PETITIONS FOR RELIEF

Habeas corpus, both in New Mexico and elsewhere, has classically been a
path out of prison. Habeas petitioners primarily sought relief from incarceration as
the primary, if not sole, goal. However, with the rise in importance of the collateral
consequences from a criminal conviction, post-conviction challenges have begun to
focus on vacating criminal convictions for other reasons. These challengers have
often already completed their criminal sentences. Notably, the federal immigration
consequences of a state criminal conviction for non-citizens are severe. Deportation
is a common, if not virtually inevitable, outcome for non-citizens convicted of all but
the most minor crimes. Vacating the state conviction is frequently the only possible
path to avoid deportation.

District courts in New Mexico and elsewhere have recently seen an increase
in the number of post-conviction challenges brought by petitioners who have already
completed their sentences and who are no longer under the supervision of the
criminal justice system. In many of these cases, petitioners are seeking relief in order
to avoid the federal immigration consequences of their conviction. However, the
procedural mechanism for bringing such claims was previously unclear under New
Mexico law. Habeas corpus is not available to individuals who have completed their
sentences. Relief under Rule 5-802 is limited to persons “under the custody or
restraint of the State.” As a result, petitioners have sought relief in a variety of other
forms, styling their petitions as requests for a writ of coram nobis or motion under
Civil Rule 1-060 to set aside the judgments.

By its nature, a civil challenge to a criminal conviction is an awkward
mechanism to bring post-conviction challenges. For example, consider the issue of

appellate jurisdiction. An unsuccessful civil action seeking relief should be heard first by the New Mexico Court of Appeals and only subsequently reviewed by the Supreme Court. However, the New Mexico Supreme Court reviews denials of habeas relief directly.\textsuperscript{11} The January 2015 amendments include a new Rule, Rule 5-803, titled “Petitions for post-sentence relief,” that replaces Civil Rule 1-060, the writ of coram nobis, and any other procedural mechanisms for collateral challenges to criminal convictions where the petitioner is no longer in custody or under restraint of the conviction. Rule 5-803 now operates as the sole mechanism for these petitioners to challenge their conviction.

The proposed Rule 5-803 reflects two major shifts in the handling of these cases. First, it consolidates all such cases into one unified procedural rule, rather than preserving multiple statutory and writ-based claims, and places that rule in the Rules of Criminal Procedure for the District Courts. Second, it creates a procedure for handling these cases that is modeled on procedure for habeas actions. With some exceptions outlined below, the proposed procedure under Rule 5-803 will largely track the process for habeas claims under Rule 5-802.

Practical considerations support the decision to use a single rule of criminal procedure for all such cases. Criminal, rather than civil, practitioners usually handle these cases. Moreover, the cases raise issues of constitutional criminal procedure that are generally more familiar to the criminal bar. Indeed, just like habeas petitions, these challenges may be the first opportunity to raise some issues relating to the criminal convictions.\textsuperscript{12}

Additionally, this approach is consistent with the history of the development of habeas relief in New Mexico. Habeas corpus was classically viewed as a civil remedy under New Mexico law.\textsuperscript{13} In 1965, the Supreme Court adopted Rule 93 to govern post-conviction challenges and incorporated it into the Rules of Civil Procedure.\textsuperscript{14} Shortly thereafter, the New Mexico Legislature adopted Section 31-11-6, which provided a statutory procedure for petitioners to challenge criminal convictions.\textsuperscript{15} This statutory procedure was effectively identical to the procedure under Rule 93.\textsuperscript{16}

In 1975, the New Mexico Supreme Court superseded Rule 93 with a new rule of criminal procedure, Rule 57, which reflected the recognition that habeas claims are effectively continuations of the original criminal case.\textsuperscript{17} The current Rule 5-802 replaced Rule 57 in 1986. As the Supreme Court stated in Allen v. LeMaster,
Our adoption of Rule 5-802 was part of a re-codification of our rules and did away with the general concept of a “post-conviction remedy” by creating a single rule governing the procedure for a habeas petitioner to exercise his or her long-established constitutional right to petition this Court for habeas corpus review of the lawfulness of the petitioner’s criminal conviction. Rule 5-802 eliminated much of the postconviction motion practice previously conducted under Rules 93 and 57 and became the primary means for a prisoner to seek postconviction relief in New Mexico.\(^\text{18}\)

In addition, Rules 57 and 5-802 appear to have preempted the statutory procedure outlined in Section 31-11-6. The New Mexico Court of Appeals upheld a challenge to Rule 57 in *State v. Garcia*.\(^\text{19}\) *Garcia* held that Section 31-11-6 was procedural in nature and could not survive in the face of a conflicting rule. After Rule 5-802 replaced Rule 57, the Court of Appeals reaffirmed the *Garcia* holding in *State v. Peppers*.\(^\text{20}\) The Supreme Court in *Cummings v. State* indicated that *Peppers* and *Garcia* remain good law.\(^\text{21}\)

In summary, habeas procedures in New Mexico have shifted over time from an approach in which multiple statutory and rule-based mechanisms existed to challenge convictions in a civil action to one in which a single, unified rule of criminal procedure exists to cover all habeas claims. The new Rule 5-803 continues this process and provides a comparable unified rule for post-sentence challenges.

Second, Rule 5-803 largely reflects the procedure in the proposed version of Rule 5-802, so that the process for post-sentence challenges to criminal convictions will mirror the habeas process as closely as possible. Of course, other procedural structures for these cases are possible. For example, post-conviction litigation could more closely reflect other forms of civil and criminal litigation. However, habeas corpus is the correct model for several reasons. Both the substantive claims and relief sought under Rules 5-802 and 5-803 are the same: Petitioners argue that their conviction is invalid as a result of constitutional or statutory error.\(^\text{22}\) Similarly, there is little difference in the process for investigating and evaluating the claim of error. Lawyers will seek discovery of the same types of information and present similar evidence to the district court for adjudication. Finally, the lawyers for the state seeking to defend the conviction will usually be the same in actions under both rules. The only major difference between actions under each rule is whether the defendant is free from custody or restraint or still in prison.

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18. *Allen*, 2012-NMSC-001, ¶ 16 (citations omitted).
20. 1990-NMCA-057, ¶ 9, 796 P.2d 614 (stating that “we do not believe that the rule change revived Section 31-11-6” and that “[b]ecause of the supreme court’s predominance when a supreme court rule and a statute conflict on matters of procedure, we hold that Section 31-11-6 has been preempted”).
II. THE PROCESS FOR HABEAS AND POST-SENTENCE PETITIONS

This Section explains the procedure under the amended rules for handling and resolving habeas petitions and petitions for post-sentence relief. It proceeds in roughly chronological order. First, it outlines the process judges and clerks use to file and assign petitions when they are received. Second, it describes the various procedural mechanisms to grant or deny petitions. Finally, it describes the discovery procedures in the rule, the most significant new addition to the rules relating to case processing.

A. Dating and Judicial Assignment

A current bottleneck in the handling of habeas claims can occur when a petition first reaches the clerk’s office in the district court. Because habeas claims are filed pro se, they are often difficult for a court clerk to correctly identify and file. Clerks will typically seek a determination from a district judge about how to handle the proposed filing. This process, while appropriate, can be lengthy and can delay or obscure the filing date of the state habeas petition. This date can be important for purposes of subsequent federal habeas review. The time to file a federal habeas petition is tolled during the period when “a properly filed application for State post-conviction review” is pending. State law effectively determines when a petition is “properly filed” under this provision.

New language in Rule 5-802 is designed to clarify this process. In cases where the petition is received by the clerk, but not filed until later, the rule requires that the date of receipt be clearly identified on the petition.

23. Despite the overall procedural similarity, there are some areas where Rules 5-802 and 5-803 are significantly different. The next Section identifies and explains the areas where the rules differ.

24. Consistent with consolidation of all post-sentence claims into a single unified procedure in Rule 5-803, the Court also adopted a new form for petitioners to use in pursuing these claims. See N.M. RULES ANN. 9-703 (2014). This new form for post-sentence petitions closely tracks NMRA Form 9-701, the form for habeas corpus petitions. The new form simply refers to the petitioner’s former, rather than current, custody.


26. Artuz v. Bennett, 531 U.S. 4, 8 (2000) (“[A]n application is ‘properly filed’ when its delivery and acceptance are in compliance with the applicable laws and rules governing filings.”).

27. N.M. RULES ANN. 5-802(F) (2014) (“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. . . . “).

28. Id. The Federal Rules of Civil Procedure do not include this provision. See FED. R. CIV. P. 3. Because Rule 5-803 deals with post-conviction challenges by individuals who have completed their sentence, petitioners under this rule generally cannot seek relief in federal court. See 28 U.S.C. § 2241(c).
accepted for filing, the filing date will relate back to the date of receipt. The rule then requires the clerk to provide a copy of the petition to the district attorney, the attorney general, and the public defender.

Significantly, this date only governs in cases where the petitioner is not currently incarcerated. Incarcerated prisoners receive the benefit of the “mailbox rule” adopted by the New Mexico Supreme Court in 2009. Petitions filed by incarcerated defendants are deemed filed as of the date they are placed in the internal prison mail system.29 Because habeas relief is only available to prisoners still serving their sentence, the new language in practice only affects habeas petitioners on probation or parole.

In addition to regulating the timing of filing, the rule amendments alter the process of judicial assignment. The prior version of Rule 5-802(E) contained a venue provision that requires petitioners to file challenges to their conviction in the district that originally adjudicated the matter. However, it did not require that any particular judge in that district hear the case. The revised language of Rule 5-802(E) ensures that the judge who presided over the original criminal case hears the subsequent challenge to the criminal conviction.30 Because the original judge already has knowledge of the facts of the case, it should ordinarily be more efficient for that judge to retain the matter even if that judge is no longer hearing criminal cases. If the original judge has left the bench, the rule mandates that the case remain with a criminal division if the district has such a structure. Judges hearing primarily criminal cases are better situated to handle habeas actions given that such cases are fundamentally criminal in nature.31 The proposed Rule 5-803(A) includes parallel language relating to venue and judicial assignment for post-sentence challenges.32

B. Procedure for Resolving Claims

The previous structure of Rule 5-802 provided limited options for the court handling a habeas petition. District courts could summarily dismiss at the outset under 5-802(E)(1) but, if the petition is not dismissed, the rule provides few procedural alternatives outside an evidentiary hearing. Because a central goal of these rule changes is the rapid resolution of meritless petitions in order to focus attention on claims involving plausibly successful grounds for relief, the rule

29. N.M. RULES ANN. 5-802(F) (2014). The rule amendments retain this language but move it from Subsection (B) to Subsection (F). Compare Rule 5-802(F), with Rule 5-802(B) (2013).
30. See N.M. RULES ANN. 5-802(E) (2014) (“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.”).
31. See Allen v. LeMaster, 2012-NMSC-001, ¶ 15, 267 P.3d 806 (“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.”).
32. See N.M. RULES ANN. 5-803(A) (2014) (“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.”).
Introduces a range of alternatives for district judges to handle habeas petitions. At each stage, the court can dismiss (or narrow) the petitioner’s claims for relief.

First, new language in Subsection G(1) permits the public defender to put in an early filing in the case, within 30 days of their receipt of the petition, indicating that the petition is “not a proceeding that a reasonable person would be willing to bring at a person’s own expense.” This standard comes from the Indigent Defense Act, which provides a right to representation by appointed counsel only if this threshold is met. Allowing the Public Defender Department to express its opinion at this stage avoids the unnecessary appointment of counsel in cases where it is not appropriate. Equally important, it can help identify and dismiss frivolous petitions early in the case. A common reason this “reasonable person” standard will not be met is that the case has no merit. The Department is often well-positioned to identify potential problems with the petition that might otherwise be missed. The timing of this filing also prevents complicated conflict issues. After appointment, the Department is in a difficult position. At that point, stating that the petition lacks merit may be inconsistent with the lawyer’s ethical obligation. However, doing so pre-appointment does not raise the same concerns.

Next, whether or not the public defender files such a statement, the new rule provides two options for district courts to handle potentially meritless petitions. The court retains the option for the district court to summarily dismiss the habeas petition that currently exists in the rule. If this happens, new language explicitly requires the court to make a record of the reasons for dismissal and to serve a copy of the dismissal on the petitioner, the respondent, and the public defender. The rule also provides a new alternative for the district court – the petition can be returned to the petitioner to provide more information or a restatement of the legal claims. This procedure is designed to handle situations where the petition is too vague to determine whether dismissal is appropriate. For example, a petitioner may simply raise a conclusory claim of ineffective assistance of counsel without any detail. Under the new rule, the district court can send the petition back for further explanation. If no revised petition is filed, the court may then dismiss.

If the petition is not dismissed, the amended rule, consistent with prior law, retains language requiring the appointment of counsel. However, the rule now makes explicit the district court’s obligation to consider the requirements of the Indigent Defense Act. New language also requires the court to serve the order appointing counsel on petitioner, respondent, and the public defender. Within 90 days, counsel

34. See N.M. Rules Ann. 5-802(G)(1) (2014) ("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.").
35. Id. ("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.").
36. Id.
37. See N.M. Rules Ann. 5-803(F)(1) (2014) (possessing comparable procedures with the exception of the provisions relating to the public defender). See also N.M. Stat. Ann. § 31-16-3(A) (1968) (stating that publicly funded representation is available to “[a] needy person who is being detained by a law
must then either amend the petition or file a statement that counsel does not intend to amend.\footnote{38} At this point, the district court can determine whether any or all of the claims should be dismissed. For any claims not dismissed, the respondent has 120 days to file a response.\footnote{39}

The post-sentence rule includes a simpler procedure that merely requires the state to file a response within 120 days.\footnote{40} The process of amending the petition (or filing a notice that the petition will not be amended) is designed to handle cases where the initial petition is filed \textit{pro se} but counsel is subsequently appointed to represent the petitioner. This is the usual pattern in habeas actions. In contrast, in cases filed under Rule 5-803, there is no right to representation by the public defender.\footnote{41} As a result, petitioners will generally either have hired counsel from the outset or proceed \textit{pro se} through the entire case. Under either circumstance, the amendment process is unnecessary and would merely complicate matters.

Once the response is filed, the amended rule now gives the district court an alternative short of a full evidentiary hearing. Labeled a "preliminary disposition hearing," this hearing permits the court to resolve some matters on the paper record, including considering information developed during discovery.\footnote{42} Consistent with the prior version of the rule, if the court believes an evidentiary hearing is unnecessary, the court can rule on the petition without one, while still requesting briefing and oral argument on legal issues. Rule 5-803(\textit{F})(3) includes identical language relating to preliminary disposition hearings.\footnote{43}

In addition to these rules changes, the Supreme Court also adopted two new form orders, Form 9-704 and 9-705, which should ease the case processing for district judges handling habeas petitions. Form 9-704 is a new Order of Appointment Form for habeas cases where the public defender is assigned to represent the habeas petitioner. The proposed form should be a straightforward document for the district court to use in making the findings required by the rule and the Indigent Defense Act.

Form 9-705 is a form case processing order for district judges. It is based on a model previously in use in the Second Judicial District and should serve as a single case management document for district judges handling habeas cases. Up until the point a response is filed, district judges should be able to use this procedural order to handle any of the steps in the habeas process. District judges can use it to dismiss enforcement officer, or who is under formal charge of having committed, or is being detained under a conviction of, a serious crime"). While there is little case law on this provision, the best reading of the statute limits representation to those cases where the petitioner is still serving their sentence. As a result, for petitions filed under Rule 5-803, representation is not available under the Indigent Defense Act.

\footnote{38} See N.M. RULES ANN. 5-802(G)(2) (1986) (explaining that under the prior version of the rule, once counsel was appointed, counsel for the petitioner could amend the petition within 90 days and, if no amendment is filed, the original petition is "deemed accepted"). This "deemed accepted" was ambiguous and the amendments remove the language.

\footnote{39} N.M. RULES ANN. 5-802(G)(2) (1986).

\footnote{40} N.M. RULES ANN. 5-803(F)(2) (2014).

\footnote{41} But see N.M. RULES ANN. Form 9-703 (2014) (containing a use note that reflects the authority of the district court to appoint an attorney other than the Public Defender, which supports the idea that the District court likely retains the inherent power to appoint other counsel).

\footnote{42} See N.M. RULES ANN. 5-802(G)(3) (1986).

\footnote{43} See N.M. RULES ANN. 5-803(F)(3) (2014).
or transfer a case, return the petition to the petitioner for more information, order a response, narrow the scope of claims at issue, and schedule a hearing. Once cases reach the hearing stage, cases are sufficiently far advanced that a form is no longer appropriate.

In addition to easing the burden on district judges, this form order would assist in appellate review as well. Some district court dispositions of habeas petitions have reached the Supreme Court without an adequate explanation of the reasons behind the result. This form should encourage district judges to provide a more complete record of their decisions.

C. The Discovery Process

The prior version of Rule 5-802 did not provide an explicit mechanism for parties to engage in discovery. In *Allen v. LeMaster*, the New Mexico Supreme Court concluded that habeas was fundamentally criminal in nature. From this conclusion, the Court then recognized that the *limits* on criminal discovery apply as well. 44 The amendments clearly authorize discovery in a new Subsection 5-802(I). 45 The rule adopts some components of civil discovery practice to supplement the fundamentally criminal nature of the proceeding.

First, the new language authorizes the parties, without court involvement, to make paper discovery requests of each other for materials in the possession of the other party. 46 Next, the rule clarifies that materials in the possession of law enforcement and the Corrections Department are discoverable by the petitioner. 47 Parties may comply with or object to these discovery requests. Objections based on privilege require a privilege log identifying the material withheld. The rule also provides a standard for the district court to apply when ruling on discovery requests – discovery should be granted when the requesting party shows that the materials are “relevant” to advance or defend against the claims. 48 The rule further prohibits the use of any other discovery devices without court approval 49 and bars any discovery by pro se petitioners without prior court authorization. 50 Finally, the rule makes available the broad sanctioning provisions that already exist in the criminal rules for discovery abuses. 51 Nothing in these rule changes alters the result in *Allen* or any other currently existing privilege.

This approach strikes the right balance between efficiency and ensuring adequate judicial oversight. In practice, the discovery occurring between the parties under Subsection (I)(1) will generally be non-controversial. Given that the state is far more likely to possess relevant paper records, this stage should usually involve

44. See *Allen v. LeMaster*, 2012-NMSC-001, ¶ 21, 267 P.3d 806 (suggesting that the Court’s conclusion finding that habeas is fundamentally criminal in nature certainly supports the notion that some right to conduct discovery existed as well).
45. See N.M. RULES ANN. 5-802(I) (2014). See also N.M. RULES ANN. 5-803(H) (2014) (containing identical language to that under Rule 5-802(I)).
47. See N.M. RULES ANN. 5-802(I)(2) (2014).
49. See N.M. RULES ANN. 5-802(I)(4) (2014).
the defendant making requests and receiving documents relating to the underlying criminal prosecution. Of course, if disputes relating to relevance or privilege arise, the parties will need judicial adjudication. The rule then clearly sets out how this process will take place. This basic model of party-initiated discovery with judicial involvement only when necessary is the standard approach under both the civil and criminal discovery rules, and functions relatively smoothly. 52

A different balance is struck when discovery extends beyond the request for documents from the opposing party to situations that involve third party witnesses, other forms of discovery, or when the petitioner is proceeding pro se. Many, if not most, requests for third party discovery involve sensitive issues requiring court oversight. For example, after Allen, trial counsel will be a common source of information in ineffective assistance cases. 53 Because those cases, though, will frequently involve close scrutiny of the scope of any waiver of the attorney-client privilege, parties should not be free to resolve that issue without the participation of the court. Similarly, taking habeas discovery from witnesses, especially victims, may be sensitive and should proceed only with judicial approval. Similar reasons support limiting unsupervised discovery by unrepresented petitioners.

III. LIMITATIONS ON HABEAS AND POST-SENTENCE RELIEF: EXHAUSTION, TIME BARS, AND PRECLUSION

A central goal of a well-functioning procedural system for litigation is filtering – potentially successful claims should be developed quickly while obviously unsuccessful claims should be dismissed at the earliest possible opportunity. Challenges brought by prisoners present one of the clearest tests of this goal. A large fraction of the petitions are destined to fail. However, given the liberty interest involved in the claims, the consequences of incorrectly dismissing a petition that should be granted are severe. This Section describes three components of the new rules that are designed to help appropriately filter out weak petitions to permit more judicial attention to potentially meritorious claims. Two of these components, an exhaustion requirement and a preclusion rule, largely codify existing New Mexico statutory and common law and bring the doctrine into the rules of procedure. The third limitation, a new time bar on some claims, is new to New Mexico law.

A. Exhaustion and Time Bars

Under New Mexico law, habeas corpus serves multiple functions. Habeas claims fall into two major categories. One large group of cases (“conviction” cases) involves claims by a prisoner that the original conviction is invalid. For example, habeas petitioners might seek release on a claim that trial counsel was constitutionally ineffective. Habeas corpus is the preferred mechanism for defendants to raise ineffective assistance claims, at least when a full record is not available at the time of direct appeal. 54 The other significant group of cases involves

52. See generally N.M. RULES ANN. 1-026 to 1-037 (1986, as amended through 2012) (civil discovery); N.M. RULE ANN. 5-501 to 5-512 (1998, as amended through 2013) (criminal discovery).
54. State v. Bernal, 2006-NMSC-050, ¶ 33, 146 P.3d 289 (“[T]his Court has a general preference that such claims be brought and resolved through habeas corpus proceedings.”).
claims relating to the prisoner’s conditions of confinement ("conditions of confinement" cases). In these cases, a petitioner does not challenge the underlying conviction, but might raise constitutional challenges relating to the adequacy of medical care, loss of good time credits or seek review of the Correction Department’s decision to impose administrative segregation.55

A new subsection of the habeas rule, Rule 5-802(C), imposes limits on the right to seek habeas review in conditions of confinement cases. As discussed below, the rule contains an exhaustion requirement for all conditions of confinement cases that mandates that prisoners exhaust internal prison grievance requirements before filing a habeas action. In addition, to the extent that a prisoner seeks to challenge a misconduct or disciplinary report or decision made by the Corrections Department, he or she must do so within one year of the receipt of the decision.

With respect to conviction cases, the rule does not contain any time limitations for petitioners still serving their sentence. However, there is a time limitation for cases brought under Rule 5-803, requiring that petitioners not currently in custody or restraint bring any challenge to the conviction within a reasonable time of completion of their sentences.

A.1 Exhaus tion

Under the amended rule, habeas petitioners challenging conditions of confinement must exhaust their administrative remedies first. This exhaustion requirement is designed to ensure that habeas petitioners have tried to resolve their challenges to their conditions of confinement through the internal corrections procedure. The language adopted by the Supreme Court by rule already exists in statutory form. NMSA 1978, Section 33-2-11 states 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 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.

The new exhaustion language in the rule exactly duplicates this limitation.56

The standard justifications for administrative exhaustion support such a requirement here. Ordinarily, the Corrections Department is in the best position to determine initially whether the prisoner’s claims have merit. Requiring exhaustion puts the Department on notice, allows it to correct errors quickly, and may help

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56. Of course, notwithstanding any limitation imposed by the proposed rule and the statute, the Supreme Court would retain any residual constitutional jurisdiction to issue writs of habeas corpus. N.M. CONST. art. IV, § 3; Cummings v. State, 2007-NMSC-048, ¶ 1, 168 P.3d 1080 (describing the New Mexico Supreme Court’s original habeas jurisdiction); cf. Lee Kovarsky, Original Habeas Redux, 97 VA. L. REV. 61 (2011) (exploring the parallel original jurisdiction of the United States Supreme Court to grant federal habeas petitions).
prevent unnecessary habeas claims in district court.\textsuperscript{57} Furthermore, exhaustion ensures that the district court will have the most complete record possible when the petitioner seeks to challenge the determination.\textsuperscript{58}

Prior to the Anti-terrorism and Effective Death Penalty Act of 1996 (AEDPA), the federal courts developed a non-stautory requirement that prisoners fully litigate claims in state court prior to presenting them for federal habeas review. The United States Supreme Court justified this approach on grounds similar to that of standard administrative exhaustion requirements.\textsuperscript{59} Requiring full litigation of habeas claims in state court would allow "a coordinate jurisdiction to correct its own errors in the first instance," "serve the interest of judicial economy," and "channel the resolution of the claim to the most appropriate forum."\textsuperscript{60} Congress eventually codified this requirement in AEDPA.\textsuperscript{61} Similar justifications support requiring a habeas petitioner challenging a condition of his confinement to exhaust his administrative remedies.

\textit{A.2 Time Bars and Confinement Cases}

In addition to the exhaustion requirement, Subsection 5-802(C) imposes a time limitation in a subset of the conditions of confinement cases. If the case involves a challenge to a misconduct report or decision, the rule now requires prisoners to bring their habeas petition challenging the decision within one year of the prisoner’s receipt of the final decision of the Corrections Department. The rule also requires the Corrections Department to inform the inmate of the one-year time requirement at the time of the final decision or the time bar is waived. Unlike the exhaustion requirement, this time limitation does not apply to other conditions of confinement cases.

A time limitation is appropriate in this narrow category of habeas cases. Broadly speaking, these cases typically involve administrative determinations that a prisoner should be placed in segregation, denied good time credits, or lose privileges for a designated period of time. The New Mexico Supreme Court has repeatedly recognized that habeas corpus is the appropriate vehicle for prisoners to challenge these determinations.\textsuperscript{62} However, district courts are in a different posture with respect to these habeas claims compared to other claims about conditions of confinement.

\textsuperscript{57} See, e.g., Bogan v. Sandoval Cty. Planning and Zoning Com’n, 1994-NMCA-157, ¶ 41, 890 P.2d 395 (stating that the purpose of the exhaustion requirement in zoning context “is to avoid circumvention of the administrative process and to give local authorities a chance to correct any errors”); Resolution Trust Corp. v. Binford, 1992-NMSC-068, ¶ 18, 844 P.2d 810 (internal quotations omitted) (“[O]ne of the main purposes of requiring exhaustion of administrative remedies is to prevent the government from being surprised by claims it has not had time to consider administratively.”); Grand Lodge of Masons v. Taxation & Revenue Dep’t, 1987-NMCA-081, ¶ 9, 740 P.2d 1163 (exhaustion justified by “the theory which underlies administrative law . . . that the issues with which it deals ought to be decided by experts”.

\textsuperscript{58} See Mcgee v. United States, 402 U.S. 479, 489–90 (1971) (explaining that the purpose of exhaustion is to permit agency full opportunity to make factual record and apply its expertise).

\textsuperscript{59} See Keeney v. Tamayo-Reyes, 504 U.S 1, 8–9 (1992).

\textsuperscript{60} Id. at 9.

\textsuperscript{61} 28 U.S.C. § 2254(c)(2) (2015) (prohibiting, with some exceptions an evidentiary hearing if the habeas petitioner “failed to develop the factual basis of a claim in state court proceedings”).

Unlike situations where the prisoner alleges an ongoing deprivation such as a lack of medical care, district courts in these cases are effectively reviewing the validity of the administrative determination by the New Mexico Corrections Department. In practice, the prisoner is frequently raising claims of procedural error at the administrative level.63

This framework is comparable in some respects to district court review of other administrative agency actions either through an appeal or a writ of certiorari. Of course, under Civil Rules 1-074(E) and 1-075(D), challenges to administrative agency actions must be filed within 30 days in order to be timely. Under these rules, the purpose of the time limitations is to ensure rapid review of the administrative decision, in part so that the evidence and other portions of the record relevant to the decision remain available for review. The same justifications apply here. A one-year period of limitation recognizes that incarcerated prisoners need more time than other litigants to challenge the administrative adjudication but still ensures that the case is brought in a timely fashion.

A.3  Time Bars and Conviction Cases

In the conviction cases, the new rule adopts a time limitation in the limited category of cases where petitioners have completed their sentence, i.e. cases brought under the proposed new Rule 5-803. The rule does not create a time bar in cases brought under Rule 5-802 where petitioners are still serving their sentence. This is a significant change in New Mexico law. Statutes of limitations have traditionally not applied to habeas corpus cases in New Mexico.64 Similarly, the New Mexico Supreme Court has refused to apply the related equitable defense of laches in habeas cases.65 Rule 5-803 now requires that petitioners bring any challenge to their conviction within “a reasonable time” after the completion of the petitioner’s sentence, unless the court finds good cause, excusable neglect, or extraordinary circumstances beyond the control of the petitioner that justify filing the petition beyond that time.66

This standard is designed to be broad and flexible. It would, for example, cover situations involving newly discovered exculpatory evidence. Similarly, in many situations, the consequences of the conviction were more severe than were apparent at the time.67 The commentary also makes clear that a court decision that applies retroactively would be among the circumstances justifying a late filing of a petition. The rule does not to reduce the ability of the New Mexico Court of Appeals or Supreme Court to hold that new rules of constitutional law are retroactive in

63. See, e.g., Miller, 2003-NMSC-025, ¶ 17 (failure to provide prisoner adequate notice); Lopez, 2003-NMSC-003, ¶ 7 (prisoner not permitted to call witnesses).

64. See State v. Sutphin, 2007-NMSC-045, ¶ 12, 164 P.3d 72 (“New Mexico does not impose a statute of limitations on habeas petitioners . . . .”).

65. Id.

66. N.M. RULES ANN. 5-803(C) (2014).

67. The commentary notes that “[p]etitions may often be filed late under this rule because of the development of serious unforeseen collateral consequences which are beyond the control of the petitioner, such as deportation.” N.M. RULES ANN. 5-803(C) (2014) (committee commentary).
nature. In such cases, the rule should restart the clock and provide the petitioner a reasonable time from the date of the decision to challenge his conviction.68

Statutes of limitations are designed to balance two competing interests.69 On one hand, by their very design, time bars extinguish claims that would be successful solely on the ground that too much time has lapsed. Petitioners that would be entitled to relief if their claim were filed earlier are denied relief simply because another year has passed. On the other hand, a time bar protects the state’s strong interest in finality in criminal cases. As time passes, evidence relating to the habeas claim grows stale and it becomes difficult for the state to defend against claims of procedural error. Similarly, evidence relating to the underlying criminal action may be lost as cases get older. In cases involving a guilty plea, no underlying trial record exists as substitute evidence if witnesses are unavailable or their memory has faded. As a result, an order granting a habeas petitioner a new trial may effectively serve as a judgment of acquittal since the state may not plausibly be able to retry the defendant. In addition, in the subset of criminal cases involving victims, old habeas claims can be traumatic for those involved, forcing victims and their families to revisit an event years later that they have hoped to place in their past. New Mexico recognizes this interest of victims and grants them both constitutional and statutory rights to a timely resolution of their case.70

These two competing interests support a time bar in Rule 5-803. In the cases where the petitioner has completed the sentence, the cost of denying relief is reduced because the petitioner’s interest in the action is more limited. Once the prisoner is no longer in custody, he has no liberty interest supporting his claim. While the collateral consequences may be significant, including the possibility of deportation, he is no longer under the direct restraint of the challenged sentence. Notably, the central reasoning of Sutphin, the key New Mexico case on this issue, focuses on the costs of continued wrongful incarceration as the reason not to apply a time limitation.71 In actions under the proposed Rule 5-803, these costs are no longer at issue. Additionally, the importance of finality is increased in these cases. Because the clock starts at the completion of the sentence, these challenges will be quite removed in time from the original conviction. The prisoner effectively has the entire term of his sentence to bring the challenge under Rule 5-802 plus an additional period of “reasonable time” to file a petition under Rule 5-803. Moreover, it might be reasonable to expect the State to preserve evidence when a prisoner remains in

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68. The commentary to Rule 5-803 makes clear that “the time limitations contained in Paragraph C may be tolled in instances when a decision from a court applies retroactively.” N.M. RULES ANN. 5-803(C) (2014) (committee commentary).
69. See Sun Oil v. Wortman, 486 U.S. 717, 736 (1988) (Brennan, J., concurring) (“The statute of limitations a State enacts represents a balance between, on the one hand, its substantive interest in vindicating substantive claims and, on the other hand, a combination of its procedural interest in freeing its courts from adjudicating stale claims and its substantive interest in giving individuals repose from ancient breaches of law.”); Roberts v. Sw. Cmty. Health Servs., 1992-NMSC-042, ¶ 26, 837 P.2d 442 (describing policy considerations underlying statutes of limitations).
70. See N.M. CONST. art. II, § 24(A)(2) (“A victim of enumerated crimes or that victim’s representative shall have . . . the right to timely disposition of the case.”); NMSA 1978, § 31-26-4(B) (1999) (“A victim shall have the right to . . . timely disposition of the case.”).
custody; it is less reasonable to expect the retention of evidence for cases where the sentence is complete.

In contrast, a time bar under Rule 5-802 restricting the claims of prisoners serving their sentences is not appropriate. Admittedly, time bars are common in other jurisdictions, including in the federal system. Such a time bar can avoid abuse of the writ, limiting the ability of a petitioner to file successive and repetitive petitions that raise meritless claims. Moreover, any time bar in Rule 5-802 would only limit prisoners whose sentences are longer than the limitation period, because claims filed by prisoners with shorter sentences would always be timely. As a result, only prisoners serving long sentences are subject to the time bar. Prisoners with lengthy sentences are disproportionately convicted of serious, often violent, crimes. These cases are particularly likely to involve victims who need consideration of their interests. Moreover, if the passage of time has compromised the underlying evidence, the serious nature of the case makes the inability to retry the case especially costly.

Despite these arguments, the strength of the liberty interest for habeas petitioners seeking release is a powerful argument against any time limitation. Some outlet should always remain for petitioners to seek release to protect the rare case where a long-delayed habeas petition would succeed. Even if a time bar retained an exception for actual innocence claims, any exception could potentially be too narrow and might foreclose some meritorious petitions. Additionally, an exception of that type will inevitably lead to litigation over the meaning of "actual innocence" and will force the district courts to adjudicate the applicability of the time bar. This type of litigation over threshold matters will add to the complexity of habeas cases and may distract the court from the underlying substantive claim.

B. Preclusion

The amended rules include a substantial new limitation on habeas petitions filed by individuals who have sought similar relief before. If the petitioner is raising a new claim, i.e. not one presented previously, he must show that "fundamental error has occurred" or "an adequate record to address the claim properly was not available at the time of the prior petition." If the petitioner is attempting to raise again a claim that was previously rejected, he must show that there "has been an intervening change of law or fact or the ends of justice would otherwise be served by rehearing the claim." Identical language appears in the new Rule 5-803 governing post-sentence challenges.

In my view, as discussed below, the new language simply codifies the current state of New Mexico law when a habeas petition raises claims rejected on

73. N.M. RULES ANN. 5-802(H)(1) (2014).
74. Id.
75. See N.M. RULES ANN. 5-803(G) (2014). Additionally, Rule 5-802(B)(5) and 5-803(D)(4) require the petitioner to explain why these standards are met. See N.M. RULES ANN. 5-802(B)(5) (2014); N.M. RULES ANN. 5-803(D)(4) (2014). Consistent with this approach, the form petition for habeas claim, Form 9-701, includes language requesting a concise statement of the facts supporting the claim and requesting information about those claims raised on direct appeal and in prior habeas petitions. See N.M. RULES ANN. Form 9-701 (2014).
direct appeal or, alternatively, raises a claim on habeas not raised on direct appeal. If a habeas petitioner seeks to raise a claim that was not raised on direct appeal, he must show fundamental error has occurred or an adequate record to address the claim properly was not available at the time of direct appeal. On the other hand, if the petitioner is attempting to raise again a claim that was rejected on direct appeal, he must show that there has been an intervening change of law or fact or the ends of justice would otherwise be served by rehearing the claim. Subsection H mirrors this approach for second and successive habeas petitions. This symmetry between prior habeas petitions and direct appeal will ease the use of the standard as well as avoid confusion.

The justification for some limit on second and successive petitions is straightforward. A major source of frivolous habeas petitions is repeated litigation by a small group of prisoners. Limitations on second and successive petitions provide one way to reduce this abuse of the writ. More abstractly, in most procedural systems, claimants need to provide at least some justification for raising issues that have already been rejected. Indeed, in the civil context, the core idea of claim preclusion is that similar claims must be consolidated into one pleading and that claimants have one (and only one) opportunity to seek relief.76

However, standard notions of claim and issue preclusion generally do not apply in habeas cases. In Campos v. Bravo, the New Mexico Supreme Court stated,

[R]arely are principles of finality applied with the same force in habeas proceedings as they are in ordinary litigation. In the words of the United States Supreme Court, “[c]onventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged.77

Instead, the New Mexico courts have crafted notions of preclusion that are unique to the habeas context. While the boundaries of the doctrine are unsettled, courts appear to have some discretionary capacity to dismiss habeas claims where the issues have been presented to prior courts. The New Mexico cases have described these doctrines in comparison to direct appeal. The cases recognize that the preclusive consequences of a habeas petition should be at least as great as the consequences of an unsuccessful direct appeal.78

76. See Cherpelis v. Cherpelis, 1996-NMCA-037, ¶ 20, 914 P.2d 637 (“Preclusion doctrine arises from a need to prevent relitigation of issues previously decided. Promoting finality in civil disputes is part of the foundation of an ordered society. It is unfair to the prevailing party and an unwise use of court resources to permit relitigation of an issue that has been resolved in a previous action.”) (internal citations omitted).


78. The new commentary to Rule 5-802 reinforces this notion. “The standard is higher for a petitioner raising a claim rejected in a previous habeas petition than a claim rejected on direct appeal.” N.M. RULES ANN. 5-802 (2014) (committee commentary). However, the commentary also encourages district courts to be judicious in exercising their discretion, especially when the prior habeas petition did not have the benefit of counsel “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.” Id.
Some older New Mexico cases set up rules of preclusion that apply when a habeas petitioner seeks relief that either was raised and rejected in a prior petition or was not raised at all in such a prior proceeding. These cases held that while the prior proceeding does not automatically bar the later habeas petition, the district court may exercise the discretion to reject the repeated claims. However, it is unclear whether these decisions remain good law. They all relied on language in the former Civil Rule 93(d). Rule 93(d) explicitly stated that “[t]he sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.” In 1975, the New Mexico Supreme Court superseded Rule 93 with a new rule of criminal procedure, Rule 57, and then replaced Rule 57 with Rule 5-802. The current rules do not contain this language. Given the rule changes, these cases may no longer be controlling.

More recent cases provide preclusion doctrines outside the rules. In Manlove v. Sullivan, the New Mexico Supreme Court recognized that when prisoners file successive habeas petitions, issues resolved in the initial petition might have preclusive effects in later filings. In Manlove, the Court concluded that preclusion was not appropriate because the collateral estoppel requirements were not met. The language in Manlove suggests that the preclusive consequences of the initial petition are unilateral – the state can suffer from preclusion but the prisoner cannot.

Despite this language, subsequent New Mexico cases appear to blur this distinction and recognize that the prisoner might also face preclusion from a previous habeas petition. The New Mexico Supreme Court has repeatedly considered the related question of the preclusive effects of a direct appeal on later habeas actions. Duncan v. Kerby involved an ineffective assistance challenge brought in a habeas petition where the prisoner has raised the same issue on direct appeal and lost. The Supreme Court rejected an automatic rule that the direct appeal barred the habeas claim. “[R]edundant claims may be precluded” but the decision of whether to permit relitigation of the claim is within the “sound discretion of the reviewing court.” This discretion must consider “relevant facts and circumstances, including whether or not a full evidentiary hearing on counsel’s effectiveness was previously conducted


80. See, e.g., Sisk, 1968-NMSC-087, ¶ 6 (“Although not res judicata, [petitioner] is not entitled to again seek relief on the identical grounds as a matter of right. . . . [T]he court is required to exercise a sound judicial discretion in considering new applications for discharge based upon grounds already determined to be without merit.”).

81. See, e.g., Gillihan, 1974-NMSC-060, ¶ 9; Canales, 1967-NMSC-221, ¶ 3.

82. Id. at n.3 (“There is no compelling reason to limit application of issue preclusion principles against the state . . . . Habeas corpus jurisprudence, however, may well limit the application of principles of finality against a petitioner.”).

83. 1993-NMSC-011, ¶ 1, 851 P.2d 466.

84. Id. ¶ 6.
when that claim is at issue.” The Duncan Court examined and distinguished Manlove on the grounds that the preclusive consequences of decisions on direct appeal are weaker than the preclusive effects of decisions made in resolving a habeas petition.

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.

Since there are some preclusive consequences for the prisoner flowing from the direct appeal, the natural conclusion from the Duncan reasoning is that there are similar (and perhaps greater) effects from an unsuccessful habeas petition.

The Supreme Court’s decision in Clark v. Tansy, handed down the next year, suggests the same result outside the ineffectiveness context. Clark involved a habeas petition in which the prisoner sought to relitigate claims relating to sentencing that were rejected on direct appeal. The New Mexico Supreme Court concluded such relitigation was appropriate when there is “an intervening change of law or fact, or that the ends of justice would otherwise be served.” The state raised Manlove and the Supreme Court also distinguished it on the grounds that the preclusive consequences of a direct appeal are less than the consequences of a prior habeas petition.

Taken together, these cases appear to recognize that prisoners bringing unsuccessful habeas challenges may face preclusion in future habeas petitions. Duncan and Clark suggest that the preclusive consequences of a habeas petition should be at least as great as the consequences of an unsuccessful direct appeal. However, even Manlove describes these doctrines as discretionary rather than a firm limitation on the right to seek habeas relief.

Given this case law, the new rule that applies the preclusion rules developed in the direct appeal context to cases involving a second or successive habeas claim. The New Mexico Supreme Court has drawn a distinction between those cases where the claim was originally raised and rejected on direct appeal and cases where the claim was not raised at all. With respect to claims not raised on direct appeal, the doctrine is clearly established. A prisoner is precluded from raising the claim in a habeas petition unless “fundamental error has occurred, or when an adequate record to address the claim properly was not available on direct appeal.” The Supreme Court has repeatedly applied this “fundamental error” standard in cases to determine whether the habeas petitioner was barred from raising particular claims. Notably, 88. Id.

89. Id.
91. Id.
92. Id. ¶¶ 10–12.
94. Compare Campos, 2007-NMSC-021, ¶ 18 (fundamental error where felony murder conviction may have relied on legally inadequate predicate felony), with State v. Sutphin, 2007-NMSC-045, ¶ 27,
this is the same standard applied when a defendant failed to preserve an issue for appeal by objecting in the trial court.95

For cases where the habeas petitioner actually raised the issue on direct appeal and lost, the doctrine is less clear. *Campos* states that the petitioner must show that the claim “is grounded in facts beyond the record previously presented on appeal, and if the additional facts are those which could not, or customarily would not, be developed in a trial on criminal charges.”96 In contrast, *Clark* held that relitigation should be permitted when there is “an intervening change of law or fact, or that the ends of justice would otherwise be served.”97 This *Clark* standard is broader than the *Campos* standard in two significant ways. First, it explicitly permits a petitioner to re-raise claims based on a change of law, in addition to new factual developments, and second, it provides an additional exception for “the ends of justice.” The New Mexico Supreme Court has not resolved this apparent conflict, likely because these types of cases are relatively rare compared to situations in which the claim was not raised at all on direct appeal.

The language of the rule follows the *Clark* approach. While *Campos* is more recent, the reference is dicta. Because *Campos* involved a claim that was not raised on direct appeal, rather than one that was raised and rejected, the Supreme Court had no opportunity to apply the standard in that case.98 *Campos* simply quotes the identical language from *Duncan* in providing the legal standard. Because *Clark*, handed down in 1994, is later than *Duncan*, a 1993 decision, the New Mexico Supreme Court has actually applied the broader standard more recently.

The structure of *Clark* and *Duncan* also favors the *Clark* standard. *Duncan* itself involved a defendant who had unsuccessfully litigated an ineffective assistance claim on direct appeal and then wished to raise that same claim in his habeas petition. The Supreme Court permitted the claim to proceed and granted habeas relief because the factual record was far more developed on habeas.99 Because *Duncan* involved only factual issues, the Court had no reason to consider whether an intervening change in law would also be sufficient to support relitigation of a previously rejected claim. *Clark*, on the other hand, involved a purely legal change. Between the direct appeal and the habeas petition, the United States Supreme Court issued a relevant reinterpretation of the Due Process Clause in death penalty cases.100 The *Clark* Court then permitted the petitioner to relitigate the issue even though there were no new facts. This progression suggests that *Clark* expanded the *Duncan* rule and more accurately reflects the standard. Indeed, if *Campos* and *Duncan* are read to limit relitigation to cases involving factual changes, *Clark* was likely decided wrongly.


99 See *Duncan*, 1993-NMSC-011, ¶ 8 (“Although the grounds alleged in support of Duncan’s ineffective assistance of counsel argument were basically the same on direct appeal and in the habeas corpus proceedings, the evidence available in the two proceedings was dramatically different.”).

100 *Clark*, 1994-NMSC-098, ¶ 2.
since Clark could not show “facts beyond the record previously presented on appeal,” merely an intervening change in the law.

Finally, the Clark rule is also more consistent with the rest of the habeas case law. This approach is less constraining on habeas courts, reflecting the idea that “res judicata in the habeas corpus setting” is “an equitable, discretionary, and flexible judicial doctrine.”\(^{101}\) In addition, allowing relitigation based on changes in law comports with the retroactivity precedent. The New Mexico Supreme Court has recognized that habeas petitioners can benefit from new rulings after their direct appeals are final if (and only if) the ruling is retroactive.\(^{102}\) Read literally, the Campos/Duncan approach would prevent some petitioners from benefitting from even retroactive rules because they could not demonstrate facts beyond the record on appeal. Similarly, while Congress has now heavily restricted second and successive habeas petitions by statute, permitting an “ends justice” exception is in line with the pre-AEDPA United States Supreme Court decision in Sanders v. United States.\(^{103}\) Sanders held that when a prisoner files a successive habeas petition, “[e]ven if the same ground was rejected on the merits on a prior application, it is open to the applicant to show that the ends of justice would be served by permitting the redetermination of the ground.”\(^{104}\) Both Campos and Clark rely on Sanders in setting the New Mexico standard.\(^{105}\)

Habeas and post-sentence challengers may raise a plausible constitutional objection to any rule setting out a preclusion doctrine. The New Mexico Supreme Court only has the power to create procedural rules.\(^{106}\) At least at the federal level, questions of res judicata and collateral estoppel are substantive and cannot be the subject of a rule of procedure. The United States Supreme Court promulgates the federal rules under the Rules Enabling Act,\(^{107}\) which prohibits rules that alter substantive rights. In Semtek International, Inc. v. Lockheed Martin Corp.,\(^{108}\) the United States Supreme Court considered the possibility that a federal rule of civil procedure set out a preclusion doctrine and rejected that conclusion on the grounds that preclusion was substantive to exist in the rules.\(^{109}\) The standard interpretation of Semtek is that the federal rules cannot establish preclusion doctrines.\(^{110}\) Arguably, Semtek might suggest that the New Mexico Supreme Court cannot create preclusion doctrines by rule either.

In this context, though, there is little reason to think that state and federal law are identical. Even though both the United States Supreme Court and the New Mexico Supreme Court can only create rules that are procedural, the scope of the rulemaking authority of the state court is far broader than that of the federal court. The New Mexico Supreme Court has the inherent power to make procedural rules as

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104. Id. at 16.
109. Id. at 503–04.
110. See, e.g., Brereton v. Bountiful City Corp., 434 F.3d 1213, 1217 (10th Cir. 2006).
a result of the State Constitution. The United States Supreme Court only can make rules under the more limited authority delegated by Congress under the Rules Enabling Act. As a result, there is every reason to think that the New Mexico Supreme Court can make some rules that would be beyond the scope of the United States Supreme Court.

More importantly, the history of the habeas rule provides some indication that preclusion is within the court’s rulemaking power. As discussed above, Rule 93 contained language related to preclusion. When adopted, Rule 93 mirrored the language of Section 31-11-6, a statutory provision adopted by the legislature that purported to regulate post-conviction actions. Notably, Section 31-11-6(D) contains an identical provision to Rule 93 stating that the court “shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.” In 1975, the New Mexico Supreme Court superseded Rule 93 with a new rule of criminal procedure, Rule 57, which diverged from Section 31-11-6, which was eventually replaced by Rule 5-802. The Court of Appeals has held that these rules preempted the statute.

This progression from Rule 93 (containing a preclusion provision) to Rule 5-802 (lacking such language) suggests that this type of rule is not too substantive for the Court to regulate. Moreover, the Court can only invalidate statutes that are procedural in nature. Since the decisions in Garcia and Peppers indicate that Section 31-11-6 is invalid, including the preclusion language in subsection D, this result implies that the Court has the power to issue rules in this area.

IV. AMENDMENTS TO RULES 5-801 AND 12-501

The Court also adopted comparatively minor changes to two other rules. Amendments to Rule 5-801 limited its scope and directed all cases challenging the legal validity of a conviction or sentence through Rules 5-802 and Rule 5-803. Rule 12-501 now ensures that the time bar is sufficiently flexible for the Supreme Court’s current use of the rule but also allows the state to raise the defense of procedural default in subsequent federal habeas actions.

A. Rule 5-801

The prior version of Rule 5-801 stated that “[t]he court may correct an illegal sentence at any time pursuant to Rule 5-802 NMRA and may correct a sentence imposed in an illegal manner within the time provided by this rule for the reduction of a sentence.” The scope of this rule was unclear. The rule directed motions to correct “an illegal sentence” to Rule 5-802 but permits motions to correct “a sentence imposed in an illegal manner” to be filed under this rule. However, these terms are broad and are not well-defined. As the commentary to this rule notes, this rule was originally drafted based on Federal Rule of Criminal Procedure 35. Rule 35

113. State v. Peppers, 1990-NMCA-057, ¶ 9, 796 P.2d 614 (“Because of the supreme court’s predominance when a supreme court rule and a statute conflict on matters of procedure, we hold that Section 31-11-6 has been preempted.”); State v. Garcia, 1984-NMCA-009, ¶¶ 14–19, 680 P.3d 613. See also Cummings, 2007-NMSC-048, ¶ 19–22 (noting continued validity of Peppers and Garcia).
historically included identical language relating to illegal sentences. However, Congress revoked that language in the Sentencing Reform Act of 1984 and Rule 35 no longer contains the comparable provisions.\(^{114}\)

The New Mexico Court of Appeals recently outlined the history of Rule 5-801 in its decision in State v. Torres.\(^{115}\) Torres held that the district court lacked the authority to grant the State’s motion to increase a sentence filed almost 20 years after the sentence was originally imposed. Torres recognized that district courts traditionally had indefinite jurisdiction to correct illegal sentences under the common law.\(^{116}\) However, the Court of Appeals held that Rule 5-801 was “meant to defeat the broad jurisdiction embodied in the common law.”\(^{117}\) Reviewing the development of the rule, Torres found that “the historical amendments to Rule 5–801(A) evidence a clear effort to limit district court jurisdiction in this arena, favoring appellate and habeas corpus review of illegal sentences over unlimited district court jurisdiction.”\(^{118}\)

Consistent with this historical restriction of the scope of the rule and in order to resolve any ambiguity, the revisions narrow the scope of Rule 5-801 further by deleting the opening subsection. As a result, the rule only authorizes motions to “reduce” the defendant’s sentence and will no longer include motions to “correct” the sentence.\(^{119}\) The commentary makes clear that this change is designed to limit Rule 5-801 to motions where the defendant seeks a discretionary reduction in sentence from the district court judge. It will no longer cover cases where the defendant is effectively challenging the legality of the sentence. Challenges relating to the validity of the sentence should be filed under Rule 5-802 or Rule 5-803 while challenges raising clerical or other technical errors should be filed under Rule 5-113(B). Of course, appellate review would also remain available to challenge any sentence.

B. Rule 12-501

The amendments also revised the time limits in Rule 12-501(C). Rule 12-501(B) required that petitioners seek certiorari review for district court denials of requests for habeas relief within 30 days of entry of judgment. Subsections 12-501(C)(1) and (2) permitted the Court to extend the time period for 30 days on: 1) a showing of good cause if the time has not expired or 2) on a showing of excusable neglect or circumstances beyond the control of the petitioner if the time has expired. Subsection (C)(3) stated that motions for an extension of time may not be granted after sixty days from the time the order denying the petition has been granted and that motions not granted within sixty days are automatically denied.


\(^{115}\) 2012-NMCA-026, ¶ 17–27, 272 P.3d 689.

\(^{116}\) Id. ¶ 28.

\(^{117}\) Id. ¶ 30.

\(^{118}\) Id. ¶ 17. See also id. ¶ 27 (“Given the history of the New Mexico rule, in conjunction with its federal counterpart, the current version of N.M. Rules Ann. 5-801(A) (2014) reflects a clear intent to strictly limit the district court’s jurisdiction to habeas corpus proceedings to correct an illegal sentence.”).

\(^{119}\) While the revised rule only authorizes motions to reduce the sentence, the rule does not limit the State’s ability to file motions under other rules. Notably, the State may seek correction of clerical errors under N.M. Rules Ann. 5-113(b) (2015).
In some cases, the New Mexico Supreme Court has not enforced this time limitation in Subsection (C)(3) against habeas petitioners. Those decisions might have significant implications in subsequent federal habeas actions. In order to seek federal habeas relief, prisoners must first exhaust all available state remedies.120 Failing to comply with a procedural rule, such as a state rule relating to the timeliness of appeals, may entitle the state to raise the defense of procedural default. Prisoners who have procedurally defaulted on an issue in state court are not entitled to raise it on federal habeas review absent cause and prejudice.121 Procedural rules, though, that are not consistently applied may not lead to default. The federal court reviewing the habeas petition must determine whether the state rule used to deny relief is “firmly established” and “regularly followed.”122 The time bar in Rule 12-501 might be subject to challenge on these grounds.

The amendments to Rule 12-501(C)(3) provides the Supreme Court the necessary flexibility to handle its docket but still permit the state to raise the defense of procedural default in federal court if prisoners do not comply with the time requirements in the rule. The language permits a further extension of time after 60 days has expired upon a showing of good cause and extraordinary circumstances. The standard is more difficult to meet than the standards in 12-501(C)(1) and (C)(2) for earlier extensions while still permitting the Court to hear the petition in appropriate cases. This language should be sufficiently clear to allow the state to argue procedural default in a subsequent federal habeas action in which a prisoner does not seek review in a timely manner.

In addition, no Court-approved form existed for petitioners to seek review of their habeas claims in the New Mexico Supreme Court under Rule 12-501. The Court has now adopted Form 9-702 to fill this gap.123 Using straightforward language that should be accessible to pro se litigants, the form requests a simple statement of the question(s) presented, procedural history, basis for the argument, and the request for relief.

CONCLUSION

Process determines substance. This is perhaps more true in habeas corpus than in any other area of law. Habeas procedure has often failed nationally at the central goal of ensuring the rapid and accurate resolution of petitioner’s claims. The 2015 changes in post-conviction procedure in New Mexico are designed to be a step in the right direction for state post-conviction challenges.124

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123. N.M. RULES ANN. Form 9-702 (2014).
124. This article was edited by New Mexico Law Review Manuscript Editor Jaymie Roybal.