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TO SHIELD AND PROTECT:¹ THE COMPETENCE TO STAND TRIAL DOCTRINE IN NEW MEXICO

By Lea A. Zukowski*

INTRODUCTION

Decades before the United States Supreme Court articulated the rule for determining whether a defendant is competent² to stand trial in *Dusky v. United States*,³ the territory of New Mexico recognized the right,⁴ creating the foundation for future development of the competency doctrine in this state. Since 1910, the doctrine has continued to develop in case law and in revisions to statutes and procedural rules. Although the competency requirement is rooted in notions of fairness and due process, a defendant who raises competency in New Mexico often faces a cruel irony: an extended deprivation of liberty without the benefit of a trial.⁵ This article will trace the development of the doctrine in New Mexico, analyze the current statute and rule, and provide a critique of the proposed revisions to the rules for competency determinations, keeping in mind the specific goal of reducing the length of pretrial detention for defendants who raise competency.

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1. *State v. Upton*, 1955-NMSC-087, ¶ 14, 290 P.2d 440 (“Our statute . . . shields and protects persons who are insane.”); *but see* ROBERT J. TORREZ, MYTH OF THE HANGING TREE: STORIES OF CRIME AND PUNISHMENT IN TERRITORIAL NEW MEXICO 158 (2008) (noting that John Upton was found to be competent and he was executed on Feb. 24, 1956).

2. The terms competence, competency, and competent are used interchangeably in this article and all refer to the legal concept of being competent to stand trial. Competency to stand trial also includes competency at other stages of the proceeding including plea negotiation and sentencing.

3. *Dusky v. United States*, 362 U.S. 402, 402 (1960) (articulating the still controlling formulation that the determination of competence to stand trial depends upon “whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him”).

4. *Territory v. Kennedy*, 1910-NMSC-047, ¶ 6, 110 P. 854 (documenting the Supreme Court of the Territory of New Mexico affirming the trial judge’s statement that “the law did not tolerate the trial of an insane person, and if he was then insane the trial could proceed no further at that time”).

5. LINDA FREEMAN, ALEX ADAMS & AMIR CHAPEL, N.M. SENT’G COMM’N, EFFECT OF MENTAL HEALTH DIAGNOSES ON LENGTH OF STAY IN TWO NEW MEXICO DETENTION FACILITIES, 2–3 (2013) (reporting that when all other variables were held constant, having a competency or diagnostic evaluation resulted in a longer length of stay than for arrestees who did not require such evaluation and that only being charged with a violent felony resulted in longer pretrial detention).

BACKGROUND

The right of a criminal defendant not to be tried while incompetent is a fundamental concept in criminal law.⁶ The prohibition against punishing a defendant who lacks the ability to understand the charges against him and the consequences of a trial dates back to at least mid-seventeenth-century England.⁷ The competency doctrine is related to several constitutional protections including the due process clause, the right to the assistance of counsel, the right to a fair trial, and the right of the accused to testify and to confront accusers.

The competency requirement stems from the right of criminal defendants to be present during trial⁸ since a defendant who is physically or mentally absent cannot adequately defend against a criminal charge.⁹ The right to be competent to stand trial protects the adversarial process¹⁰ and helps insure the integrity of the proceedings by increasing reliability, protecting the right to a fair trial with evenly matched adversaries, and preserving the legitimacy of the system.¹¹

Competence to stand trial is distinct from other legal questions about the mental faculties of defendants. Though the terms “insanity” or “insane” are used in older case law to describe what we now refer to as incompetence, today these are distinct legal concepts. Insanity is an affirmative defense to criminal charges when

6. See David W. Beaudreau, *Due Process or “Some Process”? Restoring Pate v Robinson’s Guarantee of Adequate Competency Procedures*, 47 CAL. W. L. REV. 369, 375 (2011) (“[M]odern courts have determined this right plays an essential role in the criminal justice system.”); Michael L. Perlin, “*For the Misdemeanor Outlaw*”: *The Impact of the ADA on the Institutionalization of Criminal Defendants with Mental Disabilities*, 52 ALA. L. REV. 193, 198 (2000) (“Few principles are as firmly embedded in Anglo-American criminal jurisprudence as the doctrine that an incompetent defendant may not be put to trial.”).

7. See, e.g., J. Amy Dillard, *Without Limitation: “Groundhog Day” for Incompetent Defendants*, 56 DEPAUL L. REV. 1221, 1225 (2007) (“The notion that a criminal defendant must be competent before standing trial dates as far back as medieval English law.”); Grant H. Morris et al., *Competency to Stand Trial on Trial*, 4 HOUS. J. HEALTH L. & POL’Y 193, 201 (2004) (reporting that Medieval English law allowed torture of defendants who refused to enter a plea, but a person who was mute due to mental or physical defects was not tortured); *Drope v. Missouri*, 420 U.S. 162, 171 (1975) (citing II WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *24 (William C. Jones ed., Bancroft Whitney Company 1916) to establish the history of the competence requirement in the common law tradition).

8. See Beaudreau, *supra* note 6, at 375 (“This right shares its conceptual footing with the right not to be tried in absentia.”); Louis B. Schlesinger, *A Case Study Involving Competency to Stand Trial: Incompetent Defendant, Incompetent Examiner, of “Malingering by Proxy”?*, 9 PSYCHOL. PUB. POL’Y & L. 381, 381 (2003) (“The law on competency to stand trial . . . stems from the prohibition against trial in absentia.”).

9. See *Drope*, 420 U.S. at 171 (“The mentally incompetent defendant, though physically present in the courtroom, is in reality afforded no opportunity to defend himself.”) (citing Caleb Foote, *A Comment on Pre-Trial Commitment of Criminal Defendants*, 108 U. PA. L. REV. 832, 834 (1960)).

10. See *id.* at 171–72 (“[I]t suffices to note that the prohibition [against trying an incompetent defendant] is fundamental to an adversary system of justice.”); see generally Note, *Incompetency to Stand Trial*, 81 HARV. L. REV. 454 (1967) (describing the importance of having fair and reasonable procedures for making competency determinations).

11. RISDON N. SLATE, ET AL., *THE CRIMINALIZATION OF MENTAL ILLNESS: CRISIS AND OPPORTUNITY FOR THE JUSTICE SYSTEM*, 302 (Carolina Acad. Press, 2nd ed. 2013); see also Note, *supra* note 10, at 458 (“The adversary form of the criminal proceedings necessarily rests on the assumption that the defendant will be a conscious and intelligent participant; the trial of a defendant who cannot fulfill this expectation appears inappropriate and irrational.”).

the defendant suffered from diminished mental function at the time of the commission of the crime.¹² Competence, by contrast, refers to whether a defendant has “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding” and have “a rational as well as factual understanding of the proceedings against him.”¹³ Incompetence is also different from incapacity. Incapacity is a legal concept that applies in the context of probate issues and refers to determining whether a person has the ability to manage personal or financial affairs.¹⁴

The presence of mental illness, intellectual disability,¹⁵ traumatic brain injury, or physical illnesses that affect mental functioning do not automatically mean a defendant is not competent to stand trial,¹⁶ because a person with these disabilities may meet the legal standard for competence.¹⁷ “While there is certainly an overlap between mental disorders and legal competency, a person afflicted with a mental disorder may be found legally competent.”¹⁸ For example, many people in jails are mentally ill,¹⁹ but not all of them will be found incompetent to stand trial.²⁰ A finding

12. *State v. Najar*, 1986-NMCA-068, ¶ 8, 724 P.2d 249 (“A claim of incompetency to stand trial is distinct from both the defense of insanity and the defense of lack of capacity to form a specific intent The competency issue is whether a defendant understands the nature and significance of the proceedings, has a factual understanding of the charges, and is able to assist his attorney in his defense The insanity defense concerns a defendant’s mental state at the time the offense was committed and is governed by its own procedural rules.”); *see also* ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS, 159 (AM. BAR ASS’N 1989) (stating that “[t]he defense of . . . [insanity] is an affirmative defense to criminal charges that . . . negates the culpability requisite to a finding of guilt”).

13. *Dusky*, 362 U.S. at 402.

14. *See, e.g.*, N.M. STAT. ANN. § 45-5-101 (2011) (defining terms used in determining if a person is incapacitated and requires a guardian or conservator).

15. Even though New Mexico’s statutes use the term “mental retardation,” it will not be used in this article unless part of a direct quote. This outdated and derogatory term has widely been replaced by the terms “developmentally disabled” or “intellectually disabled.” *See State v. Linares*, 2017-NMSC-014, ¶ 1, n.1, 393 P.3d 691.

16. N.M. STAT. ANN. § 43-1-5 (1977) (“Neither the fact that a person has been accepted at or admitted to a hospital or institutional facility, nor the receiving of mental health or developmental disability treatment services, shall constitute a sufficient basis for a finding of incompetence.”); *Linares*, 2017-NMSC-014, ¶ 33 (“A defendant may be incompetent to stand trial due to mental retardation; however, mental retardation, in and of itself, is not conclusive evidence that a defendant is not competent.”) (citations omitted); ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS, 175 (AM. BAR ASS’N 1989) (“[D]efendants may not be mentally ill yet may be incompetent to stand trial.”); *see also* SLATE ET AL., *supra* note 11, at 301.

17. *Dusky*, 362 U.S. at 402 (1960) (defining competency as whether the defendant has “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding” and have “a rational as well as factual understanding of the proceedings against him”).

18. LINDA FREEMAN, AMIR CHAPEL & MATTHEW MALAN, N.M. SENT’G COMM’N, EFFECT OF COMPETENCY AND DIAGNOSTIC EVALUATION ON LENGTH OF STAY IN A SAMPLE OF NEW MEXICO DETENTION FACILITIES 1 (2013).

19. SLATE ET AL., *supra* note 11, at 228 (finding prevalence rates of mental illness among those in jail to range from 6 percent to 64 percent depending upon the methodology used).

20. SLATE ET AL., *supra* note 11, at 317 (finding that between 20 and 30 percent of defendants referred for evaluations are found to be incompetent to stand trial); *Mental Competency in the Court*, MENTALCOMPETENCY.ORG, <http://www.mentalcompetency.org/mental-competency-in-the-court-room/> (last visited October 19, 2017) (“An estimated 60,000 competency evaluations are court-ordered each year. Approximately 20 percent of these evaluations lead to findings of incompetence.”).

of incompetence is not a get-out-of-jail-free card; many defendants who are initially found incompetent later become competent to stand trial through successful treatment or rehabilitation efforts,²¹ and defendants who are unlikely to become competent and are dangerous are subject to commitment.²²

Though the United States common law has long recognized that prosecuting or convicting a defendant who is not competent to stand trial is a violation of due process,²³ it was not until 1960 that the United States Supreme Court provided the current test for determining competence to stand trial in *Dusky v. United States*.²⁴ The determination of competence depends upon “whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.”²⁵ This standard is the minimum inquiry that due process requires.²⁶ The *Dusky* standard has been adopted by all of the states as the baseline for determining competence to stand trial.²⁷

A few years after deciding *Dusky*, the Court in *Pate v. Robinson*²⁸ affirmed the constitutional right of defendants to be competent during trial.²⁹ Defendant Robinson’s attorney raised the issue of his competency during trial,³⁰ but did not formally move for determination of the issue.³¹ Multiple witnesses provided uncontradicted testimony about Robinson’s history of mental illness and irrational behavior.³² The trial court found Robinson to be mentally alert and able to understand

21. See SLATE ET AL., *supra* note 11, at 301. (“Across studies, it is found that around 75 percent . . . and as many as 95 percent . . . of incompetent defendants are restored to competence within approximately 6 months.”); see also James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 459 (1985) (regarding restoration of competence for intellectually impaired defendants).

22. See N.M. STAT. ANN. §§ 31-9-1 to -2 (1993) (describing commitment procedures for a defendant who is not competent and is determined to be dangerous); N.M. STAT. ANN. §§ 43-1-1 to -25 (1999) (describing commitment procedures for defendants with mental health and developmental disabilities); see also *State v. Rotherham*, 1996-NMSC-048, ¶¶ 2–11, 923 P.2d 1131 (describing the confinement of defendants who have been found incompetent to stand trial).

23. *Pate v. Robinson*, 383 U.S. 375, 378 (1966) (“[T]he conviction of an accused person while he is legally incompetent violates due process”) (citing *Bishop v. United States*, 350 U.S. 961 (1956)); *Youtsey v. United States*, 97 F. 937, 940 (6th Cir. 1899) (“It is fundamental that an insane person can neither plead to an arraignment, be subjected to a trial, or, after trial, receive judgment, or, after judgment, undergo punishment.”); *United States v. Chisholm*, 149 F. 284, 289 (S.D. Ala. 1906) (“[T]he mental impairment of [a] prisoner’s mind . . . disable[s] him . . . from fairly presenting his defense.”).

24. *Dusky v. United States*, 362 U.S. 402, 402 (1960).

25. *Id.*

26. *Godinez v. Moran*, 509 U.S. 389, 402 (1993) (“While states are free to adopt competency standards that are more elaborate than the *Dusky* formulation, the Due Process Clause does not impose these additional requirements.”).

27. See Grant H. Morris et al., *Competence to Stand Trial on Trial*, 4 HOUS. J. HEALTH L. & POL’Y 193, 208 (2004) (“[S]tate courts in interpreting their states’ competency statutes have quoted the *Dusky* language verbatim, accepting the *Dusky* standard as the required standard for competency.”).

28. *Pate*, 383 U.S. at 386.

29. *Id.* at 377 (“We have concluded that Robinson was constitutionally entitled to a hearing on the issue of his competence to stand trial.”).

30. *Id.* at 376.

31. *Id.* at 384.

32. *Id.* at 378.

the proceedings as evidenced by his interactions with the trial judge, and thus ignored the testimony about Robinson's history of instability.³³ The United States Supreme Court ruled that Robinson was entitled to a new trial, finding a violation of his due process rights when the trial court failed to determine competency.³⁴ The Court stated, "While Robinson's demeanor at trial might be relevant to the ultimate decision as to his sanity, it cannot be relied upon to dispense with a hearing on that very issue."³⁵ The Court held that the evidence of Robinson's history of mental illness raised a sufficient doubt as to his present competency, and thus the lower court was required to determine the issue.³⁶

Nearly a decade later, the United States Supreme Court in *Drope v. Missouri*³⁷ further clarified the competency doctrine established by *Dusky* and *Pate*. In *Drope*, the defendant's attorney filed a pretrial motion requesting a competency evaluation.³⁸ A report from Drope's examining psychiatrist was attached to the motion.³⁹ Drope's wife testified that he was "sick and needed psychiatric care."⁴⁰ Furthermore, Drope attempted to kill himself during the trial and could not attend the proceedings.⁴¹ The trial continued despite Drope's physical absence and questionable competence.⁴² Drope was convicted.⁴³ The Supreme Court vacated the conviction because "the correct course was to suspend the trial until such an evaluation could be made."⁴⁴

The Court in *Drope* reaffirmed the *Dusky* standard⁴⁵ and notably added to the doctrine by emphasizing the trial court's responsibility to be aware of competency issues.⁴⁶ The Court stated, "Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial."⁴⁷ Thus, after *Drope*, trial courts must exercise a level of vigilance that goes beyond just responding to motions made by the attorneys, and

33. *Id.* at 385–386.

34. *Id.* at 385 ("The court's failure to make such inquiry thus deprived Robinson of his constitutional right to a fair trial.").

35. *Id.* at 386.

36. *Id.* at 387 ("In the event a sufficient doubt exists as to his present competence such a hearing must be held.").

37. *Drope v. Missouri*, 420 U.S. 162 (1975).

38. *Id.* at 164.

39. *Id.*

40. *Id.* at 166.

41. *Id.*

42. *Id.* at 166–167.

43. *Id.*

44. *Id.* at 181.

45. *Id.* at 171 ("It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to trial.").

46. *Id.* at 181.

47. *Id.*

trial courts are required to consider competency when it arises at any stage of a criminal proceeding and not just before trial.⁴⁸

PART I: THE IMPORTANCE OF COMPETENCY ISSUES IN NEW MEXICO

The determination of competence to stand trial has been called “the single most important issue in the criminal mental health field”⁴⁹ and it is also one of the most controversial topics in the legal field.⁵⁰ The issue of competence is particularly relevant in New Mexico because delays caused in part by confusion about the procedure to determine competency contribute to extensive pretrial detention of potentially incompetent defendants.⁵¹

In the most recent surveys of pretrial length of stay in New Mexico jails, the New Mexico Sentencing Commission found that competency evaluations are correlated with disproportionately extended length of stay in New Mexico detention centers.⁵² Compared to arrestees who do not have a competency proceeding, arrestees who are found competent have a median length of stay 2.3 times longer, and arrestees who are found not competent have a median length of stay 3.8 times longer.⁵³ Out of all the variables that affect length of stay, only being charged with a violent felony had a greater impact on length of stay than having a competency evaluation.⁵⁴

One way New Mexico could decrease the length of time potentially incompetent defendants languish in jail before trial is to reduce the amount of time it takes to make the determination of competency. As found by the Sentencing Commission, pretrial length of stay is significantly extended for arrestees who raise competency,⁵⁵ which is in part due to the complexity of the current procedure. The

48. *Id.* at 163 (“the information . . . created sufficient doubt of [Drope’s] competence to stand trial to require further inquiry on the question”); *Pate v. Robinson*, 383 U.S. 375, 385 (1966) (“good faith doubt”).

49. ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS, Standard 7-4.1 cmt. (AM. BAR ASS’N 1989); *see also* ALAN A. STONE, MENTAL HEALTH AND LAW: A SYSTEM IN TRANSITION 200 (1975) (stating that determination of competence is “the most significant mental health inquiry pursued in the system of criminal law”).

50. *See* Nicholas Rosinia, Note, *How ‘Reasonable’ has Become Unreasonable: A Proposal for Rewriting the Lasting Legacy of Jackson v. Indiana*, 89 WASH. U. L. REV. 673, 673 (2012) (“[C]ompetency to stand trial is one of the most widely debated concepts in criminal jurisprudence.”).

51. *See generally* LINDA FREEMAN, N.M. SENT’G COMM’N, LENGTH OF STAY IN DETENTION FACILITIES: A PROFILE OF SEVEN NEW MEXICO COUNTIES (2012); FREEMAN, ADAMS & CHAPEL, *supra* note 5; FREEMAN, CHAPEL & MALAN, *supra* note 18.

52. *See, e.g.*, FREEMAN, CHAPEL, & MALAN, *supra* note 18, at 1 (concluding that “arrestees with competency proceedings had a longer median length of stay in jail”).

53. FREEMAN, CHAPEL & MALAN, *supra* note 18, at 4.

54. FREEMAN, ADAMS & CHAPEL, *supra* note 5, at 3 (noting that when all other variables were held constant, being charged with a violent felony resulted in a stay of 286 days longer than those not charged with a violent felony. Having a competency or a diagnostic evaluation resulted in stay of 162.6 days longer than for those who did not require such evaluation).

55. *See, e.g.*, *State v. Linares*, 2017-NMSC-014, ¶¶ 3–20, 393 P.3d 691 (describing pretrial incarceration of over three years between indictment and eventual finding of incompetence to stand trial); *State v. Serros*, 2016-NMSC-008, ¶ 23, 366 P.3d 1121 (describing four years and three months of pretrial incarceration in protective custody with delay in part due to competency being raised); *State v. Stock*, 2006-NMCA-140, ¶¶ 2–9, 147 P.3d 885 (describing pretrial incarceration for three years with delay in part

rule must be simplified to assure that the procedure is fair and timely, and that the goals of the criminal justice system to prevent and deter criminal behavior are met.

PART II: NEW MEXICO'S CURRENT STATUTE AND PROCEDURE FOR DETERMINING COMPETENCY

A. The statute: Mental Illness and Competency, NMSA §§ 31-9-1 to 31-9-2

The statute prescribes the procedure related to competency to stand trial, from raising the issue to commitment and treatment when a defendant is found not competent.⁵⁶ As the New Mexico Court of Appeals aptly recognized, “Our Legislature built the due process alert into New Mexico law. It did not mince words in broadly stating that ‘[w]henver it appears that there is a question as to the defendant’s competency to proceed in a criminal case, any further proceeding in the cause shall be suspended until the issue is determined.’”⁵⁷ NMSA 31-9-2 provides, “Upon motion of any defendant, the court shall order a mental examination of the defendant before making any determination of competency” Thus, New Mexico’s statutory requirement is only a question as to competency without requiring a specific burden of proof. Section 31-9-1.1 requires an examination upon a motion for evaluation of competency, a professional evaluation,⁵⁸ and a hearing after the evaluation is completed.⁵⁹ Section 31-9-1 requires suspension of the proceedings whenever competence is raised until the issue has been determined.⁶⁰

B. The Rule: NMRA 5-602

Section B of the current rule sets forth the procedure trial courts must follow when competency is raised. The relevant parts to this discussion read:

- (1) The issue of the defendant’s competency to stand trial may be raised by motion, or upon the court’s own motion, at any stage of the proceedings.
- (2) The issue of the defendant’s competency to stand trial shall be determined by the judge, unless the judge finds there is evidence which raises a reasonable doubt as to the defendant’s competency to stand trial.
 - (a) If a reasonable doubt as to the defendant’s competency to stand trial is raised prior to trial, the court shall order the defendant to be evaluated as provided by law. . . .⁶¹

due to competency being raised); *State v. Flores*, 2005-NMCA-135, ¶¶ 3–7, 124 P.3d 1175 (describing over three years of incarceration that included treatment to competency at the state hospital).

56. N.M. STAT. ANN. §§ 31-9-1 to -2 (1993).

57. *Flores*, 2005-NMCA-135, ¶ 17 (quoting N.M. STAT. ANN. § 31-9-1).

58. N.M. STAT. ANN. § 31-9-1.1 (directing that “[t]he defendant’s competence shall be professionally evaluated by a . . . qualified professional recognized by the district court as an expert and a report shall be submitted as ordered by the court”).

59. *Id.*

60. *Id.* § 31-9-1.

61. Rule 5-602(B) NMRA.

Section C is titled “Mental examination” and provides: “Upon motion and upon good cause shown, the court shall order a mental examination of the defendant before making any determination of competency under this rule.”⁶²

The rule identifies two different burdens of proof needed to trigger an evaluation of competency. First the rule requires a “reasonable doubt” as to the defendant’s competency if the issue is raised prior to trial.⁶³ According to the rule, if the judge does not find evidence that raises a reasonable doubt as to competency, a professional evaluation does not need to occur.⁶⁴ Second, the rule requires a motion and “good cause shown” to order an evaluation.⁶⁵ This discrepancy seems to mean that if the issue is raised by a motion, good cause must be shown, but if the issue is raised prior to trial, presumably with or without a motion, there must be a reasonable doubt as to the defendant’s competency. The rule does not specify when and if a hearing is required after an evaluation is completed. Lastly, the rule requires that proceedings be stayed only if a defendant is found to be incompetent and not while the issue is being determined.⁶⁶

PART III: NEW MEXICO CASE LAW RELATED TO COMPETENCE TO STAND TRIAL

A. Foundational cases

*1. Territory v. Kennedy*⁶⁷

The events underlying the *Kennedy* case occurred in 1910 when New Mexico was still a territory. James Kennedy was the cook for a group driving cattle.⁶⁸ One day he did not bring the water along from the previous camp site.⁶⁹ His employer, Francis Evans felt he was “obligated to reprimand Kennedy . . . or as he expressed it, ‘jack him up pretty sharp’”⁷⁰ before sending Kennedy back for the water.⁷¹ Sometime in the middle of the night, another member of the party awoke to see Kennedy strike Evans three times with an ax, killing him.⁷² Despite mounting a defense of insanity at the time of the crime and the judge acknowledging that Kennedy might not be competent at the time of trial,⁷³ Kennedy was convicted of the

62. Rule 5-602(C) NMRA.

63. Rule 5-602(B)(2)(a) NMRA.

64. Rule 5-602(B) NMRA.

65. Rule 5-602(C) NMRA.

66. Rule 5-602(B)(3)(a) NMRA.

67. *Territory v. Kennedy*, 1910-NMSC-047, 110 P. 854. Note that in this case “the defense of insanity” is used as the term is used today, but “insanity at the time of trial” is the same as the term “competence to stand trial” today.

68. *Id.* ¶ 4.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* ¶ 6 (noting that testimony regarding Kennedy’s present competence was offered and that the judge told the jury that “the law did not tolerate the trial of an insane person”).

murder.⁷⁴ He appealed the conviction, and the New Mexico Supreme court remanded the case.⁷⁵

Several points made by the Supreme Court in *Kennedy* have continued relevance. First, the Court demonstrated New Mexico's recognition of the right of a defendant to be competent to stand trial.⁷⁶ Second, the Court established that incompetence at the time of trial is not a basis for acquittal when the Court found that the trial court erred by allowing the jury to consider acquittal on the basis of present competence, stating, "Insanity at the time of the trial alone is not a ground of acquittal, and should not have been submitted to the jury as such ground in this case."⁷⁷ The opinion also distinguishes insanity at the time of the crime from present inability to competently participate in the trial.⁷⁸

Perhaps the most enduring and important aspect of the *Kennedy* decision is the right of the defendant to have the issue of his present competence decided by a jury rather than the court when the issue is raised during trial.⁷⁹ Because *Kennedy* was decided before New Mexico enacted its Constitution, which guarantees the right to a jury "as it has heretofore existed," this right cannot be denied to criminal defendants.⁸⁰ The issue of when a jury rather than the court should decide competence is a theme that arises throughout the development of the doctrine.⁸¹

2. *In re Smith*⁸²

Along with *Kennedy*, *In re Smith* laid the foundation for the competence doctrine in New Mexico. It provides an interesting story that reveals another theme in the development of the doctrine that persists to this day—the concern that the claim of incompetence is subject to abuse by a clever defendant.

74. *Id.*

75. *Id.* ¶ 22. Information about the case after remand is not available, but there is no record of *Kennedy* being executed.

76. *Id.* ¶ 6 ("That led the trial judge to state, in the presence of the jury, in substance that the law did not tolerate the trial of an insane person, and if he was then insane the trial could proceed no further at that time.").

77. *Id.* ¶ 19 (noting further that this instruction "is not an error of which the defendant could complain, since it gave him a chance of acquittal to which he was not entitled").

78. *Id.*

79. *Id.* ¶ 7 ("The course which the trial court pursued in submitting to the jury, with the other issues in the case, the question whether the defendant was then insane, is, we think, required by our statute (section 1929, Comp. Laws 1897), when the question is first raised after the trial has begun.").

80. See *State v. Chavez*, 1975-NMCA-119, ¶¶ 13–17, 541 P.2d 631 (finding the statute that allowed the issue to be decided without a jury unconstitutional under the New Mexico Constitution in part because *Kennedy* demonstrated the right to have a jury decide present competency when the issue is raised during trial).

81. See, e.g., *State v. Sena*, 1979-NMCA-043, ¶ 4, 594 P.2d 336 (distinguishing competency to stand trial from competency to be sentenced, and finding the court, without a jury, can determine competency when the issue is raised after trial); *Hoffman v. State*, 1968-NMCA-028, ¶ 15, 441 P.2d 226 (finding the defendant was entitled to have the issue of competence submitted to a jury); *State v. Folk*, 1952-NMSC-079, ¶ 8, 247 P.2d 165 (discussing the procedure followed by the court in *Kennedy* when the issue arose during trial).

82. *In re Smith*, 1918-NMSC-129, 176 P. 819. Note this case also uses the phrase "insane at time of trial" the same way "competent at the time of trial" is used today.

On February 20, 1916, A.B. Smith, alias W.F. Dashley, escaped from the Luna County jail in Deming, New Mexico along with four other prisoners.⁸³ Smith, the alleged leader of the group,⁸⁴ had been in the jail on forgery charges.⁸⁵ The group drove away in a stolen car and was found by a sheriff's posse later that day near Rincon, New Mexico.⁸⁶ During the confrontation, shots were fired, and Sheriff Dwight Stevens was killed.⁸⁷ All of the escaped prisoners were caught within days⁸⁸ except for Smith, who eluded police for months.⁸⁹ Smith was eventually captured in Reno, Nevada on August 25, 1916, when he was again attempting to commit forgery.⁹⁰ Upon capture, Smith reported that he had gone from Deming to Albuquerque, then to California.⁹¹ He was brought back to New Mexico to face charges.⁹² Smith was tried for murder and convicted.⁹³ He then appealed, and his conviction was affirmed on July 15, 1918.⁹⁴

On July 15, 1918, Smith's execution by hanging was scheduled to occur on August 13, 1918.⁹⁵ Smith was granted a reprieve by the governor until October 25, 1918, and he was moved to the state penitentiary in Santa Fe "for safe keeping."⁹⁶ On August 10, 1918, a writ *de lunatic inquiriendo* was issued by the district court of Santa Fe.⁹⁷ Smith was deemed by the district court "to be of unsound mind."⁹⁸ On this basis, Smith petitioned the New Mexico Supreme Court to stay his execution until he could be "restored to reason."⁹⁹

The Court found that the writ and the proceeding in the district court pertained only to the protection of civil and property interests of people who were found to be insane, and the finding of an "unsound mind" for that purpose did not apply to competency in a criminal proceeding.¹⁰⁰ However, and of enduring importance, the Court decided that when the question of competency at the time of trial arises, the common law and humanity require an inquiry on the matter.¹⁰¹ The

83. *State v. Starr*, 1917-NMSC-092, ¶ 1, 173 P. 674.

84. *Jail Breaker Caught at Reno: Man Believed to Have Led Deming Jail Break to be Taken to Las Cruces*, EL PASO HERALD, Aug. 28, 1916, at 8, [hereinafter *Jail Breaker*] <http://texashistory.unt.edu/ark:/67531/metaph138415/m1/8/zoom/> (last visited Oct. 31, 2017).

85. Kevin Buey, *Headstone restored for Luna County sheriff killed in 1916*, THE DEMING HEADLIGHT, June 11, 2008 12:00 AM (on file with author).

86. *Starr*, 1917-NMSC-092, ¶ 1.

87. *Id.*

88. *Id.*

89. *State v. Smith*, 1918-NMSC-090, ¶ 2, 174 P. 740.

90. *Jail Breaker*, *supra* note 84.

91. *Id.*

92. *Id.*

93. *Smith*, 1918-NMSC-090, ¶ 1.

94. *Id.* ¶ 11.

95. *In re Smith*, 1918-NMSC-129, ¶ 1, 176 P. 819.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* ¶ 8.

101. *Id.* ¶¶ 12–15 ("[T]he common law forbids the trial, sentencing, or execution of an insane person for a crime while he continues in that state . . . the judgment of the district court of Santa Fé county, filed

Court considered the evidence of Smith's mental state during trial to determine whether to stay his execution. Ultimately the Court did not stay the sentence, finding "that Smith is sane, and that he has sufficient intelligence to understand the nature of the proceedings against him and his impending fate and execution, and that he understands, knows, and is able to allege any fact which might exist tending to show that he should not be executed."¹⁰²

Given Smith's reputation as the leader of the gang who escaped jail¹⁰³ and his being the only one of five escapees to elude capture,¹⁰⁴ he had a heavy burden to persuade the Court of his incompetence. Smith mounted what appears to be a formidable amount of evidence in his attempt to persuade the Court to stay his sentence.¹⁰⁵ He had a parade of witnesses and was represented by a reputable lawyer.¹⁰⁶ The Court documented the details of the evidence, but unlike the district court, the Supreme Court was not persuaded by Smith's presentation.¹⁰⁷

It appears that Smith may have prevailed in the end: there is no evidence that either Smith or his accomplice Starr was ever executed,¹⁰⁸ and New Mexico has the benefit of his case to guide the competency doctrine. *In re Smith* established that competency can be raised at any time and courts are required to make an inquiry anytime the issue arises, but a jury is only required to decide the issue if it is raised during trial and not at any another phase of the proceedings.¹⁰⁹

in this court as stated, was a sufficient suggestion to the court that the question of the sanity or insanity of the petitioner should be investigated as a matter of humanity.").

102. *Id.* ¶ 36.

103. *Jail Breaker*, *supra* note 85.

104. *See In re Smith*, 1918-NMSC-129, ¶ 1.

105. *See id.* ¶¶ 25–35.

106. *Id.* (detailing all of the evidence presented by Smith, which included testimony from his sister, several doctors, and employees of the penitentiary). Smith's lawyer, A.M. Edwards, was probably the future assistant district attorney and state senator.

107. *Id.* ¶¶ 1, 37.

108. *See Buey*, *supra* note 85 (reporting that murdered sheriff Stephen's grandson was told the perpetrators were sentenced to life in prison); Mark Allen, *Possible Legal Executions*, RESEARCH IN PROGRESS, <http://www.angelo.edu/services/library/librarians/mallan/rip.php> (last visited Oct. 19, 2017); TORREZ, *supra* note 1, at 23, 30 (noting that Governor's pardons and prison escapes were common reasons that executions were not always carried out).

109. *In re Smith*, 1918-NMSC-129, ¶¶ 12–15 ("[T]he common law forbids the trial, sentencing, or execution of an insane person for a crime while he continues in that state . . . the judgment of the district court of Santa Fé county, filed in this court as stated, was a sufficient suggestion to the court that the question of the sanity or insanity of the petitioner should be investigated as a matter of humanity."); *see also* State v. Sena, 1979-NMCA-043, ¶¶ 4, 21, 594 P.2d 336 (noting that competence to stand trial and competence to be sentenced are different issues and that a defendant is not entitled to a jury on the issue of competence to be sentenced).

B. Current case law¹¹⁰

1. *State v. Rotherham*¹¹¹

In *Rotherham*, the New Mexico Supreme Court considered the constitutionality of the procedure to be followed after a finding of incompetence.¹¹² Ultimately, the Court found New Mexico's procedure to be constitutional.¹¹³ Though this procedure is outside of the scope of this article, *Rotherham* bears mention here because the New Mexico Supreme Court recently identified *Rotherham* as articulating the correct formulation of the conditions necessary for a defendant to be found competent.¹¹⁴ The *Rotherham* formulation cites to *Dusky v. United States*,¹¹⁵ and includes three elements. First, to be competent, the defendant must have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding."¹¹⁶ Second, the defendant must have "a rational as well as factual understanding of the proceedings against him."¹¹⁷ And third, "the accused must have the capacity to assist in his own defense and to comprehend the reasons for punishment."¹¹⁸

2. *State v. Garcia*¹¹⁹

Garcia is valuable because it clarifies the role of the expert who evaluates a defendant upon the court's order. Arthur Garcia faced charges in connection with a car accident.¹²⁰ The district court ordered an evaluation after his defense counsel raised the issue of competence to stand trial.¹²¹ The evaluation found Garcia to be incompetent.¹²² The state objected, requesting another evaluation because the state contended that the evaluator was "the defense's expert."¹²³ However, the district court denied the request. The Court of Appeals affirmed, determining that when the

110. These cases were decided under N.M. STAT. ANN. §§ 31-9-1 to -2 (1993), which has not changed substantially since 1978 when the current compilation was completed. The last change occurred in 1993 when minor adjustments were made (specifically, adding the phrase "to proceed in a criminal case" to the first sentence, and replacing the word "if" with the phrase "unless the case is dismissed upon motion of a party when" in the second sentence). *Cf.* Act of Apr. 6, 1993, ch. 240, 1993 N.M. Laws 2356.

111. *State v. Rotherham*, 1996-NMSC-048, 923 P.2d 1131.

112. *Id.* ¶ 1 ("At issue on appeal is the constitutionality of New Mexico's Mental Illness and Competency Code, NMSA 1978, §§ 31-9-1 to -1.5 (Cum.Supp.1995) . . . which provides the procedure to be followed in cases where a criminal defendant is incompetent to stand trial.").

113. *Id.* ¶ 62.

114. *State v. Linares*, 2017-NMSC-014, ¶ 34, n.8, 393 P.3d 691 (stating that New Mexico courts should adhere to the formulation in *Rotherham*) (citing *Rotherham*, 1996-NMSC-048).

115. *Dusky v. United States*, 362 U.S. 402 (1960).

116. *Rotherham*, 1996-NMSC-048, ¶ 13 (citing *Dusky*, 362 U.S. 402).

117. *Id.* (citing *Dusky*, 362 U.S. 402).

118. *Id.*

119. *State v. Garcia*, 2000-NMCA-014, 998 P.2d 186.

120. *Id.* ¶ 2.

121. *Id.* ¶ 7.

122. *Id.* ¶ 8.

123. *Id.*

court orders an evaluation, the evaluator is the court's expert, not either party's expert.¹²⁴

3. *State v. Flores*¹²⁵

When the *Flores* opinion was published in 2005, it replaced *State v. Folk*¹²⁶ as the touchstone case in the competency jurisprudence.¹²⁷ In addition to being an important case in the development of the doctrine, it is illustrative of the pretrial delays that occur when competence is raised.

Ruben Flores was charged with murder in January 1999.¹²⁸ The proceedings were stayed in May 1999 so that Flores' competence could be determined.¹²⁹ After the state stipulated that Flores was not competent, the court ordered treatment.¹³⁰ Seven months later, in December 1999, Flores was transferred to Las Vegas Medical Center.¹³¹ After three months, Flores' treating doctors determined that Flores was now competent, and he was transferred back to jail in March 2000.¹³² While awaiting a second competency hearing, Flores was involved in an incident at the jail that resulted in a charge for aggravated battery upon a peace officer in December 2000, nine months after he had been treated to competency and returned to the jail.¹³³ This charge was joined with the murder case for the purpose of determining his competence to stand trial.¹³⁴

The hearing to determine Flores' competence took place in district court in May, June, and October 2001, more than a year after Flores had returned to jail after he had been treated to competence.¹³⁵ Conflicting testimony was offered as to Flores' competence to stand trial, and the judge ultimately found Flores competent to stand trial and not "mentally retarded."¹³⁶

Flores' trial for aggravated battery began in August 2002 before a different judge.¹³⁷ On the eve of trial, Flores' attorney raised the question of Flores' present competence to stand trial.¹³⁸ Even though the competency determination had been made ten months before, the judge deferred to the prior finding of competence and

124. *Id.* ¶ 32 ("The record indicates that Dr. Cave was selected by the New Mexico Department of Health, *not* Defendant, and that she was further selected as the court's expert, *not* Defendant's.") (alterations in original).

125. *State v. Flores*, 2005-NMCA-135, 124 P.3d 1175.

126. *State v. Folk*, 1952-NMSC-079, 247 P.2d 165.

127. According to Westlaw's citing references tab, *Folk* was cited by at least nineteen New Mexico cases between 1954 and 2005. *Flores* is the most recent case to reference *Folk* as precedent.

128. *Flores*, 2005-NMCA-135, ¶ 2.

129. *Id.*

130. *Id.*

131. *Id.* ¶ 3.

132. *Id.*

133. *Id.* ¶ 4.

134. *Id.*

135. *Id.* ¶ 5. Flores was in jail after being treated to competency for 14 months before his competency hearing began. *See Id.* ¶ 3.

136. *Id.* ¶¶ 5-6.

137. *Id.* ¶ 6 (noting the murder charge was resolved by Flores entering a guilty plea).

138. *Id.* ¶ 7.

did not consider the issue again.¹³⁹ Flores was convicted and subsequently appealed.¹⁴⁰ The Court of Appeals affirmed the decision of the trial court, finding no abuse of discretion when the trial court declined to consider anew Flores' competence.¹⁴¹

Flores is important in the doctrinal development for several reasons. First, there is an explicit requirement that a request for a competency determination be made based on more than just the impression of counsel.¹⁴² Second, although *Flores* not specifically require a full evidentiary hearing to create a reasonable doubt adequate to require an evaluation, it does appear to require some evidence. In affirming the trial court, the Court of Appeals stated, "[t]he observations and conclusions of Defendant's counsel as to Defendant's ability to consult and understand were not supported by any affidavits or testimony regarding observations of Defendant's present abilities."¹⁴³ The court provided as an example of evidence that could have been adequate to create a reasonable doubt: "an affidavit from someone who has observed the defendant and formulated an opinion about his or her competency, such as a corrections officer or defense counsel's paralegal."¹⁴⁴

Finally, *Flores* offers a clue as to why New Mexico courts have come to require more than a question as to competency¹⁴⁵ provided by the statutory scheme:

Of course, trial courts at times may be legitimately leery of requests for competency evaluations, since some requests are undoubtedly made primarily or solely for the purpose of delay. We note such concern as expressed in *Drope*: "The sentencing judge observed that motions for psychiatric examinations have often been made merely for the purpose of delay, and estimated that almost seventy-five percent of those sent for psychiatric examinations are returned mentally competent." 420 U.S. at 178 n.13, 95 S.Ct. 896 (internal quotation marks and citation omitted). It is likely this concern that gave rise to New Mexico case law's requirement that a defendant offer something more than defense counsel's bare representations about the defendant's competency.¹⁴⁶

Since *Flores* was decided and published in 2005, most of the cases addressing competency to stand trial have been unpublished,¹⁴⁷ and the doctrine regarding competency has remained relatively stable. The cases that have been published deal primarily with situations where the established procedure was not

139. *Id.* ¶ 11.

140. *Id.* ¶¶ 11–12.

141. *Id.* ¶ 35.

142. *Id.* ¶¶ 27–30 (stating that "in New Mexico law, something more than counsel's unsubstantiated assertions and opinion regarding a defendant's competency is required to pass the reasonable doubt and good cause tests").

143. *Id.* ¶ 35.

144. *Id.* ¶ 31.

145. N.M. STAT. ANN. § 31-9-1 (1993) ("Whenever it appears that there is a question as to the defendant's competency to proceed in a criminal case . . .").

146. *Id.* ¶ 30.

147. See Rule 12-405 NMRA (indicating that in New Mexico, unpublished cases are not precedential).

followed.¹⁴⁸ *Montoya*,¹⁴⁹ published in 2010, involves a clear abuse of discretion by a trial court when it refused to allow the issue of competence to be raised.¹⁵⁰ *Gutierrez*,¹⁵¹ published in 2015, addressed an unconstitutional finding of competency after incompetence had already been established.¹⁵² Thus, *Flores* has remained the touchstone case in the competency jurisprudence for over a decade.

4. *State v. Linares*¹⁵³

Linares, the New Mexico Supreme Court's most recent published decision, is notable for several reasons. First, *Linares* is a very recent example of the extended pretrial incarceration that occurs when competency is raised, demonstrating that defendants who raise competency in New Mexico still endure long periods of detention without the benefit of trial.¹⁵⁴ Second, *Linares* describes the distinct procedure that is to be used when a defendant is found to be incompetent due to intellectual disability compared to other conditions.¹⁵⁵ The Court notes that "mental retardation, in and of itself, is not conclusive evidence that a defendant is incompetent."¹⁵⁶ This case also shows that a finding of intellectual disability and incompetence does not mean a defendant will be released, but may be subject to civil commitment upon a finding of dangerousness.¹⁵⁷ Lastly, the Court in *Linares* unequivocally criticizes New Mexico's continued use of the outdated phrase "mentally retarded," and recommends that the New Mexico Legislature revise statutes "applicable to the developmentally disabled and replace any terms that have pejorative or derogatory connotations with suitable and respectful alternatives."¹⁵⁸

5. *State v. Stock*¹⁵⁹

The final case that bears mentioning is *Stock*, not because of its contribution to the doctrine, but because it exemplifies several of the reasons New Mexico must improve the procedure for competency determinations.

Paul Stock was charged with numerous counts of criminal sexual penetration of a minor.¹⁶⁰ When the issue of competence to stand trial was raised, the

148. See, e.g., *State v. Serros*, 2016-NMSC-008, ¶ 62, 366 P.3d 1121 (involving a defendant who raised competency, but the issue was not addressed directly because it was raised to delay the case).

149. *State v. Montoya*, 2010-NMCA-067, 238 P.3d 369.

150. *Id.* ¶ 2.

151. *State v. Gutierrez*, 2015-NMCA-082, 355 P.3d 93.

152. *Id.* ¶¶ 31, 42 (describing that the hearing was to make a determination about "mental retardation" only, but the judge made a determination of competency without notice or adequate evidence).

153. *State v. Linares*, 2017-NMSC-014, 393 P.3d 691.

154. *Id.* ¶¶ 4–19 (describing the events over the three years between indictment and eventual finding of incompetence to stand trial).

155. *Id.* ¶¶ 25, 33–34, 42.

156. *Id.* ¶ 33.

157. See *id.* ¶ 42 (describing the procedure for civil commitment after a finding of incompetency due to "mental retardation").

158. *Id.* ¶ 1, n.1.

159. *State v. Stock*, 2006-NMCA-140, 147 P.3d 676.

160. *Id.* ¶ 2.

proceeding was stayed.¹⁶¹ Ultimately, through a series of errors and oversights, Stock spent over five years in jail without a trial.¹⁶² The charges were dismissed by the trial court due to unreasonable delay.¹⁶³ The Court of Appeals affirmed the decision,¹⁶⁴ and the Supreme Court quashed certiorari.¹⁶⁵

Stock demonstrates how extreme the delay can be when competency is raised¹⁶⁶ and the dilemma faced by defendants and lawyers when a defendant's competency is questionable. Stock was described as having "the intellectual functioning of a twelve-year-old."¹⁶⁷ The Court of Appeals noted that even if Stock had wanted to object to the delay, he was often not transported to hearings.¹⁶⁸ Due to the delay, the charges against Stock were never ultimately decided. Though it is not determinative of Stock's guilt on the past charges, after his release, he again faced charges for similar crimes.¹⁶⁹ He ultimately pled no contest¹⁷⁰ and is currently incarcerated.¹⁷¹ If his initial case had been handled effectively, the interests of justice may have been served and Stock may have been deterred from committing the later crimes, or he may have had the opportunity for rehabilitation if he had been convicted as a sexual offender. *Stock* serves as a cautionary tale and demonstrates some of the reasons New Mexico must improve its procedure for making competency determinations.

PART IV: PROPOSED REVISIONS TO THE RULE FOR DETERMINING COMPETENCY

New Mexico's current procedure for making competency determinations is in desperate need of revision as evidenced by the disproportionately long length of pretrial detention that defendants who raise competency face and the potential for this delay to thwart the goals of the criminal justice system. This section will briefly note problems with the current procedure and then provide a critique of the proposed revisions to the rule for making competency decisions.

A. New Mexico's current procedure for making competency determinations

The current procedure lacks clarity and has created confusion and inconsistency in New Mexico's criminal justice system. Problems stem from

161. *Id.*

162. *Id.* ¶ 11 (noting that numerous delays resulted in five years passing since the alleged incident).

163. *Id.* ¶ 10.

164. *Id.* ¶ 1.

165. *State v. Stock*, 2007-NMCERT-001, 152 P.3d 152.

166. *See Stock*, 2006-NMCA-140, ¶ 11 (noting there were five years between arraignment and dismissal).

167. *Id.*

168. *Id.*

169. *See* N.M. COURTS CASE LOOKUP, <https://caselookup.nmcourts.gov/caselookup/> (search using "case number search" and entering number "D-202-CR-200902879") (last visited Oct. 27, 2017).

170. *Id.*

171. N.M. CORRECTIONS DEPARTMENT, http://search.cd.nm.gov/history_detail (search using the last name "Stock," first name "Paul," offender number "480072," and NMCD number "71862") (last visited Oct. 15, 2017) (showing that Stock is currently an inmate at the Lea County Correctional Facility).

inconsistencies between the rule and the statute, and from internal inconsistencies in the current rule.

First, there are multiple, inconsistent statements of the burden of proof required to trigger a determination of competence to stand trial. The statute requires an evaluation simply when a motion is made.¹⁷² The rule adds a requirement to show “good cause” when the issue is raised by filing a motion¹⁷³ and a requirement to establish “reasonable doubt” if the issue is raised before trial.¹⁷⁴

Second, it is unclear what, if any, evidence is required to trigger an evaluation. The statute does not mention any level of evidence necessary to order an evaluation.¹⁷⁵ The rule states that there must be “evidence” upon which to base a reasonable doubt,¹⁷⁶ but there is no clarification about the requirement. The Court of Appeals, interpreting the rule in *State v. Flores*,¹⁷⁷ indicated that there must be evidence such as affidavits or testimony regarding a defendant’s possible incompetence before a trial court is required to make an evaluation of competence to stand trial.¹⁷⁸

Third, there is a discrepancy regarding when the proceedings are stayed. The statute requires suspension of the proceedings whenever there is a question of competence until competency has been determined.¹⁷⁹ In contrast, the rule requires a stay only after a defendant has been found incompetent.¹⁸⁰ Following the rule would allow criminal proceedings to continue while competency is determined, in clear violation of due process.

Finally, a practical issue that contributes greatly to delay when competency is raised is the paucity of evaluators. Particularly in rural areas, defendants who require a competency evaluation endure long periods of pretrial incarceration not only because of the confusing procedure, but because there simply are not enough evaluators in New Mexico. This issue needs to be addressed because even if the procedure is flawless, without evaluators to perform assessments, there will continue to be disproportionately long pretrial incarceration for defendants who raise competency.

B. Critique of the Proposed Revisions

Perhaps due in part to concern about disproportionately lengthy pretrial detention of defendants who raise competency, the New Mexico Supreme Court recognized the need to revise to the procedure for competency evaluations. The Ad Hoc Committee on Rules for Mental Health Proceedings was tasked with revising the existing rules after the Committee for Criminal Procedure was unable to compromise on a proposal. Proposed revisions to the rules were published and

172. N.M. STAT. ANN. § 31-9-2 (1967).

173. Rule 5-602(C) NMRA.

174. Rule 5-602(B)(2) NMRA.

175. N.M. STAT. ANN. § 31-9-1 (1993).

176. Rule 5-602(B)(2) NMRA.

177. *State v. Flores*, 2005-NMCA-135, 124 P.3d 1175.

178. *Id.* ¶¶ 30–31.

179. N.M. STAT. ANN. § 31-9-1.

180. Rule 5-602(B)(3)(a) NMRA.

opened for public comment in March 2016.¹⁸¹ The volume and depth of the comments received is indicative of not only the importance of this issue in our legal community, but also the complexity of creating a rule that addresses the intricate details and competing interests when competence to stand trial is raised.

This critique is focused on simplifying the initial process in order to reduce pretrial detention for defendants who raise competency. This is only one of the many competing interests that the Committee must consider when drafting these rules. At times, the critique is intended to explain a particular aspect of the rule that commentators found objectionable, and at others will offer alternatives that the committee and/or future commentators might consider based on this author's extensive research of the American Bar Association recommendations, case law, procedures used by other states, and review of all the public comments submitted to the committee.

The critique offered here is not intended to be a comprehensive analysis of the entire proposed revisions. For example, it will not address proposed rules 6-507.1,¹⁸² 8-507,¹⁸³ 8-507.1,¹⁸⁴ or the proposed forms. It will not identify typographical or obvious errors that have been pointed out in public comments. Furthermore, this critique will not address areas that others have expertise in and are better suited to make suggestions, particularly realistic time limits for accomplishing the requirements of the rule, which should come from attorneys, judges, and the evaluators who perform this work. This author highly encourages those with knowledge and interest to read the next version of the proposed rules and provide comments, which according to Rule 23-106.1(B), should be published in March of either 2018 or 2019.

1. How the proposed rule addresses the problems with the current procedure

- a. *The proposed rule needs to clarify that the burden of proof for triggering a determination of competency is a good faith basis.*

As noted in Part IV (A), there are currently inconsistent statements of the burden of proof required to trigger a determination of competence in the rule, and no burden of proof articulated in the statute.¹⁸⁵ The proposed rule seems to address this problem by lowering the burden of proof and requiring that any time there is a question about competency, a motion based on a good faith will trigger an evaluation. The proposed rule states: "When a question of competence is raised by a party, a motion for a competency evaluation shall be in writing and shall contain the following: (a) a statement that the motion is based on a good faith belief that the

181. *Proposed Revisions to the Rules of Criminal Procedure for the District Courts, Magistrate Courts, and Municipal Courts and the Criminal Forms*, N.M.CTS. [hereinafter *Proposed Rule*], https://supremecourt.nmcourts.gov/uploads/FileLinks/68d7e94c91244c3582e80b8272c30db1/2016_01.pdf (last visited Oct. 19, 2017).

182. *Id.* (Competency; transfer to district court).

183. *Id.* (Insanity [or incompetency]; transfer to district court).

184. *Id.* (Competency; transfer to district court).

185. *See supra* Part IV(A).

defendant may not be not competent to stand trial.”¹⁸⁶ This change aligns not only with the spirit of New Mexico’s statute,¹⁸⁷ but also with the United States Supreme Court’s recommendation that an evaluation be ordered when there is any question about competency.¹⁸⁸

However, when the proposed rule discusses resolving the motion in section F, it requires that the court find that the motion is “supported by probable cause to believe that the defendant is not competent to stand trial.”¹⁸⁹ The requirement of “probable cause” raises the burden of proof above “a good faith” basis. The proposed rule may be recreating the problem in the current rule of inconsistent statements of the burden of proof. Just as the current rule is confusing because there is not a clear and consistent burden of proof to trigger an evaluation, it is likely the proposed rule will also be confusing. The burden of proof must be clarified; the burden of proof required to trigger an evaluation of competency should be a good faith basis not only because it aligns with the statute, but it is also in accord with the ABA recommendations.¹⁹⁰

b. The proposed rule should clearly state that no evidence is required to trigger an evaluation.

Proposed rule 5-602.1 (D)(1) requires a written motion that contains the following:

- (a) a statement that the motion is based on a good faith belief that the defendant may not be not [sic] competent to stand trial;
- (b) a recital of the specific facts, observations, and conversations with the defendant that have formed the basis for the motion. If filed by defense counsel, the motion shall contain such information without invading the attorney-client privilege;
- (c) a statement that the motion is not filed for purposes of delay;
- (d) a statement of whether the motion is opposed as provided in Rule 5-120 NMRA; and
- (e) a request for a competency evaluation.¹⁹¹

Although a motion seems to be enough to trigger the trial court to order an evaluation, the probable cause requirement found at Section F¹⁹² makes it unclear whether or not probable cause can be found from the motion alone or if additional

186. *Proposed Rule 5-602.1(D)(1)*, *supra* note 181.

187. N.M. STAT. ANN. § 31-9-2 (1967) (requiring an evaluation when a motion is made with no required burden of proof).

188. *See, e.g., Drope v. Missouri*, 420 U.S. 162, 177 (1975) (stating it would have been “the better practice to order an immediate examination” when there was a question as to defendant’s competence).

189. *Proposed Rule 5-602.1(F)(1)*, *supra* note 181.

190. CRIMINAL JUSTICE MENTAL HEALTH STANDARDS 7-4.4(a), at 188 (AM. BAR ASS’N 1989). Other states’ statutes also require only a question of competence to trigger a determination. *See, e.g.,* COLO. REV. STAT. § 16-8.5-103(1) (2012) (“Whenever the question of a defendant’s competency to proceed is raised. . . .”); N.H. REV. STAT. ANN. § 135:17(1)(a) (2016) (“When . . . said court is notified . . . that there is a question as to the competency. . . .”).

191. *Proposed Rule 5-602.1(D)(1)(a)–(e)*, *supra* note 181.

192. *Id.* 5-602.1(F)(1) (requiring the trial court to file an order “finding whether the motion is supported by probable cause to believe that the defendant is not competent to stand trial”).

evidence is required. Furthermore, if the rule does not specify that evidence is not required, trial courts will likely look to the case law, particularly *State v. Flores*,¹⁹³ and conclude that evidence is required.¹⁹⁴

The proposed rule should specifically state that evidence is not required to find probable cause and that the probable cause requirement will be met by the requirements in the motion. Requiring evidence before an evaluation is not reasonable, as aptly noted by one court when it stated, “[i]t cannot reasonably be supposed that Congress intended to require the accused to produce, in order to get a mental examination, enough evidence to prove that he is incompetent . . . If the accused already had such evidence, there would be little need for the examination.”¹⁹⁵

c. The proposed rule needs further clarification about what proceedings are stayed when competency is raised.

The proposed rule attempts to clarify what proceedings are stayed by providing a compromise that will likely decrease the amount of pretrial incarceration defendants who raise competency have to endure, though it does need some adjustment to be practical.

Section E reads:

Effect of filing of motion; proceedings not stayed. The filing of a motion for a competency evaluation shall not stay the proceedings or toll any time limits in the case, provided that the court shall not take any action affecting the defendant’s substantial rights while the motion is pending or the question of the defendant’s competency remains unresolved. For the purposes of this paragraph, an action affecting the defendant’s substantial rights includes, for example, consideration of a plea of guilty or nolo contendere, holding an evidentiary hearing, or proceeding to trial, and does not include addressing discovery disputes or setting or reviewing the conditions of release.¹⁹⁶

It is misleading for the heading to read “proceedings not stayed”¹⁹⁷ because it implies that all proceedings continue while competency is being decided, which is not what the rest of the section explains.¹⁹⁸ For clarity, the heading should read “Proceedings affecting defendant’s substantive rights stayed.”

193. *State v. Flores*, 2005-NMCA-135, 124 P.3d 1175. *Flores* remains the touchstone case in New Mexico regarding competency to stand trial. *See supra* Part III(B)(3).

194. *Flores*, 2005-NMCA-135, ¶ 17 (“Thus, whether a ‘question as to the defendant’s competency to proceed’ exists is judged by whether there is evidence that raises a reasonable doubt as to the defendant’s competency to stand trial.”); *supra* Part III(B)(3).

195. *Mitchell v. United States*, 316 F.2d 354, 360 (D.C. Cir. 1963); *see also* ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS, Standard 7-4.2(a) cmt. (AM. BAR ASS’N 1989) (noting that the ABA strongly discourages evidentiary hearings, stating “[the court] need not be convinced that a defendant is incompetent to stand trial before ordering an evaluation, because that is the objective of an evaluation.”).

196. *Proposed Rule 5-602.1(E)*, *supra* note 181.

197. *Id.*

198. *See id.* (explaining that proceedings that affect a defendant’s substantive rights will be stayed).

The rule should clearly distinguish between proceedings that affect substantive rights and proceedings that are purely legal or procedural. Proceedings that affect substantive rights are actions that require the defendant's participation in order to resolve questions of fact; legal or procedural actions do not require the presence of the defendant.¹⁹⁹ Staying only the proceedings that affect a defendant's substantive rights will assure that the process will continue while the evaluation is conducted and the determination is being made, thereby reducing the overall amount of time a defendant who raises competency will remain detained before trial. Finally, the phrase "for example" should be changed to "including but not limited to" to clarify that courts have discretion to proceed with actions that may not be contemplated by the proposed rule.

Overall, the proposed rule provides clarifications that will eliminate the problems with the current procedure, though some adjustments are still needed to further simplify and clearly articulate the procedure. In addition to the changes that address current problems, there are other changes that would improve the rule; additional analysis is offered in the next section.

2. Additional suggestions to improve the proposed rule

- a. *The rule should not list possible improper purposes of raising competency.*

Section 5-602.1(A) reads:

Purpose; scope. This rule is intended to provide a timely, efficient, and accurate procedure for resolving whether a defendant is competent to stand trial. Competency to stand trial is distinct from other questions about mental health, such as the defendant's sanity at the time of the alleged offense and capacity to form specific intent. A party shall not use this rule for purposes unrelated to the defendant's competency to stand trial, such as to obtain information for mitigation of sentence, to obtain a favorable plea negotiation, or to delay the proceedings against the defendant.²⁰⁰

The last sentence of this section should be replaced with, "A party shall not use this rule for purposes unrelated to the defendant's competency to stand trial. Other uses of this rule will be considered improper and are subject to sanctions."

199. See FLA. R. CRIM. P.3.210(a)(2) (1992) ("The incompetence of the defendant shall not preclude such judicial action, hearings on motions of the parties, discovery proceedings, or other procedures that do not require the personal participation of the defendant."); see also COLO. REV. STAT. § 16-8.5-102(1) (2008) ("[A] determination that a defendant is incompetent to proceed shall not preclude the furtherance of the proceedings by the court to consider and decide matters, including a preliminary hearing and motions, that are susceptible of fair determination prior to trial and without the personal participation of the defendant."); MD. CODE ANN., CRIM. PROC. § 3-106(g) (West 2013) ("If the defendant is found incompetent to stand trial, defense counsel may make any legal objection to the prosecution that may be determined fairly before trial and without the personal participation of the defendant.").

200. *Proposed Rule 5-602.1(A)*, *supra* note 181.

Although there is a concern that competency is raised for improper purposes,²⁰¹ there are many alternative explanations that must be considered, particularly in New Mexico where raising competency often results in disproportionately extended pretrial incarceration. The following non-exhaustive list is offered to demonstrate that there are many plausible explanations other than manipulation or improper raising of the issue of competency that explain why so many more defendants are evaluated than are found not competent to stand trial.

For instance, since lawyers and courts are required to err on the side of caution when there is a question of competency,²⁰² competency should be raised when symptoms of mental illness, intellectual disability, brain injury, physical illness, or effects of drug use appear to inhibit a defendant's ability to understand and participate in the judicial process.²⁰³ However, these impairments may not amount to incompetence and only an examination performed by an expert can make the distinction between these conditions and incompetence. Furthermore, because evaluations do not occur immediately, a defendant might present quite differently when the evaluation finally occurs, if, for example, the effects of substance use have worn off or if medication has been given to treat mental illness. Additionally, as with intellectual disability, there is a stigma attached to being labeled incompetent; defendants may "fake good" to avoid being labeled.²⁰⁴ Also, felony defendants who are deemed not competent and dangerous can be detained in a locked facility for treatment, without the benefit of a trial.²⁰⁵ Ultimately, a defendant could be subjected to commitment and detained for long periods, again, without a determination of guilt or innocence.²⁰⁶ Thus, defendants have good reasons to avoid a finding of incompetence if they can, which may affect the number of evaluations that result in findings of incompetence.

201. See *supra* Part III(B)(3). As noted by the Court of Appeals in *State v. Flores*, 2005-NMCA-135, ¶ 30, 124 P.3d 1175, since approximately 75 percent of competency evaluations find defendants competent, "trial courts at times may be legitimately leery of requests for competency evaluations." Nationally, this rate has remained consistent. See *SLATE ET AL.*, *supra* note 11 (reporting that between 20 and 30 percent of defendants referred for evaluations are found to be incompetent to stand trial); see also *FREEMAN, CHAPEL & MALAN*, *supra* note 18 (citing several studies that support these rates).

202. See *Pate v. Robinson*, 383 U.S. 375, 378, 385–386 (1966) (determining that when the evidence presents a "bona fide doubt" as to the defendant's competency, a court's failure to order a competency evaluation and hearing violates the defendant's right to due process).

203. As noted in the Background section, *supra*, none of these conditions are conclusive of lack of competence to stand trial.

204. See generally, ROBERT B. EDGERTON, *THE CLOAK OF COMPETENCE, REVISED AND UPDATED EDITION* (Berkeley: Univ. of Cal. Press, rev. ed. 1993); James R. Patton & Denis W. Keyes, *Death Penalty Issues Following Atkins*, 14(4) *EXCEPTIONALITY* 237, 252 (2006) ("[M]any individuals with mental retardation, when given the chance, want to 'pass' as normal and shed the label of mental retardation.").

205. N.M. STAT. ANN. § 31-9-1.2(B) (1993); see, e.g., *State v. Demongey*, 2008-NMCA-066, 187 P.3d 679 (demonstrating substantial time period where there were five years between arraignment and evidentiary hearing that ultimately resulted in defendant's commitment to Las Vegas Medical Center for a time equal to the maximum prison sentence he would have received if convicted); *State v. Rotherham*, 1996-NMSC-048, ¶¶ 2–12, 923 P.2d 1131, (describing several examples of defendants who received commitments without trial, including Christopher Rotherham who indicted in June 1989 and remained at the State hospital until he was criminally committed in April 1994).

206. See N.M. STAT. ANN. § 31-9-1.5(D) (1993); see, e.g., *State v. Linares*, 2017-NMSC-014, ¶ 42, 393 P.3d 691.

- b. *The definition of competency should be changed to conform to the definition recently articulated by the New Mexico Supreme Court.*²⁰⁷

The definition of competency in the proposed rule should conform to the definition recently affirmed by the New Mexico Supreme Court in *State v. Linares*.²⁰⁸ As noted by the Court in *Linares*, there has been confusion about the exact definition of competency, and the Court stated that the correct definition is the one articulated in *Rotherham*.²⁰⁹ The definition of competency should read: “Whether the defendant has sufficient present ability to consult with his or her lawyer with a reasonable degree of rational understanding, a rational as well as factual understanding of the proceedings against him or her, and the capacity to assist in his or her own defense and to comprehend the reasons for punishment.”²¹⁰

- c. *The rule should clarify the requirements of the motion requesting an evaluation.*

The requirements for a motion are:

When a question of competence is raised by a party, a motion for a competency evaluation shall be in writing and shall contain the following:

- (a) a statement that the motion is based on a good faith belief that the defendant may not be not competent to stand trial;
- (b) a recital of the specific facts, observations, and conversations with the defendant that have formed the basis for the motion. If filed by defense counsel, the motion shall contain such information without invading the attorney–client privilege;
- (c) a statement that the motion is not filed for purposes of delay;
- (d) a statement of whether the motion is opposed as provided in Rule 5-120 NMRA; and
- (e) a request for a competency evaluation.²¹¹

To start, the requirements listed in (b) should be reworded to state, “a recital of the *basic* underlying facts, observations, *or* conversations that form the basis for the motion.” Even though the current requirements are similar to the ABA recommendation and other states’ requirements,²¹² this level of specificity goes beyond providing a good faith basis for the motion, risks the party having to reveal

207. *Proposed Rule 5-602.1(B)(1)*, *supra* note 181 (defining competency as “whether the defendant understands the nature and significance of the criminal proceedings against him, has a factual understanding of the criminal charges, and is able to assist his attorney in his defense”).

208. *Linares*, 2017-NMSC-014.

209. *Id.* ¶ 34, n.8.

210. *See id.* ¶ 34 (quoting *Rotherham*, 1996-NMSC-048, ¶ 13).

211. *Proposed Rule 602.1(D)*, *supra* note 181.

212. *See, e.g.*, N.C. GEN. STAT. ANN. § 15A-1002 (West 2017); OKLA. STAT. ANN. tit. 22 § 1175.2(A) (West 2014) (“The application for determination of competency shall allege that the person is incompetent to undergo further proceedings, and shall state facts sufficient to raise a doubt as to the competency of the person.”); UTAH CODE ANN. § 77-15-3 (West 2008) (“The petition shall contain a recital of the facts, observations, and conversations with the defendant that have formed the basis for the petition.”); CRIMINAL JUSTICE MENTAL HEALTH STANDARDS, 7-4.2 (d) (AM. BAR ASS’N 1989) (“The motion should also set forth the specific facts that have formed the basis for the motion.”).

privileged information,²¹³ and potentially creates unnecessary tension in the attorney-client relationship.²¹⁴ Next, the second sentence of (b)²¹⁵ may be confusing and should be more explicit by stating, “If filed by defense counsel, the motion shall not contain information that would violate attorney-client privilege.”

Finally, though the requirement at D(1)(a) that the motion contain a statement that it “is based on a good faith belief that the defendant may not be competent to stand trial”²¹⁶ may be objectionable to some who might find it unnecessary or even insulting, it should not be changed. This requirement is supported by the ABA²¹⁷ and other states’ procedures that have a similar requirement.²¹⁸ It does not presuppose bad faith, but rather is necessary to validate the motion and to minimize the criticism that a higher burden of proof should be required.²¹⁹

d. The rule should clarify that a hearing will only be required before an evaluation is ordered if there is probable cause to believe that the motion was brought for an improper purpose.

The proposed rule provides instruction for resolving a motion for an evaluation of competency in Section F:

Resolution of motion; probable cause. A motion for a competency evaluation shall not be opposed, except on the grounds that the motion is advanced for an improper purpose such as harassment or delay. In considering a motion, the court shall comply with the following procedures.

213. See, e.g., FLA. R. CRIM. PRO. § 3.210(b)(1) (2010) (stating that when defense files the motion, “[t]o the extent that it does not invade the lawyer-client privilege, the motion shall contain a recital of the specific observations of and conversations with the defendant that have formed the basis for the motion.”); CRIMINAL JUSTICE MENTAL HEALTH STANDARDS 7-4.2(f) (AM. BAR ASS’N 1989) (“[T]he defense counsel should not divulge confidential communications or communications protected by the attorney-client privilege.”).

214. See, e.g., ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS, 7-4.2, cmt. (AM. BAR ASS’N 1989) (discussing the ethical conflicts that raising competency may create for an attorney).

215. *Proposed Rule 5-602.1 (D)(1)(b)*, *supra* note 181 (“If filed by defense counsel, the motion shall contain such information without invading the attorney-client privilege.”).

216. *Proposed Rule 5-602.1 (D)(1)(a)*, *supra* note 181.

217. See CRIMINAL JUSTICE MENTAL HEALTH STANDARDS, 7-4.2(d) (AM. BAR ASS’N 1989) (“A motion for evaluation should . . . contain a certificate of counsel indicating that the motion is based on a good faith doubt that the defendant is not competent to stand trial and that it is not filed for the purpose of delay.”).

218. COLO. REV. STAT. ANN. § 16-8.5-102 (b) (West 2008) (“A motion to determine competency shall be in writing and contain a certificate of counsel stating that the motion is based on a good faith doubt that the defendant is competent to proceed.”); UTAH CODE ANN. § 77-15-3 (2)(a) (West 2008) (“The petition shall contain a certificate that it is filed in good faith and on reasonable grounds to believe the defendant is incompetent to proceed.”); FLA. R. CRIM. PRO. § 3.210(b)(1) (2010) (“A certificate of counsel that the motion is made in good faith and on reasonable grounds to believe that the defendant is incompetent to proceed.”).

219. As noted in Part II (4)(C), *supra*, courts may be leery that competency is improperly raised, and sometimes for good reason. See, e.g., *State v. Serros*, 2016-NMSC-008, ¶ 62, 366 P.3d 1121 (noting that competency was raised to delay the case).

(1) Unopposed. Within forty-eight (48) hours of the filing of a motion that is unopposed under Subparagraph (D)(1)(d) of this rule, the court shall file an order substantially in the form approved by the Supreme Court finding whether the motion is supported by probable cause to believe that the defendant is not competent to stand trial. The determination shall be based solely upon the allegations in the motion and upon the court's own observations of the defendant.

(2) Opposed. A response in opposition to a motion for a competency evaluation shall be in writing, shall cite specific facts in opposition to the motion, and shall be filed within five (5) days of the filing of the motion or be deemed waived. Upon the filing of a response in opposition, the court shall do one of the following:

(a) unless the court determines that a hearing on the motion is necessary, file an order substantially in the form approved by the Supreme Court within forty-eight (48) hours finding whether there is probable cause to believe that the defendant is not competent to stand trial; or

(b) within five (5) days of the filing of a response under this Subparagraph, hold a hearing on the motion and file an order substantially in the form approved by the Supreme Court finding whether there is probable cause to believe that the defendant is not competent to stand trial.²²⁰

The proposed rule improves upon the current procedure by clearly indicating that a hearing before an evaluation of competency is not required. However, to be internally consistent and to align with the statute,²²¹ the rule should clarify that only reason a court can require a hearing is to determine whether the motion was brought for an improper purpose, and not “whether there is probable cause to believe that the defendant is not competent to stand trial.”²²² Since a motion for evaluation can only be opposed because it is allegedly brought for an improper purpose,²²³ the alleged improper purpose must be the focus of the hearing. The party opposing the motion must bear the burden to demonstrate an improper purpose, and probable cause to believe the defendant is not competent may be used only to rebut the allegation. Consequently, Section F (2)(b) should clarify that the focus of the hearing is not the motion, but the alleged improper purpose, and unless an improper purpose is proven, the court shall file an order substantially in the form approved by the Supreme Court finding there is probable cause to believe that the defendant is not competent to stand trial.

e. The rule should not include a statement about sanctions if a party lacked reasonable grounds.

Section F (3) states “**Sanctions.** If the court finds that either party lacked reasonable grounds to file or oppose the motion, the court may initiate contempt

220. *Proposed Rule 5-602.1(F)*, *supra* note 181.

221. N.M. STAT. ANN. § 31-9-2 (1967) (requiring an examination simply when a motion is filed and stating that such examination is required before a court can make a determination of competency).

222. *Proposed Rule 5-602.1(F)(2)(b)*, *supra* note 181.

223. *Id.* 5-602.1(F).

proceedings consistent with Rule 5-112 NMRA.” This statement should be eliminated. Foremost, an attorney is obligated to raise the issue if there is any question of a defendant’s competency, but since around seventy-five percent of the time evaluations find competency,²²⁴ clearly the circumstances that raise the question initially do not always persist. This requirement could have a chilling effect on attorneys’ raising competency for fear of being found unreasonable if their suspicions are not confirmed by the evaluation, which could foreseeably lead to violations of defendants’ due process rights. Also attorneys are already subject to discipline and sanctions if they file motions without merit,²²⁵ making it unnecessary for the rule to reiterate an attorney’s professional obligations.

f. The proposed rule should state that the report will not be provided to the prosecution when the evaluation finds the defendant is competent and the issue is not contested or is withdrawn.

Section H of the proposed rule²²⁶ should include a provision that if the evaluation finds the defendant competent and the finding is not contested, or the party who raised the issue withdraws it, the evaluator’s report shall not be provided to the prosecution. If the issue of competency is not in contention, and since the information can only be used to determine competency,²²⁷ it is not relevant to any proceedings.

Additionally, Equal Protection demands that people with disabilities are treated equally under the law.²²⁸ The people for whom competency to stand trial might be questioned are most likely people with disabilities.²²⁹ If a defendant’s competency is never questioned, the private health information used to make a competency determination would not ordinarily be revealed during a criminal proceeding. However, defendants whose disabilities make their competency questionable are subject to evaluation and therefore normally confidential information may be exposed. If not for a disability, a person’s competence would not be questioned, and his or her private health information would remain confidential. Since a defendant without a disability would not be compelled to share potentially prejudicial and private health information with the prosecution, to assure equal protection, a defendant with disabilities who has been found competent should not have to reveal this information, unless the issue is contested and the court requires a hearing on the issue.

g. The rule should allow trial courts to have discretion when time limits have not been met instead of having a bright line rule to dismiss

224. See, e.g., SLATE ET AL., *supra* note 11, at 317 (reporting that between 20 and 30 percent of defendants referred for evaluations are found to be incompetent to stand trial).

225. See Rules 16-100 to -805 NMRA.

226. *Proposed Rule 5-602.1(H)*, *supra* note 181.

227. See *id.* 5-602(E); *id.* 5-602.1(N).

228. See U. S. CONST. amend. XIV, § 1 (the “Equal Protection Clause”); N.M. CONST. art. II, § 18 (Due Process; Equal Protection; Sex Discrimination).

229. Disabilities that may manifest in a way that makes a defendant’s competency questionable include mental illness, intellectual limitations, traumatic brain injuries, and other health impairments that affect cognitive function.

cases when time limits are exceeded.

Section L of the proposed rule reads:

Effect of noncompliance with time limits. (1) The court may deny an untimely motion for extension of time or may grant it and impose other sanctions or remedial measures, as the court may deem appropriate in the circumstances. (2) In the event the question of the defendant's competence is not resolved within the time limits provided in this rule, including any court-ordered extensions, the case shall be dismissed without prejudice.²³⁰

Based on the comments that were submitted, the requirement that cases be dismissed without prejudice if the time limits are not met seems to be the most objectionable part of the proposed rule.²³¹ There are many reasons why a decision about competency might not be made according to the timelines, primarily the lack of evaluators to create the reports, but also defendants not complying with the evaluation, lawyers not attending to deadlines, defendants who are genuinely not competent and unable to participate in the evaluation to name but a few. There are also valid reasons that cases should not be summarily dismissed, including public safety, judicial efficiency, and the overall credibility and reliability of our criminal justice system. Given the various reasons the deadlines might not be met and the important interests at stake, there should not be a bright-line rule for dismissing cases. The rule should allow the trial court to have discretion to provide a remedy depending upon the individual circumstance of the case and the reasons for delay, with some ultimate cutoff to prevent extreme situations of extended pretrial incarceration.²³²

h. Issues the proposed rule does not address

The proposed rule does not address how long a competency finding lasts or when a new determination should be made. As evidenced in New Mexico's case law, courts often struggle with this issue when there is a gap between the completion of an evaluation or a restoration to competency and a trial.²³³ Ideally, the changes in the proposed rule, including stricter timelines, will decrease the gap between a finding

230. *Proposed Rule 5-602.1(L)*, *supra* note 181.

231. *See id.* at 23, 25, 41, 46, 56.

232. *See, e.g.*, *State v. Linares*, 2017-NMSC-014, 393 P.3d 691 (accounting a pretrial incarceration of over three years between indictment and eventual finding of incompetence to stand trial); *State v. Serros*, 2016-NMSC-008, 366 P.3d 1121 (recounting a situation of four years and three months of pretrial incarceration in protective custody with delay in part due to competency being raised); *State v. Stock*, 2006-NMCA-140, 147 P.3d 885 (indicating a pretrial incarceration for three years with delay in part due to competency being raised); *State v. Flores*, 2005-NMCA-135, 124 P.3d 1175 (describing over three years of incarceration that included treatment to competency at the state hospital).

233. *See, e.g.*, *State v. Castillo*, No. 31054, 2013 WL 5310262, ¶ 7 (N.M. Ct. App. August 28, 2013) (describing the trial court found defendant competent because she had been found competent on prior occasions, despite current testimony and evaluation indicating she was not currently competent); *State v. Montoya*, 2010-NMCA-067, 238 P.3d 369 (trial court judge did not consider present question of competency when defendant had been found competent to stand trial at the during the preliminary hearing stage); *Flores*, 2005-NMCA-135 (finding of competency ten months earlier was deemed adequate to determine present competency).

of competency and trial, and this will not be a continuing issue. However, for clarity, and to be consistent with case law, the proposed rule should state that the remedy for a concern about stale information is a new evaluation.²³⁴

Furthermore, the proposed rule does not provide guidance about what a trial court should do with an evaluation other than the one ordered by the court or if there are multiple evaluations. The proposed rule appears to only contemplate a court ordered evaluation, and like the current rule, it “neither permits nor prohibits additional evaluations.”²³⁵ One suggestion is that the rule could require that all evaluations be performed by the court’s expert. If all evaluations were performed by court appointed evaluators, non-indigent defendants would be required to pay, which could help provide funding to hire more evaluators.

CONCLUSION

The New Mexico Supreme Court seeks to provide improvements to the current procedures for determining competence to stand trial by revising the rules. Change is clearly necessary, particularly because defendants who raise competency too often languish in jail for disproportionately long periods of time before guilt or innocent has been determined. Though it is unlikely that any rule will fully accommodate all of the competing interests that are implicated when competence to stand trial is raised, the attempt must be made to provide practical compromises that will ensure that defendants’ due process rights are protected and the goals of the criminal justice system are met. Many dedicated and committed lawyers, advocates, and judges struggle with complex problems that arise when a defendant’s competency is raised, and hopefully they will take the opportunity to read and comment on the next revision to the proposed rule so that the Committee can adjust the rule to best address the myriad concerns—including reducing the extended pretrial detention of defendants who raise competency.

234. *Castillo*, No. 31054, 2013 WL 5310262, ¶ 12.

235. *Linares*, 2017-NMSC-014, ¶ 27.