NEW MEXICO SEXUAL ASSAULT BENCHBOOK

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New Mexico Judicial Education Center
Institute of Public Law, UNM School of Law
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New Mexico Sexual Assault Benchbook
Published March 2008

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This benchbook is intended for educational and informational purposes only. It is not intended to provide legal advice. Readers are responsible for consulting the statutes, ordinances, rules and cases pertinent to their issue or proceeding. Readers should keep in mind that laws and procedures are subject to change.

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NEW MEXICO
SEXUAL ASSAULT BENCHBOOK

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Appendices

Appendix A: ***Sexual Assault Evidence Kit (SAEK) Instructions***
Exam and treatment protocol and directions for evidence collection from sexual assault patients – Revised December 2006 (For most current version contact New Mexico Coalition of Sexual Assault Programs at 505-883-8020 in Albuquerque or 1-888-883-8020 toll free outside of Albuquerque.)

Appendix B: ***Sexual Assault History Form – New Mexico Sexual Assault Evidence Kit (SAEK)***
June 2005 (For most current version contact New Mexico Coalition of Sexual Assault Programs at 505-883-8020 in Albuquerque or 1-888-883-8020 toll free outside of Albuquerque.) NOTE: This is the form hospitals are encouraged to use. It accompanies the protocol in Appendix A. SANEs, with their specialized training, may use a more detailed form.

Appendix C: ***New Mexico Statewide Resource Numbers*** **from** ***2006 Responding to Sexual Assault, Domestic Violence, and Stalking: A Guide for Law Enforcement in New Mexico***
(For most current version contact New Mexico Coalition of Sexual Assault Programs at 505-883-8020 in Albuquerque or 1-888-883-8020 toll free outside of Albuquerque.)

Appendix D: ***Forensic DNA Analysis for Non-Scientists***
Prepared by the DNA analysts of the Albuquerque Police Department Crime Lab – 2007.

Appendix E: ***New Mexico SANE Programs***
December 2007 (For most current version contact New Mexico Coalition of Sexual Assault Programs at 505-883-8020 in Albuquerque or 1-888-883-8020 toll free outside of Albuquerque.)

Appendix F: ***General Information about New Mexico Sexual Assault Nurse Examiner (SANE) Programs***
December 2007 (For most current version contact New Mexico Coalition of Sexual Assault Programs at 505-883-8020 in Albuquerque or 1-888-883-8020 toll free outside of Albuquerque.)

Appendix G: ***Qualifications for Being a New Mexico SANE – Adult/ Adolescent***
Revised September 2007 (For most current version contact New Mexico Coalition of Sexual Assault Programs at 505-883-8020 in Albuquerque or 1-888-883-8020 toll free outside of Albuquerque.)

Appendix H: ***Core Components of a SANE Medical Record***
November 2005 (For most current version contact New Mexico Coalition of Sexual Assault Programs at 505-883-8020 in Albuquerque or 1-888-883-8020 toll free outside of Albuquerque.)

Appendix I: ***SANE Drug-Facilitated Sexual Assault Form***
June 2005 (For most current version contact New Mexico Coalition of Sexual Assault Programs at 505-883-8020 in Albuquerque or 1-888-883-8020 toll free outside of Albuquerque.)

Appendix J: ***Notice of Requirement to Register as Convicted Sex Offender Pursuant to NMSA 29-11A-7***
Sample form used in Second Judicial District. NOTE: This sample may not be applicable to all situations. For example, it provides for annual renewal of registration, however, under certain circumstances renewal is required every 90 days. The notice must be carefully tailored to meet the statutory requirements for the circumstances of each case.

PREFACE

Acknowledgements

The *New Mexico Sexual Assault Benchbook* was authored by the New Mexico Judicial Education Center, primarily on-call Senior Attorney Laura Bassein. This benchbook is modeled on, and partially draws from, a sexual assault benchbook published by the Michigan Judicial Institute, which graciously permitted this use. The Judicial Education Center gratefully acknowledges the wealth of information contained in the Michigan benchbook and the invaluable starting point it provided for this New Mexico version.

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Purpose

The *New Mexico Sexual Assault Benchbook* is intended to serve as a comprehensive resource guide for trial courts in handling sexual penetration and sexual contact crimes.

The benchbook is a current and convenient secondary source of law, policy and practice for these cases. Do not rely on the benchbook as legal authority. Instead, consult the New Mexico statutes, rules, forms and uniform jury instructions, as well as case law and court policies and procedures, for specific requirements.

Style and Format

The *New Mexico Sexual Assault Benchbook* is written in a descriptive style. Abbreviations are kept to a minimum and should be readily recognizable when encountered. Likewise, citations to statutes, rules and cases use the most concise style possible while still providing adequate reference information. In general, citations in the text use the following style:

- Laws: New Mexico statutes are cited as §__-__-__, such as §66-8-113, without "NMSA 1978." Federal laws are cited as __ U.S.C. §___, such as 25 U.S.C. §1901.

- Rules: New Mexico judicial rules are cited as Rule __-___, such as Rule 9-501, without the addition of "SCRA."

- Cases: New Mexico cases are cited using the vendor-neutral citation form adopted in 1998, such as 1998-NMCA-039, where available, or the New Mexico Reports or Pacific Reporter citation, such as 116 N.M. 456 (1993) or 863 P.2d 1077 (1993).

Effective Date

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CHAPTER 1

UNDERSTANDING SEXUAL VIOLENCE

This chapter covers:

- Defining "rape" and "sexual assault."
- Understanding the dynamics of the perpetrator.
- Understanding the dynamics of the victim.
- Cross-cultural communication.
- Statewide and community-based efforts on sexual assault.
- Sex offender treatment.

1.1 Introduction

This chapter summarizes some of the research findings on the dynamics of sexual assault, sexual assault perpetrators, and sexual assault victims. It also includes a brief discussion on cross-cultural considerations that may arise in sexual assault cases. This chapter also describes various community resources available to victims of sexual assault, both on a statewide and local level. Finally, it contains information on sex offender treatment.

1.2 Defining "Rape" and "Sexual Assault"

Rape and sexual assault are commonly used terms. However, they are terms that are far from being commonly understood. In practice, the terms are variously defined and elude a singular, universally-accepted definition. Sexual assault experts may use the terms interchangeably, but generally recognize that the two terms are on a continuum of criminal sexual behavior, including forcible sexual penetration against (and between) females, forcible sexual penetration against (and between) males, non-forcible sexual assault against minors (and the physically helpless and the mentally incapacitated), sexual penetration of the vagina and anus with an object or body part other than the penis, marital rape, statutory rape, incest, fellatio, and anal intercourse. See generally Tracy, Fromson & Else, *A Call to Change the UCR Definition of Rape*, 5 Sexual Assault Report 1 (September/October 2001), p. 2. For individuals who work in the field of sexual violence, sexual assault is viewed as an umbrella term that includes the specific types of sexual assault. The term 'sexual assault' is preferred in that it clearly labels the crime and is gender neutral. The term 'rape' is more commonly

used in public discourse and historical context as synonymous with sexual assault. Differences exist in the legal and lay perceptions of what these terms mean.

Regarding this continuum of criminal sexual behavior, sexual assault experts know that the terms rape and sexual assault encompass more than just sexual penetration, and include the unwanted sexual contact of another person's intimate parts. Consistent with this view, one sexual assault expert recommends that, at least from a clinical point of view, rape should be defined as any form of *forcible sexual assault*, regardless of whether the sexual act involved sexual penetration:

> "[I]t makes more sense to regard rape as *any* form of forcible sexual assault, whether the assailant intends to effect intercourse or some other type of sexual act. There is sufficient similarity in the factors underlying all types of forcible sexual assault—and in the impact such behavior has on the victim—so that they may be discussed meaningfully under the single term of *rape*. The defining element in rape is lack of consent . . . ." Groth, *Men Who Rape: The Psychology of the Offender* (Plenum Press: NY, 1979), p. 3.

1.2.1 Rape and Sexual Assault Under New Mexico Statutes

Chapter 30 of the New Mexico statutes deals with criminal offenses and contains Article 9 titled "Sexual Offenses." Article 9 includes the crimes of criminal sexual penetration and criminal sexual contact. The acts commonly called rape or sexual assault are encompassed within the crimes of criminal sexual penetration and criminal sexual contact.

> "Criminal sexual penetration is the unlawful and intentional causing of a person to engage in sexual intercourse, cunnilingus, fellatio or anal intercourse or the causing of penetration, to any extent and with any object, of the genital or anal openings of another, whether or not there is any emission." §30-9-11(A).

> "Criminal sexual contact is the unlawful and intentional touching of or application of force, without consent, to the unclothed intimate parts of another who has reached his eighteenth birthday, or intentionally causing another who has reached his eighteenth birthday to touch one's intimate parts." §30-9-12(A).

> "Criminal sexual contact of a minor is the unlawful and intentional touching of or applying force to the intimate parts of a minor or the unlawful and intentional causing of a minor to touch one's intimate parts." §30-9-13(A).

The scope of these statutory provisions encompasses, and thus criminalizes, a broad range of sexual misconduct. For instance, it encompasses criminal sexual conduct against both male and female victims, making it gender neutral. It encompasses criminal sexual conduct against the mentally disabled and the physically helpless. It encompasses marital rape. It encompasses criminal sexual conduct against a child, regardless of the child's age (with

graduated punishment levels based on age categories). It also encompasses and distinguishes criminal sexual conduct by the use of force or coercion, as well as a number of other circumstances.

The New Mexico Legislature has also enacted legislation about other sexually based crimes, such as indecent exposure, prostitution, harassment, etc. These crimes, however, do not include what is normally understood to be rape or sexual assault.

Criminal sexual penetration and criminal sexual contact comprise the primary crimes addressed in this benchbook. These crimes are addressed in greater detail in Chapter 2 and throughout the benchbook.

1.2.2 Is Rape a Crime of Sex or Violence?

A common question regarding rape is whether it is a crime of sex or violence. According to the National Judicial Education Program's *Understanding Sexual Violence: The Judicial Response to Stranger and Nonstranger Rape and Sexual Assault* (October 1994), Unit III, p. 5, such a question presumes a false dichotomy since it does not specify from whose point of view the question should be answered—the rapist's or the victim's. The authors of the above publication referenced one sexual assault expert's view of the answer, which is quoted more fully below:

> "Rape is a violent act, but it is also a sexual act, and it is this fact that differentiates it from other crimes. Further, it is illogical to argue, on the one hand, that rape is an extension of normative male sexual behavior and, on the other hand, that rape is not sexual…. [R]ape is not less sexual for being violent, nor is it necessarily true that the violent aspect of rape distinguishes it from legally 'acceptable' intercourse…. It is unfortunate that the rather swift public acceptance of the 'rape as violence' model, even among groups who otherwise discount feminist arguments, has unintended implications.... [E]mphasizing violence—the victim's experience—is … strategic to the continued avoidance of an association between 'normal' men and sexual violence. Make no mistake, for some men, rape is sex—in fact, for them, sex is rape. The continued rejection of this possibility, threatening though it may be, is counterproductive to understanding the social causes of sexual violence." Scully, *Understanding Sexual Violence: A Study of Convicted Rapists* (Unwin Hyman, 1990), pp. 142-143.

Other sexual assault experts believe that rape is a pseudosexual act that serves primarily nonsexual needs. One such expert explained this as follows:

> "[C]areful clinical study of offenders reveals that rape is in fact serving primarily nonsexual needs. It is the sexual expression of power and anger. Forcible sexual assault is motivated more by retaliatory and compensatory motives than by sexual ones. Rape is a pseudosexual act, complex and multidetermined, but addressing issues of hostility (anger) and control (power)

> more than passion (sexuality). To regard rape as an expression of sexual desire is not only an inaccurate notion but also an insidious assumption, for it results in the shifting of the responsibility for the offense in large part from the offender onto the victim: if the assailant is sexually aroused and is directing these impulses toward the victim, then it must be that she has deliberately or inadvertently stimulated or aroused this desire in him through her actions, style of dress, or some such feature. This erroneous but popular belief that rape is the result of sexual arousal and frustration creates the foundation for a whole superstructure of related misconceptions pertaining to the offender, the offense, and the victim." Groth, *Men Who Rape: The Psychology of the Offender* (Plenum Press: NY, 1979), p. 2.

Experts in sexual assault recognize that sexual violence is clearly not about intimacy, respect, or healthy sexuality. Rather, if viewed as a continuum with healthy sexuality on one end and sexual assault on the other end, sexual assault is more closely aligned with power, anger, control, cruelty and objectification of another individual.

1.2.3 Commonly Used Terms Describing Rape and Sexual Assault

Terms used in the field of sexual assault vary considerably depending on the perspective of the person using the term. For example, terms like offender, perpetrator or suspect, and victim, survivor or patient are used interchangeably by different professions in the field.

The following alphabetical list provides a non-exhaustive summary of common terms used to describe rape and sexual assault:

- **Child Sexual Abuse –** Sexual assault generally pertains to adult (or adolescent) victims, while sexual abuse generally pertains to child and some adolescent victims. A detailed discussion of child sexual abuse is outside the scope of this benchbook. For further information on this topic, see the *New Mexico Child Welfare Handbook*.

- **Drug-Facilitated Rape -** Drug-facilitated rape includes circumstances where the perpetrator administers alcohol or controlled substances to the victim to facilitate a sexual assault. For purposes of this definition, it does not matter whether the victim consented to the ingestion or delivery of the alcohol or controlled substance. However, for purposes of New Mexico's drug-facilitated criminal sexual penetration crime, the delivery of such substances must be without the victim's knowledge, and the drug-facilitator must be gamma hydroxybutyric acid or flunitrazepam. See, §30-31-22(B), and §2.3 for more information on this crime.

- **Intimate Partner Rape -** Intimate partner rape (sometimes called marital or spousal rape) is a type of non-stranger rape (see below), where the victim and perpetrator are not only known to one another but are also currently or formerly married, living together, or involved in a dating relationship.

Note that in New Mexico, under the Crimes Against Household Members Act the crime of 'assault against a household member with intent to commit a violent felony' consists of any person assaulting a household member with intent to commit, among other things, criminal sexual penetration in the first, second or third degree. §30-3-14(A). 'Household member' means "a spouse, former spouse or family member, including a relative, parent, present or former step-parent, present or former in-law, a co-parent of a child or a person with whom a person has had a continuing personal relationship. Cohabitation is not necessary to be deemed a household member for the purposes of the Crimes Against Household Members Act." §30-3-11. See also, the Family Violence Protection Act, which also defines household member at §40-13-2(D) (note that 'child' is included in the FVPA definition). Thus, a portion of cases included within 'assault against a household member with intent to commit a violent felony' might be considered intimate partner rape.

- **Non-stranger Rape -** Non-stranger or acquaintance rape is a type of rape in which the victim and perpetrator are acquainted with or known to each other in some way. Examples of non-strangers or acquaintances include people whom the victim may have recently met, friends, coworkers, co-students, neighbors, family doctors, therapists, spiritual leaders, business partners, mail carriers, store clerks, etc. Non-stranger rapes involve issues of violated trust, betrayal, difficulties in maintaining everyday activities and impact on the family or community.

- **Statutory Rape** – Statutory rape encompasses the notion that predatory behavior by older adults on adolescents is inappropriate and illegal.

- **Stranger Rape -** Stranger rape is a type of rape in which the victim and perpetrator are not known to each other or acquainted in any way. The public's fear of stranger rape is high and perception is that it is common. In fact, stranger rape is relatively uncommon. The National Women's Study (1992) and National Violence Against Women Survey (1998) indicate that sexual assaults by strangers are about 22% of sexual assaults. *Rape in America: A Report to the Nation,* National Victim Center and Crime Victims Research and Treatment Center (1992), p. 7; *Full Report of the Prevalence, Incidence, and Consequences of Violence Against Women*, Tjaden, Patricia and Thoennes, Nancy (National Institute of Justice and the Centers for Disease Control and Prevention 2000). Of note, individuals who are sexually assaulted by strangers are more apt to file a police report, seek health related services and to view the assault as a crime. Rennison, *Rape and Sexual Assault: Reporting to Police and Medical Attention, 1992-2000* (Bureau of Justice Statistics, 2002), p. 3.

1.2.4 Characteristics of Sexual Assault Crimes

The following subsections discuss common characteristics of rape and sexual assault and refer to numerous studies on those offenses. The reader is cautioned that the findings and statistics of these studies are dependent, in many circumstances, upon the characteristics and definitions of rape and sexual assault used in the studies. The variability in defining "rape"

and "sexual assault," as previously discussed, can cause a variability in the findings and statistics in these rape and sexual assault studies.

- **Non-stranger rape is far more common than stranger rape -** The overwhelming majority of sex offenders are known to their victims. Seventy five percent (75%) of rape and sexual assault victimizations involve offenders (both single- and multiple-offender situations) who have had a prior relationship with the victim as either a family member, intimate partner, or acquaintance. Greenfeld, *Sex Offenses and Offenders* (Bureau of Justice Statistics, 1997), p. 4. The number of stranger and acquaintance rapes and sexual assaults vary, however, according to whether a single or multiple offender was involved. In single-offender rapes and sexual assaults, strangers accounted for nearly 20% of the victimizations (or, in other words, over 80% of the single-offender rapes are committed by non-strangers). *Id.* In contrast, in multiple-offender rapes and sexual assaults, strangers accounted for 76% of the victimizations. *Id.*

- **Rape and sexual assault are underreported crimes -** According to the Bureau of Justice Statistics, only 32% of sexual assault/rape victims overall reported their crimes to law enforcement. Greenfeld, *supra* at 2. Another study states that between 64% and 96% of all rapes are never reported to criminal justice authorities. Lisak & Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 Violence and Victims 1 (2002). However, in a more recent study involving only female victims, 36% of rapes, 34% of attempted rapes, and 26% of sexual assaults were reported to the police. Rennison, *supra* at 1. The Rennison study also showed that, generally, the closer the relationship between the victim and offender, the greater the likelihood that the rape or sexual assault would not be reported to law enforcement. For instance, when the offender was a current (or former) husband or boyfriend of the female victim, 77% of rapes, 77% of attempted rapes, and 75% of sexual assaults were not reported. *Id.* at 3. When the offender was a friend or acquaintance, 61% of rapes, 71% of attempted rapes, and 82% of sexual assaults were not reported. *Id.* When the offender was a stranger, only 54% of rapes, 44% of attempted rapes, and 34% of sexual assaults were not reported. *Id.* Although there are many reasons why victims may not report a sexual assault or rape to law enforcement agencies, including fear of retribution, of not being believed, and of the criminal justice system in general, the most common reason given for non-reporting was that it was considered a personal matter. Greenfeld, *supra*. See also Rennison, *supra* ("When victims of rape, attempted rape, and sexual assault did not report the crime to the police, the most often cited reason was that the victimization was a personal matter.") The most common reason given for reporting the sexual assault or rape was to prevent further crimes by the offender against the victim themselves. Greenfeld, *supra*.

- **The overwhelming majority of sexual assaults are perpetrated against females -** An estimated 91% of victims of rape and sexual assault are women. *Id.* See also Rennison, *supra* at 1 (94% of rapes, 91% of attempted rapes, and 89% of completed and attempted sexual assaults involved female victims).

- **The overwhelming majority of sexual assault perpetrators are males** - In single-offender rapes and sexual assaults, the percentage of male offenders is nearly 99%. Greenfeld, *supra*.

- **Weapons are not used in a majority of sexual assaults; sex offenders tend to use just the amount of force necessary to get what they want -** Eighty four percent (84%) of rape and sexual assault victims reported that no weapon was used by the offender. Greenfeld, *supra* at 3. In fact, one FBI research effort concluded that "a threatening presence and verbal threats were used to maintain control over the victim" and "minimal or no force was used in the majority of instances." See Hazelwood, R. and Warren, J., *The Criminal Behavior of the Serial Rapist*, FBI Law Enforcement Bulletin, 1990.

- **Most rapes and sexual assaults occur in the victim's home or within one mile of the victim's home or at a friend's, relative's, or neighbor's home -** Nearly 6 of 10 rape and sexual assault victims reported that the incident occurred in their home or within one mile of the home in a friend's, relative's, or neighbor's home. *Id.* at 3. This is consistent with the statistics regarding the prevalence of non-stranger relationships between the victim and offender.

- **Drugs and alcohol are often involved -** Substantial evidence exists that rape victims have higher rates of drug and alcohol consumption and greater likelihood of having drug and alcohol related problems than non-victims of crime. *Rape in America: A Report to the Nation,* National Victim Center and Crime Victims Research and Treatment Center (1992), p. 7.

- **Rape is primarily a crime against youth -** The majority of rape occurs against children and adolescents, with more than half of the female rape victims being under 18 years old when they experienced their first rape. In the National Violence Against Women Survey, of the women disclosing rape, 22% were under age 12 when they experienced their first rape and 32% were ages 12 to 17. Although women are much more likely to be raped than men, of the men disclosing rape, 48% were under age 12 when they experienced their first rape and 23% were ages 12 to 17. *Full Report of the Prevalence, Incidence, and Consequences of Violence Against Women*, Tjaden, Patricia and Thoennes, Nancy (National Institute of Justice and the Centers for Disease Control and Prevention 2000).

- **Human response to threat often termed 'Fight or Flight' may more appropriately be updated as 'Freeze, Flight, Fight or Fright' -** Acute stress responses to trauma, such as sexual assault, include the following: freeze, flight, fight, fright, often in that order. It is common to think that a victim would fight back or run away; however, victims often also freeze or become immobile in response to sexual assault. High levels of anxiety and avoidance are associated with flight responses; increased anger and aggression represent the persistent mobilization of a fight response; and dissociative symptoms, emotional numbing, or depersonalization

reflect freeze responses. See Osterman, J.E., M.D. and Chemtob, C.M., Ph.D., *Emergency Psychiatry: Emergency Intervention for Acute Traumatic Stress*, Psychiatric Services, 50:739-740, June 1999. 'Freezing' corresponds to what clinicians typically refer to as hypervigilance (being on guard, watchful, or hyper-alert). This initial freeze response is the 'stop, look, and listen' response associated with fear. After the initial freeze response, the next response in sequence consists of an attempt to flee, and once that response is exhausted, an attempt to fight may be made—in that order. The next sequential step in fear-circuitry responses after fighting is tonic immobility, otherwise termed 'playing dead' or 'fright.' "The clinical relevance of tonic immobility as a survival response may be illustrated best in relation to the behavior of some victims of violence or sexual assault who exhibit extreme passivity during the assault. Here again, an understanding of the hard-wired nature of the response might help ameliorate one dimension of the painful memories that plague some victims who wonder why they did not put up more of a fight." Bracha, H.S., M.D., et al, *Does "Fight or Flight" Need Updating?,* Psychosomatics 45:448-449, October 2004.

- **Consent differs from acquiescence or submission -** "Consent is not mere acceptance of or submission to a proposal, but carries with it a certain seal of approval…. Consent changes the normative judgments pertaining to the acts in question, so that something might look like consent, but if it is flawed in some way – the person is hypnotized, drunk or threatened – then they have not consented even though they said 'yes.' … Consent then should be distinguished from mere *acquiescence* or *submission*, which many courts and commentators in rape cases have allowed to count as consent. One reason that this is misguided is that assent in such cases may well be in the face of threats of various kinds." McGregor, Joan, *Is it Rape? On Acquaintance Rape and Taking Women's Consent Seriously*, Burlington, VT: Ashgate Publishing (2005).

1.3 Understanding the Dynamics of the Perpetrator

This section explores some common characteristics of sex offenders, as well as factors that are often present in cases involving sexual assault.

No two sex offenders are exactly alike. In fact, one sexual assault expert said that "sex offenders comprise an extremely heterogeneous population that cannot be characterized by single motivational or etiological factors." Schwartz, *The Sex Offender: Corrections, Treatment and Legal Practice* (Civic Research Institute, Vol I, 1995), pp. 11-2. However, sex offenders often exhibit similar characteristics. As a result, some experts on sex offenders have formed typologies to create a hierarchy of seriousness, and to catalog perpetrator dangerousness and victim impact. One common typology, formed by Dr. A. Nicholas Groth, classifies the act of rape (as opposed to the type of rapist) into three categories, all of which may also be used to describe the motives, behavior, and conduct of the rapist: (1) anger rape; (2) power rape; and (3) sadistic rape. Another common typology, formed by the Federal Bureau of Investigation, classifies rapists into four categories: (1) power-reassurance rapist;

(2) assertive rapist; (3) angry-retaliatory rapist; and (4) anger-excitement rapist. *Id*. at 3-28 to 3-29. For a list and discussion of nine different typologies, see *Id*. at pp. 3-22 to 3-29.

Note: The reader is cautioned that typologies, although a quick and easy reference with condensed information, have drawbacks. For instance, they do not always take into account the personal characteristics of each individual rapist, and they are not usually subjected to validation studies. Moreover, such typologies can cause stereotyping and may often reflect the bias of the author's professional background. *Id.* at 3-21 to 3-22.

What follows are some common characteristics of sex offenders:

- **Sex offenders are overwhelmingly male -** The great majority of sex offenders are male. Nearly 99% of sex offenders in single victim incidents were male. Greenfeld, *Sex Offenses and Offenders* (Bureau of Justice Statistics, 1997), p. 2. However, the Federal Bureau of Investigation reported in 1997 that females constituted eight percent of all rape and sexual assault arrests for that year. *Myths and Facts About Sex Offenders* (Center for Sex Offender Management, August 2000), p. 4.

- **Sex offenders typically have access to consensual sex -** The majority of sex offenders have access to consensual sex during the time that they rape or sexually assault their victims. Groth, *Men Who Rape: The Psychology of the Offender* (Plenum Press: NY, 1979), p. 5.

- **Sex offenders are not typically mentally ill -** The majority of sex offenders are not mentally ill; in fact, as a group, sexual assault perpetrators are no more likely than other felons to be mentally ill. Scully, *Understanding Sexual Violence: A Study of Convicted Rapists* (Unwin Hyman, 1990), pp. 142-143; Groth, *supra*, p. 6.

- **Most sex offenders were not sexually or physically abused as children -** In one study of 114 convicted rapists, 91% denied experiencing childhood sexual abuse; 66% denied experiencing childhood physical abuse; and 50% admitted to having nonviolent childhoods. Scully, *supra*, pp. 68-69.

- **Offenders report selecting their victims -** Selected victims might be someone who cannot fight back, who has decreased credibility, and/or who is not likely to file a police report. Sex offenders, particularly serial offenders, become adept at identifying and exploiting vulnerability. See, e.g., Salter A.C., *Predators: Pedophiles, Rapists and Other Sex Offenders: Who They Are, How They Operate, and How We Can Protect Ourselves and Our Children* (New York: Basic Books, 2003).

- **Most sex offenders are recidivists and commit other forms of interpersonal violence -** A recent study of undetected rapists, i.e., those rapists who escaped notice by the criminal justice system, found that a majority of such rapists were recidivists and committed other acts of interpersonal violence, including battery, child sexual abuse, child physical abuse, and sexual assault short of rape or attempted rape. In

Lisak & Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 Violence and Victims 1 (2002), pp. 73-84, two sexual assault experts reported on 120 of 1,882 men whose self-reported sexual acts met legal definitions of rape or attempted rape but whose actions went undetected by the criminal justice system.

The research findings revealed that of the 120 undetected, self-reported rapists:
–76 or 63.3% were **recidivists**, and reported committing additional rapes, either against multiple victims or the same victim, averaging 5.8 rapes per person.
–70 or 58.3% admitted to other acts of **interpersonal violence**, including battery, sexual assault short of rape or attempted rape, child physical abuse, and child sexual abuse. (As these findings reflect, the undetected rapists did not necessarily limit their violence either to the sexual realm or adults.)
–97 or 80.8% admitted to committing rapes against women who were **intoxicated** because of alcohol or drugs.
–21 or 17.5% admitted to using **threats or overt force** in **attempted rapes**.
–11 or 9.2% admitted to using **threats or overt force** to coerce **sexual intercourse**.
–12 or 10% admitted to using **threats or overt force** to coerce **oral sex**.

Additional aspects of the study involved comparisons of the total number of acts of interpersonal violence committed by the non-rapists, single-act rapists, and repeat rapists. The study found that between single-act and repeat rapists, repeat rapists were responsible for a disproportionate share of the overall violence committed: "More than two-thirds (68.4%) of the repeat rapists admitted to other forms of interpersonal violence, compared to 40.9% of the single-act rapists . . . ." *Id*. at 78-79. The 1,754 non-rapists committed a mean of 1.41 acts of violence, while the 44 single-act rapists committed 3.98 acts, and the repeat rapists 13.75. *Id*. at 78. Thus, after the foregoing statistics involving rape and interpersonal violence were taken into account, the researchers concluded that a relatively small proportion of men, the repeat rapists, "committed an average of six rapes and/or attempted rapes and an average of 14 interpersonally violent acts." *Id*. at 80. "[The repeat rapists'] level of violence was nearly ten times that of non-rapists, and nearly three and a half times that of single-act rapists." *Id*.

The study also compared the rate of offense between rapists who reported using threats or overt force and those who reported coercing victims incapacitated by alcohol or drugs. Regarding threats or overt force, 23 of 76 (or 30%) repeat rapists used overt force, while 12 of 44 (or 27%) single-act rapists used overt force. Regarding intoxication, 53 of 76 (or 69.7%) repeat offenders used intoxication, while 32 of 44 (72.7%) single-act rapists used intoxication. *Id*.

Significantly, the study found that the data on these 120 undetected rapists underscore the similarities between incarcerated rapists and at least some of the rapists who escape notice of the criminal justice system. *Id*. at 81.

Note: This study was conducted, in part, to address the paucity of studies on undetected rapists. According to the researchers, undetected rapists comprise a large

percentage of sex offenders because most rapes (between 64% and 96%) go unreported, and even when the rapes *are* reported, only a small percentage, especially non-stranger rapes, ever result in successful prosecution.

For information on how to obtain a copy of the foregoing study, visit www.springerpub.com (last visited March 2008).

For information on sex offender treatment and recidivism, see §1.8.

1.4 Understanding the Dynamics of the Victim

1.4.1 General Psychological Effects of Crime Victimization

The psychological impact of criminal victimization varies widely. A victim's reaction to and recovery from criminal victimization depends upon the circumstances underlying the offense and the victim's personal characteristics, including his or her support system and psychological history. Resick, *Psychological effects of victimization: Implications for the criminal justice system*, 33 Crime & Delinquency 468, 473 (1987).

Initial reactions to crime victimization may include any of the following:

- Shock
- Disbelief
- Numbness
- Disorientation
- Anger
- Fear
- Terror
- Confusion
- Guilt
- Self-blame

See Albrecht, *The Rights and Needs of Victims of Crime: The Judges' Perspective*, 34 Judges J 29, 30 (1995).

Victims of violent offenses may experience effects that may persist for months or years. Norris, Kaniasty & Thompson, "The Psychological Consequences of Crime: Findings From a Longitudinal Population-Based Study," in Davis, Lurigio & Skogan, eds, *Victims of Crime* (Thousand Oaks, CA: Sage, 2d ed, 1997), p. 161. Long-term effects may include any of the following:

- Anxiety disorders
- Depression
- Drug and alcohol abuse
- Fear

- Flashbacks
- Lowered self-esteem
- Sexual dysfunction
- Physical complaints
- Suicidal ideation
- Suspiciousness
- Post-traumatic stress disorder
- A sense of social isolation

These effects were taken from Weibe, "The Mental Health Implications of Crime Victims' Rights," in Wexler & Winick, eds, *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence* (Durham, NC: Carolina Academic Press, 1996), p. 215.

1.4.2 Psychological Effects of Sexual Assault Crimes on Victims

Initially, sexual assault victims may have widely varying immediate self-protective reactions from having a drink to 'calm one's nerves' to going to an ex-boyfriend's house for 'protection.' Such self-protective reactions may appear contradictory to what law enforcement or prosecutors expect. For example, after a sexual assault a victim may shower or throw away the clothes he/she was wearing as attempts to gain control of his/her body. This should not be perceived as intentional destruction of evidence. As another example, the victim may take time to acknowledge that the assault happened to overcome her/his fears and self blame, or to obtain support from her/his network. These reactions should not necessarily be perceived as delayed reporting but rather the victim's attempt to collect resources to feel safe enough to call law enforcement. See, e.g., Fanflik P.L., *Victim Responses to Sexual Assault: Counterintuitive or Simply Adaptive?* Special Topics Series, American Prosecutors Research Institute (2007).

Sexual assault victims may suffer consequences far longer and far more extreme than victims of other violent crimes. Acute reactions to sexual assault may continue for several months. Although some studies have shown some stabilization in the initial reactions three months after a sexual assault, victims may continue to experience related reactions or responses for more than a year. Resick & Nishith, "Sexual Assault," in Davis, Lurigio, & Skogan, eds, *Victims of Crime* (Thousand Oaks, CA: Sage, 2d ed, 1997), p. 31. In fact, one study indicates that some sexual assault victims have reported sexual assault-related difficulties as much as 13 years after the assault. Riggs, Kilpatrick & Resnick, *Long-Term Psychological Distress Associated With Marital Rape and Aggravated Assault: A Comparison to Other Crime Victims*, 7 Journal of Family Violence 283-296 (1992). Additionally, sexual assault victims comprise the largest percentage of individuals with post-traumatic stress disorder (PTSD). Culbertson & Dehle, *Impact of Sexual Assault as a Function of Perpetrator Type*, 16 Journal of Interpersonal Violence 10 (Sage Publications, 2001), p. 992.

In addition to the reactions to overall crime victimization described in §1.4.1, sexual assault victims commonly experience the following long-term reactions or responses:

- Shame

- Feelings of vulnerability
- Helplessness
- Nightmares of the sexual assault
- Sleep disturbances
- Memory disturbances
- Mental concentration disturbances
- Low self-esteem
- Problems with social adjustment
- Problems with sexual functioning (and less satisfaction with current sexual activities)
- Self harm or cutting
- Denial or repression of memory

These reactions or responses were taken from various sources including Resick & Nishith, *supra*, and Culbertson & Dehle, *supra*. Sexual assault victims have also reported experiencing the following feelings: a loss of control, an overwhelming terror of death, an intense fear of revictimization, and an invasion of personal boundaries. *Id*. Importantly, a victim's perception of the threat to his or her life posed by the sexual assault has been shown to affect the severity and persistence of psychological trauma. Resick & Nishith, *supra* at 37.

1.4.3 Recognizing the Traumatic Effects of Court Proceedings

A sexual assault victim's participation in court proceedings can be very stressful. Moreover, testifying in court, especially about such personal and violating circumstances, can be very traumatic. This fear may arise from reactions to testimony and other evidence presented at trial, attacks on the victim's credibility, a perception that the judge and jury may not believe the victim's testimony, and the physical proximity of the alleged perpetrator. Resick, *Psychological effects of victimization: Implications for the criminal justice system*, 33 Crime & Delinquency 468, 475 (1987). Facing the alleged perpetrator is particularly unnerving. Looking at the defendant, or even preparing to do so, may remind the sexual assault victim of the circumstances underlying the alleged crime and thereby produce psychological trauma. Wiebe, "The Mental Health Implications of Crime Victims' Rights," in Wexler & Winick, eds, *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence* (Durham, NC: Carolina Academic Press, 1996), p. 216. This traumatic effect may be heightened for a sexual assault victim in a case where the defendant has chosen to represent himself or herself rather than being represented by counsel. In such a case, the encounter with the defendant may be direct: the defendant may choose to cross-examine the victim directly rather than through stand-by counsel. See §5.7 for a discussion of self-represented defendants.

Apart from testifying and recounting extraordinarily personal circumstances, a sexual assault victim's participation in court proceedings may involve missing work, paying for transportation, rearranging one's daily schedule, waiting for hearings in crowded hallways and courtrooms, and accommodating continuances and delays. In addition, there is the need for the victim to participate in pre-trial interviews with law enforcement, medical and perhaps mental health professionals, and attorneys for the prosecution and defense.

1.5 Cross Cultural Communication

New Mexico is home to a diverse population. Its educational, economic, and recreational opportunities continue to attract people of many racial, national, and ethnic backgrounds. This section offers suggestions for effective cross-cultural communication and is adapted from a document prepared by the Los Angeles County Commission on Human Relations (January, 2001).

As used in this section, "culture" means group customs, beliefs, social patterns, and characteristics. Nationalities and ethnicities have culture, as do businesses, occupations, generations, genders, and groups of people who have some common distinguishing characteristics or experiences. "Culture" is not always apparent from a person's appearance. For example, immigrants and third-generation U.S. citizens, city and small-town dwellers, lesbian and gay people, deaf and hearing persons may not be distinguishable on sight.
In national and ethnic groups, the components of "culture" include language, non-verbal communication, views on hierarchies (e.g., responsibilities, duties, and privileges of family or group members), interpersonal relationships, perception of time, privacy, touching, and speech patterns. Groups other than nationalities and ethnicities may also have distinctive verbal and nonverbal perceptions and expression, shared values, standards, beliefs, and understandings. For example, language and values usually differ depending on age, occupation, education or economic status.

The following tips are based on observations of successful cross-cultural communicators. None of the behaviors that follow requires a particular personality or talent. The underlying assumption is that both parties speak the same language.

Note: For a judge in a sexual assault case, the following information must, of course, be viewed in the context of the judge's role in such a case and with the Code of Judicial Conduct in mind.

Things to Do All of the Time

- Remember that diversity has many levels and complexities, including cultures, and overlapping cultures. For example, there is great cultural diversity among Spanish-speaking populations in Europe, the Caribbean, Central America, North America, and South America, despite the fact that they share Spanish as a native language. Furthermore, within New Mexico Spanish-speaking populations are diverse from each other.
- Respect people as individuals without making assumptions, and expect others to be thoughtful, intelligent people of goodwill, deserving of respect. Do not make judgments based on accent, wordiness or quietness, posture, mannerisms, grammar, or dress; rather, assume that there are good reasons why people do things the way they do.
- Work to become conscious of your own biases.
- Be willing to admit what you do not know.

- Listen actively and carefully. Careful listening usually means undivided attention. Avoid such things as looking at your watch, looking around to see who else has arrived, and avoidable interruptions. Listen not only for factual information, but also for glimpses of the other person's sensibilities and reality. Closely watch reactions. Notice what the other person asks about. It usually indicates not only interest in the subject, but that the subject is not too personal or sensitive to discuss openly. Stop talking when the other person has something to say.
- Accept responsibility for any misunderstanding that may occur, rather than expecting the other person to bridge cultural differences. This is easy to do by saying something like: "I'm sorry that I didn't make it clear."
- Notice and remember what people call themselves, e.g., African-American or Black, Native American or Indian, Hispanic or Chicano, Iranian or Persian, Korean or Asian, and use the terms the individual uses.
- Remember that you are an insider to your culture and an outsider to other cultures. Be careful not to impose. Showing off your knowledge of someone else's culture, for example, might be considered intrusive or arrogant.
- Look for aspects of the other culture that are admirable. When you identify such a characteristic, you may want to somehow indicate your appreciation of it.

Things to Do Most of the Time

- Expect to enjoy meeting people with experiences different from yours. This tip is in the "much of the time" section and not in the "all of the time" section, because, although getting to know other cultures is stimulating and gratifying, it can take energy. There are times when each of us seeks out familiar things and people.
- Be a bit on the formal side at first in language and in behavior. After you get acquainted, you might choose to be more casual. Even then remember to use what have been called the "magic words." "Please," "thank you," and "excuse me," are universally appreciated. Use formal terms of address unless the other person indicates a preference for the informal.
- Be careful about how literally you take things, and how literally your statements might be taken. "Let's have lunch soon" or "make yourself at home" are two examples of easily misunderstood courtesy phrases.
- Expect silence as a part of conversation. Silence can mean that the person you are talking to is not interested, defers to you on the subject, or thinks that the subject is his or her own business. Silence may also mean that she or he is thinking over what you said before answering.
- If it appears to be appreciated, act as a cultural guide/coach. Explain what the local custom/practice is, e.g., "some people dress up for the holiday luncheon, but most wear ordinary work clothes."
- Look for guides/coaches to other cultures, someone who can help you put things in perspective.

Things to Do Some of the Time

- Ask questions. Most people appreciate the interest in their culture. Each person can speak for his experience and some will speak in broader terms. Be careful about asking "why," however. It frequently has a judgmental tone to it, implying that the thing you ask about is not acceptable.
- When you are asked questions, take care that your answers are not too short. Make your answers smoother and gentler than a plain "yes" or "no," or other short answers. Most cultures are less matter-of-fact than that.
- Watch cultural groups interacting among themselves; learn what their norms are. Do they urge their views on one another? Do they flatter one another? Do they defer to one another? Do they maintain eye contact? How do they behave toward elders, children or women?
- Open a subject for discussion without putting the other person on the spot. Try thinking aloud about your own experience and your culture. Thinking aloud is one way of interpreting your culture without talking down or assuming that the other person is ignorant. It also makes it safe for him and her to ask questions because you have been the first to reveal yourself.

Things Successful Communicators Never Do

- Never make assumptions based on a person's appearance, name, or group.
- Never expect people of a population group to all think or act alike.
- Never show amusement or shock at something that is strange to you.
- Never imply that the established way of doing something is the only or best way.

1.6 Statewide Agency that Addresses Sexual Assault

There is broad consensus that the most effective response to sexual violence, like domestic violence, is a coordinated community response, in which the court's efforts are part of a continuum of services offered by both the justice system and social services communities. Courts best function as part of a coordinated community response when they are aware of the specialized services provided by sexual violence agencies. This section details information at the state level. Section 1.7 provides information about resources at the community level.

The New Mexico Coalition of Sexual Assault Programs (NMCSAP or "the Coalition") is the statewide agency whose mission is to: Educate and advocate on behalf of all New Mexicans on the dynamics, incidence, statutes, effects and solutions regarding sexual violence in New Mexico, for the purpose of an eventual decline in sexual violence.

In 1978 the State of New Mexico legislature created the Sexual Crimes Prosecution and Treatment Act, §29-11-1, et. seq. "The purpose of the Sexual Crimes Prosecution and Treatment Act is to promote effective law enforcement and prosecution of sexual crimes and to provide medical and psychological assistance for victims of such crimes. Implementation of the Sexual Crimes Prosecution and Treatment Act will serve to assist existing community-based victim treatment programs, to provide interagency cooperation, training of law

enforcement, criminal justice and medical personnel and to effect proper handling and testing of evidence in sexual crime offenses." §29-11-2. This Act mandates that New Mexico state government develop a "statewide comprehensive plan to train law enforcement officers and criminal justice and medical personnel in the ability to deal with sexual crimes; to develop strategies for prevention of such crimes; to provide assistance in the assembly of evidence for the facilitation of prosecution of such crimes; and to provide medical and psychological treatment to victims of such crimes. This plan shall include, but not be limited to:

- education and training of law enforcement officers and criminal justice and medical personnel;
- collection, processing and analysis of evidence which facilitates prosecution of suspects of sexual crimes; and
- medical and psychological treatment of victims of such crimes. §29-11-5(A).

The Coalition, a private, non-profit section 501(c)(3) organization, was created and continues to exist to fulfill the requirements of this statute.

The Coalition does not provide direct services to victims, but it does serve as a centralized clearinghouse of information, training, reports, and outreach materials relating to sexual violence. Specific services provided by the Coalition include the following core activities.

1.6.1 Sexual Assault Evidence Collection Kits (SAEK) and Suspected Offender Kits

The Coalition develops/updates, assembles and distributes the evidence collection kits for both sexual assault victims and suspected offenders. Coalition staff coordinate and provide training to medical staff throughout New Mexico on the collection of evidence and the treatment of the victim of sexual violence. The protocol and instructions for the SAEK are included in Appendix A; the instructions for the suspected offender evidence kit are not included as at this time (early 2008) the instructions are undergoing substantial revision. Appendix B contains the Sexual Assault History Form that hospitals are encouraged to use for sexual assault exams. It accompanies the protocol in Appendix A. SANEs, with their specialized training, may use a more detailed form. For the most current version of these documents contact the Coalition at 505-883-8020 in Albuquerque or 1-888-883-8020 toll free outside of Albuquerque.

1.6.2 Sexual Assault Medical Billing Verification and Payment

The State of New Mexico pays 100% of the forensic medical exam per victim on bills resulting from a sexual assault exam, evidence collection or child sexual abuse exams. Up to $150 is paid on medical costs not associated with the evidence collection (injury repair, medications, etc.). The Coalition sends packets with billing instructions to medical providers throughout New Mexico on how to process these invoices. The bills and verification forms are then sent to the Coalition where they are verified for payable services. The verified bills are then paid by the Coalition through a special fund from the Division of Mental Health. See, §29-11-7.

1.6.3 Sexual and Domestic Violence Data Collection and Reports

The Coalition has a data expert who has collected incidence data from law enforcement agencies, sexual assault victim service providers, SANE Programs, domestic violence victim service providers, and courts since 2000. Annual reports are printed and distributed throughout the state. These reports provide characteristics, incidence, and trends regarding sexual and domestic violence in New Mexico. During 2007, the Coalition completed the state's first statewide victimization survey, with assistance from the Director of the National Sexual Violence Research Center, Dean Kirkpatrick, Ph.D. The 2006 Sexual Assault and Domestic Violence Reports featured the beginning analysis of this data. For examples of these annual reports, see, e.g., *Sex Crimes in New Mexico VI: An Analysis of 2006 Data from the New Mexico Interpersonal Violence Data Central Repository and the Survey of Violence Victimization in New Mexico, October 2007,* and *Incidence and Nature of Domestic Violence in New Mexico VII: An Analysis of 2006 Data from the New Mexico Interpersonal Violence Data Central Repository, July 2007,* both developed by Betty Caponera, PhD.

1.6.4 Law Enforcement Guide

The Coalition develops, prints, and distributes an annual compendium of current state and federal statutes, investigation protocols, statewide resources, and special sections on Full Faith and Credit, Stalking and Strangulation. See, e.g., *Responding to Sexual Assault, Domestic Violence, and Stalking: A Guide for Law Enforcement in New Mexico*, New Mexico Coalition of Sexual Assault Programs, Inc. (2006).

1.6.5 Trainings

The Coalition provides training on a variety of sexual assault/abuse topics designed to improve a community's response to victims and offenders of sexual abuse, including:

Sexual Assault Nurse Examiners (SANE):

- 53 hour SANE training for new nurses: A six-day standardized, statewide training presented by over 12 experts addressing the medical and forensic exam, the New Mexico Sexual Assault Evidence Kit, and the multi-disciplinary team coordinated response to sexual assault.
- SANE Precept Training: In an intensive one-day format and using experienced proctors, live 'models' and actual equipment, the precept training provides new nurses with hands-on, clinical skills and practice to meet precept requirements to become a qualified trained sexual assault nurse examiner.
- Pediatric Examination Training: In-depth advanced medical training is provided to teach SANE nurses and other medical providers the skills and knowledge in unique aspects of conducting an acute child sexual abuse examination.
- Advanced SANE Conference: Annual two-day conference, featuring national and local experts, is sponsored to provide advanced skills and knowledge to current New Mexico SANE nurses as well as nurse-practitioners and physicians involved in child sexual abuse.

Rural Law Enforcement Regional Trainings: A team of experienced investigators and prosecutors annually travel to ten rural areas of the state, including Native and Mexican border communities, offering workshops on sexual violence, domestic violence and stalking. The New Mexico Department of Public Safety (DPS) provides one of its seven mobile crime scene units at each of the sexual violence trainings, allowing investigators to learn how DPS can assist all areas of the state (including federal lands) with an investigation. Additionally, the Coalition created a training DVD and Instructor Guide on investigating non-stranger, drug-facilitated sexual assault, using New Mexico law enforcement personnel and professional actors.

Accessibility Project: A team of experts manage a special project for assessing and educating New Mexico on providing services to people with disabilities who have experienced sexual and domestic violence. The project has assessed rape crisis centers and domestic violence shelters for accessibility, as well as trained disability advocates, violence against women advocates, and criminal justice professionals regarding the circumstances and needs of persons with physical and developmental disabilities. The Coalition has provided regional trainings, statewide conferences, handbooks, and training videos to assist investigators and forensic examiners with the unique qualities of cases involving clients who have a disability.

1.6.6 School Prevention Projects

Rural New Mexico School Sexual Abuse Prevention Project: The Coalition offers a multi-tiered series of trainings which include the following audiences: community response professionals, teachers, parents, and students. The multi-tiered response is designed to create a sense of "shared responsibility" in rural communities. Teachers' manuals, videos and student brochures are distributed to schools statewide through this project.

1.6.7 Statewide Grants

With special grants and funds from the State of New Mexico General Fund, the Coalition directs funds to support:

- Sexual Violence Prevention to rape crisis centers and community-based agencies throughout the state to provide sexual abuse and assault prevention activities;
- Rape Crisis Centers;
- Sexual Assault Nurse Examiner (SANE) Programs; and
- Scholarships for law enforcement, counselors/mental health providers, SANE nurses and Rape Crisis Directors to attend national conferences.

1.6.8 NM Clearinghouse on Sexual Abuse and Assault Services

The Clearinghouse provides electronic and hard copy data to professionals in the prevention, investigation, treatment, prosecution and judicial administration of child sexual abuse and

adult sexual assault. The Coalition has a library of publications, books, periodicals, videos, reference books, and community outreach materials relating to sexual violence.

1.6.9 Sexual Assault Awareness Month

Packets of awareness materials are sent to all sexual abuse program coordinators and other community advocates to promote public awareness on sexual abuse/assault for all communities in New Mexico. The Coalition develops, prints, and distributes posters and brochures for distribution statewide.

1.6.10 Sexual Abuse/Assault Information Materials

The Coalition develops, prints, and distributes materials to promote public awareness and professional response to specific issues relating to sexual abuse and assault. Many of the materials are available in both English and Spanish. These materials are developed for parents, survivors, children, teens, professionals and special populations, such as people with disabilities. These materials are available in limited quantities, free of charge, to anyone living in New Mexico. They may be ordered by calling the Coalition (toll free outside of the Albuquerque area at 1-888-883-8020, or 505-883-8020 in the Albuquerque area).

1.7 Community-Based Efforts that Address Sexual Assault

For New Mexico, community sexual assault service agencies provide direct services to victims of sexual assault. A list of these agencies is provided in Appendix C. These agencies typically base their approach on a philosophy of self-determination and individual empowerment, providing information and advocacy, but also encouraging sexual assault victims to make their own decisions and enhance their own support systems to help them survive the sexual assault. Empowerment philosophy posits that healing occurs when sexual assault victims realize that they can decide what is best for them, that they are not alone, and that they are not to blame for the sexual assault. It further assumes that healing can happen when sexual assault victims reach out and provide support to other sexual assault victims. Empowerment philosophy intends to counteract the helplessness and immobility that often accompanies a life crisis and to put the possibility and authority for change into the hands of the sexual assault victim. By encouraging a sexual assault victim to look inward and assess his or her own needs and the resources possessed to fulfill them, a sense of autonomy can be restored.

Sexual assault service agencies provide many forms of assistance to victims of sexual assaults. The types of services provided are not uniform statewide; however, some common services are as follows:

- 24-hour telephone crisis lines in both English and Spanish
- Individual and group counseling
- Transportation assistance
- Safety planning

- Information and education about sexual violence
- Referrals and information on resources for further assistance, including medical care, mental health counseling, temporary shelter, and/or emergency funding
- Assistance to victim's family members and friends
- Assistance and advocacy with social service agencies
- Assistance and advocacy with medical and other health care
- Assistance and advocacy with the legal system
- Assistance in completing paperwork for the Crime Victims Reparation Commission

1.7.1 Sexual Assault Response Teams (SARTs)

Sexual assault is of such complexity that no single community institution acting in isolation can provide an adequate response. Accordingly, some communities participate in coordinated efforts that strive to achieve a coherent response to sexual assault. One such community effort is known as a Sexual Assault Response Team or SART.

A SART is a multi-disciplinary, community approach to respond to sexual assault and abuse. Members of a SART usually include representatives of service agencies, including a Rape Crisis Advocate, a Sexual Assault Nurse Examiner (SANE), a law enforcement officer or sex crimes detective, a mental health coordinator, a prosecutor, and sometimes a member of the crime lab.

For some communities, the SART meets monthly to discuss operational logistics, identify training needs or other gaps in services, and other strategies to improve its collective response. For other communities, the SART model is often used to respond to actual sexual assault or abuse victims where team members (except prosecutors) are present during the intake and interview of the victim.

More information on SARTs can be obtained from the Office for Victims of Crime SANE-SART website at www.sane-sart.com or the Office for Victims of Crime website at www.ojp.usdoj.gov/ovc (both sites last visited March 2008).

1.7.2 Victim Advocacy

Victim advocates are generally classified as two types: (1) prosecution-based; and (2) community-based. Prosecution-based advocates work in and for prosecutor (or city attorney) offices. Community-based advocates work in and for private organizations such as sexual assault crisis centers, etc. For additional information regarding confidentiality and privilege with respect to victim communications, see §4.9.4 regarding work product doctrine in criminal cases and §6.8.2 regarding the Victim Counselor Confidentiality Act §31-25-1 et seq.

1.8 Sex Offender Treatment

1.8.1 Principal Types and Goals of Sex Offender Treatment

Most convicted sex offenders are managed by the criminal justice system through a combination of methods, including incarceration, parole, probation, and some form of specialized sex offender treatment. Sex offender treatment can be administered while the sex offender is incarcerated in jail or prison, or after he or she is released into the community (or both). About 60% of convicted sex offenders in the United States are under some form of conditional supervision in the community. Greenfeld, *Sex Offenses and Offenders* (Bureau of Justice Statistics, 1997), p. vi. All sex offender treatment programs, i.e., therapeutic interventions for sex offenders, share the same goals: deterring (or reducing) subsequent victimization and protecting society. Schwartz, *The Sex Offender: Corrections, Treatment and Legal Practice* (Civic Research Institute, Vol I, 1995) pp. 20-2.

The National Institute of Justice explained sex offending and the aim of sex offender treatment programs as follows:

> "A 'cure' for sex offending is no more available than is a cure for epilepsy or high blood pressure. But use of a variety of interventions can help manage these disorders. A realistic objective of treatment is to provide sex offenders with the tools to manage their inappropriate sexual arousal and behavior. A therapist can, in many cases, teach offenders self-management by developing skills for avoiding high-risk situations through identification of decisions and events that precede them and through correction of their thought distortions. Treatment focuses on recognizing and managing deviant sexual behavior and offenders' thoughts and attitudes that promote it.
>
> "Research reveals that deviant thoughts and fantasies by sex offenders are precursors to sexual assault and, therefore, are an integral part of the assault pattern.
>
> "By instilling in offenders the dictum that deviant attitudes and fantasies reinforce deviant behavior and are not acceptable, treatment providers and supervising officers are prepared to intervene—set limits—at the incipient stages of reoffending patterns. Although such thoughts and feelings are not crimes, they are signals that constitute good reasons—based on empirical research and clinical experience—to increase supervision and 'tighten the reins' on an offender. This increased surveillance often results in detecting pre-assault behaviors that can be interrupted or, conversely, lead to revocation." English, Pullen & Jones, *Managing Adult Sex Offenders in the Community—A Containment Approach* (US Department of Justice, National Institute of Justice, January 1997), p. 5.

The majority of sex offender treatment programs in the United States use a combination of cognitive-behavioral treatment and relapse prevention techniques. *Myths and Facts About Sex Offenders* (Center for Sex Offender Management, August 2000), pp. 5-6. Cognitive-behavioral treatment, which is typically used on people with addictive behaviors (e.g., alcoholics and drug users), is also used on sex offenders by focusing on their sexual issues. It uses a technique called relapse prevention to minimize recidivism. Relapse prevention has three main goals (see Schwartz, *supra*):

- To increase the sex offender's awareness and range of choices concerning his or her behavior.
- To develop specific coping skills and self-control capacities.
- To create a general sense of mastery or control over his or her life.

It is clear from these goals that the aim of relapse prevention is not to eliminate a sex offender's deviant desires:

> "If the [sex] offender believes that all treatment is successful only if it eradicates any vestige of deviant desires, the effects of a momentary loss of control may be devastating. In contrast, an offender who accepts that there are no 'cures' for sexual offenders and views lapses as opportunities to enhance self-management skills through inspection of acceptable mistakes, lapses may even give such an offender a more accurate perception of the need to be vigilant for the earliest signs of a relapse process." *The Sex Offender*, *supra* at 20-10.

The Center for Sex Offender Management identified the following monitoring tools in sex offender treatment programs that may assist in treatment and in reducing recidivism:

- Polygraph examinations.
- Use of the penile plethysmograph. (**Note:** A penile plethysmograph is "a physiological instrument that measures [a male] offender's erectile response to various stimuli." *Id*., *infra* at p. 18. Because most sex offender treatment programs focus on "impulse" control and management, and not on eradicating sexually deviant thoughts, penile plethysmographs are sometimes deemed to have limited utility.)
- Drug and alcohol testing.
- Electronic monitoring. Gilligan & Talbot, *Community Supervision of the Sex Offender: An Overview of Current and Promising Practices* (Center for Sex Offender Management, January 2000), pp. 17-19.

1.8.2 Sex Offender Recidivism

The United States Supreme Court recently wrote the following regarding sex offender treatment programs and sex offender recidivism:

> "Therapists and correctional officers widely agree that clinical rehabilitative programs can enable sex offenders to manage their impulses and in this way

> reduce recidivism. See U.S. Dept. of Justice, Nat. Institute of Corrections, A Practitioner's Guide to Treating the Incarcerated Male Sex Offender xiii (1988) ('The rate of recidivism of treated sex offenders is fairly consistently estimated to be around 15%,' whereas the rate of recidivism of untreated offenders has been estimated to be as high as 80%. 'Even if both of these figures are exaggerated, there would still be a significant difference between treated and untreated individuals')." *McKune v. Lile*, 536 U.S. 24, 33 (2002).

It should be noted that studies vary considerably in their findings of recidivism rates for sex offenders. This variability is caused in part by the variability in defining "recidivism." While "recidivism" is commonly understood to mean the "commission of a subsequent offense," some studies define it variously as a subsequent *arrest*, *conviction*, or *incarceration*. *Recidivism of Sex Offenders* (Center for Sex Offender Management, May 2001), p. 2. Other factors leading to variability are the length of the follow-up period and the sample of sex offender types. *Id*. at 7.

1.8.3 A Sex Offender's Denial and Fifth Amendment Compelled Self-Incrimination Concerns

Most sex offenders deny or greatly minimize their criminal sexual behavior. See Schwartz & Cellini, *The Sex Offender: New Insights, Treatment Innovations and Legal Developments* (Civic Research Institute, Vol II, 1997), p. 6-1 ("It is quite rare to find a sexual offender who is completely honest about his history of deviant behavior. Even after their legal battles have ended and they are presented with rewards for being honest (e.g., being placed on probation), many sexual offenders continue to deny having committed any offenses.") However, many, if not most, sex offender treatment programs require offenders to admit to committing prior sexual offenses before they are admitted into the program. This may raise legal issues regarding whether an offender's admission of committing previous crimes is tantamount to compelled self-incrimination in violation of the Fifth Amendment.

The United States Supreme Court, in a plurality opinion with a fifth justice, O'Connor, J., concurring in the judgment, recently held that a state prison sex offender treatment program that required sex offenders to admit responsibility for convicted offenses, including all other prior sexual activities, did not violate the respondent's Fifth Amendment right against compelled self-incrimination when it reduced his prison privileges and threatened to transfer him to a potentially more dangerous maximum-security facility. *McKune*, *supra*.

In *McKune*, the respondent was convicted and sentenced to prison in Kansas for rape, aggravated sodomy, and kidnapping. A few years before being released from prison, Kansas prison officials ordered him to participate in their Sexual Abuse Treatment Program (SATP). This program required respondent to admit responsibility, by signing a form, for all crimes for which he was sentenced, and to complete a sexual history form detailing all prior charged and uncharged criminal sexual activities. The respondent was informed that all such information was unprivileged and that Kansas would leave open the possibility of filing criminal charges in the future. Prison officials informed respondent that if he refused to participate, his privilege status would be reduced from Level III to Level I, which would

curtail his visitation rights, earnings, work opportunities, ability to send money to family members, canteen expenditures, access to television, and other privileges. Respondent would also be transferred to a maximum-security unit, a potentially more dangerous environment, where he would be moved from a two-person to a four-person cell and his movements would be more limited. Respondent refused to participate in the SATP, claiming that the required disclosures would violate his Fifth Amendment privilege against self-incrimination. Respondent sought an injunction to prevent prison officials from withdrawing his privileges and transferring him to a different housing unit. The district court granted summary judgment for respondent. The Court of Appeals affirmed.

The United States Supreme Court reversed the judgment of the Court of Appeals, finding no compelled self-incrimination under the Fifth Amendment. The Supreme Court held that, although the privilege against self-incrimination does not terminate at the jailhouse door, Kansas' SATP does not compel prisoners to incriminate themselves in violation of the Constitution. After reviewing several precedents, four justices of the Supreme Court found the test enunciated in *Sandin v. Conner*, 515 U.S. 472, 484 (1995), to be useful for compelled self-incrimination, even though *Sandin* was a due process case. The standard is as follows: that to meet the compulsion standard, the prison conditions must constitute "atypical and significant hardship[s] on [inmates] in relation to the ordinary incidents of prison life." The Supreme Court held that the consequences stemming from respondent's invocation of the privilege—the demotion from Level III to Level I status, which curtailed his privileges, and the potential transfer to a maximum-security facility—are not serious enough to constitute compulsion. Justice O'Connor concurred in the judgment because she felt that the alteration in respondent's prison conditions were "minor" and not so great as to constitute compulsion under the Fifth Amendment. However, Justice O'Connor wrote separately because she did not agree with using the "atypical and significant hardship" standard, which she felt should be broader in Fifth Amendment cases.

CHAPTER 2

SEXUAL ASSAULT CRIMES

This chapter covers:

- Sexual assault crimes, namely criminal sexual penetration and criminal sexual contact.
- Adult offenders (including youthful offenders potentially sentenced as adults) and adult victims.
- Elements of offenses.
- Intent required for offenses.
- Relevant jury instructions.
- Penalties.
- Sex offender registration.
- Definitions of key terms.
- Other related offenses.

2.1 Introduction

This chapter discusses sexual assault crimes, namely criminal sexual penetration and criminal sexual contact. The discussion is predominantly focused on adult offenders (including youthful offenders potentially sentenced as adults) and adult victims. For more information about juvenile delinquency cases (juvenile offenders, not to be sentenced as adults) and minor victims refer to the *New Mexico Child Welfare Handbook*, chapter 33 (Juvenile Delinquency) and chapter 34 (Criminal Abuse and Neglect Proceedings).

2.2 Sexual Assault Crimes

In New Mexico, sexual assault crimes are found in two categories:

- Sexual penetration crimes, and
- Sexual contact crimes.

Recent Legislation

Legislation with a *July 1, 2007 effective date* (SJC/SB 528 and 439, 2007 General Session) amended §30-9-11 (Criminal Sexual Penetration), § 31-18-15 (Sentencing Authority), and §§ 31-21-10 and 31-21-10.1 (Parole for Sex Offenders). Significant changes include:

- Added crime of "aggravated criminal sexual penetration." §30-9-11.
- Amended crimes of criminal sexual penetration in second and third degrees. §30-9-11.
- Added sentence for aggravated criminal sexual penetration. §31-18-15.
- Deleted specific list of convictions and sentences related to parole hearing eligibility, leaving only the words "an inmate of an institution who was sentenced to life imprisonment" without any other specifications. §31-21-10(A).
- Amended supervised parole provisions for sex offenders, including increase of maximum period of parole for some offenses to the natural life of the sex offender. §31-21-10.1.
- Changed the standard of proof at parole review hearings from "reasonable certainty" to "clear and convincing." §31-21-10.1.
- Added the requirement for electronic real-time monitoring, using global positioning system or successor technology, for all sex offenders for entire time of parole. §31-21-10.1.
- Added aggravated criminal sexual penetration to definition of sex offender. §31-21-10.1.

Notes:

1. **It will remain important to refer to both pre-July 1, 2007 statutes and the statutes effective July 1, 2007 for a considerable period of time, depending on such issues as when crimes are committed, cases are filed, sentences are imposed, etc.**
2. **For additional 2007 legislative changes to the Sex Offender Registration and Notification Act see Chapter 9.**
3. **For 2008 legislative changes regarding:**
   (a) sexual assault under the Family Violence Protection Act, see Chapter 4, §4.6.
   (b) sexual assault victim polygraphs, see Chapter 7, §7.4.2.

2.2.1 Criminal Sexual Penetration

A. The **elements** of criminal sexual penetration are:

- The unlawful and intentional
- Causing of

  - o a person to engage in sexual intercourse, cunnilingus, fellatio or anal intercourse, or
  - o penetration, to any extent and with any object, of the genital or anal openings of another
- Whether or not there is any emission. §30-9-11(A).

Criminal sexual penetration does not include medically indicated procedures. §30-9-11(B). UJI 14-985.

B. Criminal sexual penetration is classified as aggravated, first, second, third or fourth degree. §30-9-11(C), (D), (E), (F) and (G).

- **Aggravated** criminal sexual penetration consists of all criminal sexual penetration perpetrated on a child under nine years of age with an intent to kill or with a depraved mind regardless of human life.
- Aggravated criminal sexual penetration is a first degree felony. §30-9-11(C) (Effective Date: July 1, 2007).

- **First degree** criminal sexual penetration consists of all sexual penetration perpetrated:
  - o On a child under thirteen years of age; or
  - o By the use of force or coercion that results in great bodily harm or great mental anguish to the victim.
- First degree criminal sexual penetration is a first degree felony. §30-9-11(D).

- **Second degree** criminal sexual penetration consists of all sexual penetration perpetrated:
  - o By the use of force or coercion on a child thirteen to eighteen years of age (Note: This language has an effective date of July 1, 2007; language effective prior to July 1, 2007 read "on a child thirteen to eighteen years of age when the perpetrator is in a position of authority over the child and uses this authority to coerce the child to submit");
  - o On an inmate confined in a correctional facility or jail when the perpetrator is in a position of authority over the inmate;
  - o By the use of force or coercion that results in personal injury to the victim;
  - o By the use of force or coercion when the perpetrator is aided or abetted by one or more persons;
  - o In the commission of any other felony; or
  - o When the perpetrator is armed with a deadly weapon.
- Second degree criminal sexual penetration is a second degree felony. Additionally, if the victim is a child who is thirteen to eighteen years of age the offender is guilty of a second degree felony for a sexual offense against a child, which requires a minimum term of imprisonment of three years not to be suspended or deferred. §30-9-11(E).

- **Third degree** criminal sexual penetration consists of all sexual penetration perpetrated through the use of force or coercion not otherwise specified in §30-9-11.

(Note: The words "not otherwise specified in [§30-9-11]" were added with an effective date of July 1, 2007.)

- Third degree criminal sexual penetration is a third degree felony. §30-9-11(F). (Note: The language "whoever commits criminal sexual penetration in the third degree when the victim is a child who is thirteen to eighteen years of age is guilty of a third degree felony for a sexual offense against a child" was removed from this section with an effective date of July 1, 2007.)

- **Fourth degree** criminal sexual penetration consists of all criminal sexual penetration:
  - not identified as first, second or third degree criminal sexual penetration, which is perpetrated on a child thirteen to sixteen years of age when the perpetrator is at least eighteen years of age and is at least four years older than the child and not the spouse of that child; or
  - perpetrated on a child thirteen to eighteen years of age when the perpetrator, who is a licensed school employee, an unlicensed school employee, a school contract employee, a school health service provider or a school volunteer, and who is at least eighteen years of age and is at least four years older than the child and not the spouse of that child, learns while performing services in or for a school that the child is a student in a school.
- Fourth degree criminal sexual penetration is a fourth degree felony. §30-9-11(G).

C. Criminal sexual penetration crimes are general **intent** crimes. See, *State v. Pierce*, 110 N.M. 76, 792 P.2d 408 (1990); *State v. McGuire*, 110 N.M. 304, 795 P.2d 996 (1990); *State v. Keyonnie*, 91 N.M. 146, 571 P.2d 413 (1977). However, if the crime charged is assault with intent to commit a violent felony (e.g. criminal sexual penetration), then it is a specific intent crime. See, *State v. Schackow*, 2006-NMCA-123. Also, if the crime charged is attempted criminal sexual penetration, it is a specific intent crime. *Schackow*; see also, §30-28-1 and *State v. Dozier*, 88 N.M. 32, 536 P.2d 1088 (Ct. App. 1975) ("An attempt … requires an 'intent to commit a felony.' This is a specific intent crime.").

"The existence or nonexistence of general criminal intent is a question of fact for the jury." *State v. Kendall*, 90 N.M. 236, 561 P.2d 935 (Ct. App.), *reversal of conviction on other grounds held improper*, 90 N.M. 191, 561 P.2d 464 (1977). See, UJI 14-141 on 'General Criminal Intent' including use notes, committee commentary and annotations regarding both general and specific intent. See also, *State v. Stefani*, 2006-NMCA-073, ¶29 (citing *State v. Gee*, 2004-NMCA-042, in support of its holding: "The Use Note following UJI 14-141, the general intent instruction, states that the 'instruction *must* be used with every crime except for the relatively few crimes not requiring criminal intent or those crimes in which the intent is specified in the statute or instruction.' Furthermore, this Court in *Gee* held that it is not fundamental error to give a general intent instruction where the crime charged is a specific intent crime. Consistent with UJI 14-141, the Use Note following the instruction, as well as this Court's holding in *Gee*, we hold that there was no error in the use of the general criminal intent instruction.")

D. Relevant jury instructions for criminal sexual penetration include:

- Fourth degree: UJI 14-962
- Third degree: UJI 14-941 through 944
- Second degree:
  - Person in position of authority (age 13-18): UJI 14-945
  - Personal injury: UJI 14-946 through 949
  - Aided and abetted: UJI 14-950 through 953
  - Commission of a felony: UJI 14-954
  - Armed with a deadly weapon: UJI 14-955
  - Multiple second degree types: UJI 14-956
  - Person in position of authority (confined inmate): UJI 14-963
- First degree:
  - Child under 13: UJI 14-957
  - Great bodily harm or great mental anguish: UJI 14-958 through 961
- Aggravated: (No jury instructions as of March 2008)

E. Penalties

Generally, criminal sexual penetration is punishable in accordance with the sentencing authority of §31-18-13 and §31-18-15. It is important to note that §31-18-15 contains provisions specifically for greater imprisonment and fines for sexual offenses against a child and aggravated criminal sexual penetration. For minimum sentencing for certain sexual offenses against a child, see §30-9-11(E). For more information about sentencing and related issues, see chapter 8 of this benchbook.

F. Sex Offender Registration

Criminal sexual penetration crimes in the first, second, third and fourth degrees, aggravated criminal sexual penetration, and attempt to commit any of these crimes are defined sex offenses under the Sex Offender Registration and Notification Act, §29-11A-3(E). More information about sex offender registration can be found in chapter 9 of this benchbook.

2.2.2 Criminal Sexual Contact

A. The **elements** of criminal sexual contact are:

- The unlawful and intentional
- Touching of or application of force
- Without consent
- To the unclothed intimate parts
- Of another who has reached his eighteenth birthday, OR

- Intentionally
- Causing another who has reached his eighteenth birthday
- To touch
- One's intimate parts. §30-9-12(A).

Criminal sexual contact does not include touching by a psychotherapist on his patient that is:

- inadvertent;
- casual social contact not intended to be sexual in nature; or
- generally recognized by mental health professionals as being a legitimate element of psychotherapy. §30-9-12(B).

B. Criminal sexual contact is classified as fourth degree or misdemeanor. §30-9-12(C) and (D).

Fourth degree criminal sexual contact consists of all criminal sexual contact perpetrated:
- by the use of force or coercion that results in personal injury to the victim;
- by the use of force or coercion when the perpetrator is aided or abetted by one or more persons; or
- when the perpetrator is armed with a deadly weapon.

Fourth degree criminal sexual contact is a fourth degree felony.

Criminal sexual contact is a **misdemeanor** when perpetrated with the use of force or coercion.

C. §30-9-13 presents a separate crime of criminal sexual contact of a minor. More information about this crime can be found in the *New Mexico Child Welfare Handbook*, chapter 34.

D. Criminal sexual contact crimes are general **intent** crimes. See, *State v. Pierce*, 110 N.M. 76, 792 P.2d 408 (1990); *State v. Keyonnie*, 91 N.M. 146, 571 P.2d 413 (1977). For all criminal sexual contact crimes where the victim is asleep, unconscious, or physically or mentally helpless, "the defendant must have the same general intent as for all sex crimes and, in addition, must have knowledge of the helpless status of the victim." UJI 14-904 (Committee Commentary). However, if the crime charged is attempted criminal sexual contact, it is a specific intent crime as is true of other attempt crimes. See, §30-28-1; *State v. Dozier*, 88 N.M. 32, 536 P.2d 1088 (Ct. App. 1975) ("An attempt … requires an 'intent to commit a felony.' This is a specific intent crime.").

"The existence or nonexistence of general criminal intent is a question of fact for the jury." *State v. Kendall*, 90 N.M. 236, 561 P.2d 935 (Ct. App.), *reversal of conviction on other grounds held improper*, 90 N.M. 191, 561 P.2d 464 (1977). See, UJI 14-141 on 'General Criminal Intent' including use notes, committee commentary and annotations regarding both general and specific intent. See also, *State v. Stefani*, 2006-NMCA-073, ¶29 (citing *State v. Gee*, 2004-NMCA-042, in support of its holding: "The Use Note following UJI 14-141, the general intent instruction, states that the 'instruction *must* be used with every crime except for the relatively few crimes not requiring criminal intent or those crimes in which the intent is specified in the statute or instruction.' Furthermore, this Court in *Gee* held that it is not fundamental error to give a general intent instruction where the crime charged is a specific intent crime. Consistent with UJI 14-141, the Use Note following the instruction, as well as

this Court's holding in *Gee*, we hold that there was no error in the use of the general criminal intent instruction.")

E. Relevant jury instructions for criminal sexual contact of an adult include:

- Misdemeanor: UJI 14-902 through 905
- Fourth degree:
  - Personal injury: UJI 14-906 through 909
  - Aided and abetted: UJI 14-910 through 913
  - Armed with a deadly weapon: UJI 14-914
  - Multiple fourth degree types: UJI 14-915

F. Penalties

Generally, criminal sexual contact is punishable in accordance with the sentencing authority for non-capital felonies in §31-18-13 and §31-18-15 and for misdemeanors in §31-19-1. For more information about sentencing and related issues, see chapter 8 of this benchbook.

G. Sex Offender Registration

Criminal sexual contact in the fourth degree and attempted criminal sexual contact in the fourth degree are defined sex offenses under the Sex Offender Registration and Notification Act, §29-11A-3(E). More information about sex offender registration can be found in chapter 9 of this benchbook.

2.2.3 Definitions Applicable to Criminal Sexual Penetration and Criminal Sexual Contact Crimes

Many of the terms used in §30-9-11 (Criminal Sexual Penetration) and §30-9-12 (Criminal Sexual Contact) are defined by statute. Such terms include:

- Deadly weapon §30-1-12(B)
- Force or Coercion §30-9-10(A)
- Great bodily harm §30-1-12(A); UJI 14-131
- Great mental anguish §30-9-10(B); UJI 14-980
- Intimate parts §30-9-12(E)
- Patient §30-9-10(C)
- Personal injury §30-9-10(D)
- Position of authority §30-9-10(E)
- Psychotherapist §30-9-10(F)
- Psychotherapy §30-9-10(G)
- Primary genital area (parts defined) UJI 14-981; See also, §30-9-14.3.
- School §30-9-10(H)
- Sex acts UJI 14-982
- Spouse §30-9-10(I); UJI 14-983

- Unlawfulness UJI 14-132

Additionally, "youthful offender" means a delinquent child subject to adult or juvenile sanctions:

- who is fourteen to eighteen years of age at the time of the offense and who is adjudicated for at least one of a specified list of offenses including criminal sexual penetration, assault with intent to commit a violent felony (the underlying violent felony may be criminal sexual penetration in the first, second or third degree), or kidnapping (which may be based upon the intent to inflict a sexual offense on the victim). §31-18-15.2(B)(1).
- who is "fourteen to eighteen years of age at the time of the offense and adjudicated for any felony offense and who has had three prior, separate felony adjudications within a three-year time period immediately preceding the instant offense." §31-18-15.2(B)(2).

2.3 Other Related Offenses

Various offenses, while not precisely sexual assault offenses involving adult offenders and adult victims, are relevant to situations involving such offenses. Examples include the following offenses (listed in alphabetical order):

- **Aggravated indecent exposure**, a fourth degree felony, consists of a person knowingly and intentionally exposing his primary genital area to public view in a lewd and lascivious manner, with the intent to threaten or intimidate another person, while committing one or more of a number of listed criminal offenses, including among other things, criminal sexual penetration and assault with intent to commit a violent felony. §30-9-14.3. Aggravated indecent exposure and attempted aggravated indecent exposure are defined sex offenses under the Sex Offender Registration and Notification Act, §29-11A-3(E).

- **Assault with intent to commit a violent felony**, a third degree felony, consists of any person assaulting another with intent to commit various crimes including criminal sexual penetration in the first, second or third degree. §30-3-3. There was no double jeopardy bar to conviction or punishment for the offenses of assault with intent to commit rape and criminal sexual penetration, where the victim testified at trial that defendant bound her to a bed, struck her several times, and threatened her verbally for a period of time before commencing the sexual assault. The New Mexico Supreme Court stated: "We think that the assaultive episode was sufficiently distinct from the sexual assault to support separate convictions and punishments both for assault with intent to commit a felony and for criminal sexual penetration." *Swafford v. State*, 112 N.M. 3, 36, 810 P.2d 1223, 1236 (1991).

- **Assault against a household member with intent to commit a violent felony**, a third degree felony, consists of any person assaulting a household member with intent to commit various crimes including criminal sexual penetration in the first, second or third degree. §30-3-14. Household member "means a spouse, former spouse or

family member, including a relative, parent, present or former step-parent, present or former in-law, a co-parent of a child or a person with whom a person has had a continuing personal relationship. Cohabitation is not necessary to be deemed a household member for the purposes of the Crimes Against Household Members Act." §30-3-11.

Two statutes regarding criminal sexual penetration and assault with intent to commit criminal sexual penetration on a household member create separate punishable offenses. *State v. Jensen*, 2005-NMCA-113, ¶6. Where an assault was with an intent to commit criminal sexual penetration, followed then by criminal sexual penetration, the fear, and the acts of penetration with resulting personal injury, are reasonably separable conduct that the defendant was not placed in double jeopardy. *Jensen* at ¶9.

- **Attempt**: The initiatory crime of "[a]ttempt to commit a felony consists of an overt act in furtherance of and with intent to commit a felony and tending but failing to effect its commission." §30-28-1. "Attempt thus has two essential elements: An overt act in furtherance of but failing to consummate the goal crime, coupled with the intent to commit the goal crime. Cases interpreting these requirements have required the overt act to be more than mere preparation: The overt act must be in part execution of the intent to commit the goal crime. However, slight acts in furtherance of that intent will constitute an attempt. Attempt is a specific intent crime, and the existence of that intent must be corroborated by objective facts. Specific intent, however, can seldom be proven by direct evidence: Intent must be proved by the reasonable inferences shown by the evidence and the surrounding circumstances. If there are reasonable inferences and sufficient circumstances then the issue of intent becomes a question of fact for the jury." *State v. Green*, 116 N.M. 273, 280, 861 P.2d 954, 961 (1993) (*citations and quotations omitted*).

- **Kidnapping** is the unlawful taking, restraining, transporting or confining of a person, by force, intimidation or deception, with intent to, among other things, inflict a sexual offense on the victim. Kidnapping can be a first or second degree felony depending on the circumstances, however, if a sexual offense is inflicted upon the victim it can only be a first degree felony. §30-4-1.

  Case summaries relevant to the kidnapping-sexual assault interface follow:

  - Consecutive sentences for kidnapping and criminal sexual penetration did not violate the double jeopardy prohibition against multiple punishments for the same offense, where the evidence supported an inference that defendant intended to commit criminal sexual penetration from the moment of the abduction. *State v. McGuire*, 110 N.M. 304, 309, 795 P.2d 996, 1001 (1990).
  - In contrast, the New Mexico Court of Appeals held that "kidnapping cannot be charged out of every CSP III without some force, restraint, or deception occurring either before or after the sexual penetration." In this case the kidnapping charge was set aside as a violation of double jeopardy. *State v. Crain*, 1997-NMCA-101, ¶21. Note that *State v. Fielder*, 2005-NMCA-108, ¶33, distinguished the *Crain*

ruling in a case charging false imprisonment and third degree criminal sexual penetration and again found no double jeopardy issue. But see, *State v. Armendariz*, 2006-NMCA-152, ¶17 (holding that the legislature did not intend multiple punishments for false imprisonment and second degree criminal sexual penetration in that case).

- Because the crimes of kidnapping and attempted criminal sexual penetration contain elements not contained in the Order Prohibiting Domestic Violence (OPDV) obtained by victim against defendant, defendant's double jeopardy rights were not violated by his conviction for those crimes following his conviction for contempt for violating the OPDV. However, "[i]n addition to the language in the restraining order itself, double jeopardy consequences may spring from instructing a party that a contempt conviction must be supported by proof of the elements defined in a criminal statute. Thus, courts should exercise extreme care in identifying which of the provisions of the restraining order form the basis for the contempt charge, and what elements are required to show that those provisions were violated." *State v. Powers*, 1998-NMCA-133, ¶33 (*citation omitted*).
- "A person is entitled to withdraw his or her consent or express a lack of consent to an act of criminal sexual penetration at any point prior to the act itself, but force or coercion exerted prior to the act itself will support a conviction for kidnapping or false imprisonment." *State v. Pisio*, 119 N.M. 252, 261, 889 P.2d 860, 869 (Ct. App. 1994).
- Merger of kidnapping and assault with intent to commit criminal sexual penetration convictions was not required by double jeopardy considerations where there was evidence apart from the defendant's subsequent sexual assault from which the jury could infer that the defendant restrained the victim with the intent of holding her for services and where, under the facts, the assault with intent to commit criminal sexual penetration occurred after the victim had been restrained and held for services. *State v. Williams*, 105 N.M. 214, 218, 730 P.2d 1196, 1200 (Ct. App. 1986).
- Charges of kidnapping and second-degree criminal sexual penetration do not merge since the elements of the offense of second-degree criminal sexual penetration do not involve all of the elements of kidnapping. *State v. Singleton*, 102 N.M. 66, 71, 691 P.2d 67, 72 (Ct. App. 1984).

- The Code of **Military Justice** provides for the following crimes for persons covered by these statutes:

  - *Rape*: One who commits an act of sexual intercourse with a female not his wife, by force and without her consent, is guilty of rape and shall be punished by death or other punishment as a court-martial may direct. Penetration, however slight, is sufficient to complete this offense. §20-12-51(A) and (C).

  - *Carnal knowledge*: One who, under circumstances not amounting to rape, commits an act of sexual intercourse with a female not his wife who has not attained the age of sixteen years, is guilty of carnal knowledge and shall be

punished as a court-martial may direct. Penetration, however slight, is sufficient to complete this offense. §20-12-51(B) and (C).

- o *Sodomy*: One who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense. Punishment shall be as a court-martial may direct. §20-12-57(A) and (B).

- o *Murder*: One who, without justification or excuse, unlawfully kills a human being when he (among other listed crimes) is engaged in the perpetration or attempted perpetration of rape or sodomy is guilty of murder and shall be punished by death or life imprisonment as a court-martial may direct. §20-12-49.

- Under §30-28-3 the elements of **solicitation** are as follows: "Except as to bona fide acts of persons authorized by law to investigate and detect the commission of offenses by others, a person is guilty of criminal solicitation if:
  - o with the intent that another person engage in conduct constituting a felony,
  - o he solicits, commands, requests, induces, employs or otherwise attempts to promote or facilitate another person to engage in conduct constituting a felony within or without the state." §30-28-3(A). See also, UJI 14-2817.

  "A person is not liable for criminal solicitation when his solicitation constitutes conduct of a kind that is necessarily incidental to the commission of the offense solicited. When the solicitation constitutes a felony offense other than criminal solicitation, which is related to but separate from the offense solicited, the defendant is guilty of such related felony offense and not of criminal solicitation. Provided, a defendant may be prosecuted for and convicted of both the criminal solicitation as well as any other crime or crimes committed by the defendant or his accomplices or coconspirators, or the crime or crimes committed by the person solicited." §30-28-3(D). "To be guilty of solicitation the crime intended to be committed must be a felony. New Mexico law makes no provision for soliciting someone to commit a lesser offense than a felony. The same is true for the crimes of attempt and conspiracy. The underlying crime must be punishable as a felony." Committee Commentary to UJI 14-2817

- It is **unlawful** for a person **to distribute gamma hydroxybutyric acid or flunitrazepam** to another person without that person's knowledge and with intent to commit a crime against that person, including criminal sexual penetration. 'Without that person's knowledge' means the person is unaware that a substance with the ability to alter that person's ability to appraise conduct or to decline participation in or communicate unwillingness to participate in conduct is being distributed to that person. Any person who violates this subsection is:
  - o for the first offense, guilty of a third degree felony; and
  - o for the second and subsequent offenses, guilty of a second degree felony.

  §30-31-22(B).

CHAPTER 3

DEFENSES TO SEXUAL ASSAULT CRIMES

This chapter covers:

- Defenses to sexual assault crimes and other related offenses.
- Applicability of defenses and rules on instructing juries.
- Abandonment, renunciation, and withdrawal.
- Accident.
- Alibi/Entrapment.
- Consent.
- Double jeopardy.
- Duress.
- Impossibility/impotency.
- Insanity/diminished capacity.
- Intoxication.
- Mistake.
- Statute of limitations.

3.1 Introduction

This chapter discusses defenses and their applicability to sexual assault crimes and other related offenses. The defenses appear alphabetically by common names. The discussion includes applicability, elements, burden of proof, and other relevant issues. This chapter does not constitute a complete list or analysis of defenses to crimes, but rather includes selected information on some defenses particularly pertinent to sexual assault crimes.

3.2 Applicability of Defenses and Rules on Instructing Juries

The rules for instructing juries on potential defenses have been established by statute, court rule, and case law. In New Mexico, very clear directives exist about the use of Uniform Jury Instructions. The General Use Note for the Criminal Uniform Jury Instructions provides as follows:

> "Except for grand jury proceedings, when a uniform instruction is provided for the elements of a crime, a **defense** or a general explanatory instruction on evidence or trial procedure, the uniform instruction must be used without substantive modification or substitution. **In no event may** an elements instruction be altered or **an instruction given on a subject which a use note directs that no instruction be given**. For any other matter, if the court determines that a uniform instruction must be altered, the reasons for the alteration must be stated in the record. (*Emphasis added.*)
>
> "For a crime for which no uniform instruction on essential elements is provided, an appropriate instruction stating the essential elements must be drafted. However, all other applicable uniform instructions must also be given. For other subject matters not covered by a uniform instruction, the court may give an instruction which is brief, impartial, free from hypothesized facts and otherwise similar in style to these instructions."

General Use Note to New Mexico Uniform Jury Instructions – Criminal. While this General Use Note certainly applies to the elements of crimes, there are some aspects of instructing juries that are particularly pertinent to defenses. Thus, this discussion appears here in the chapter on defenses to sexual assault crimes.

"The court must instruct the jury upon all questions of law essential for a conviction of any crime submitted to the jury." Rule 5-608(A). "At the close of the defendant's case, or earlier if ordered by the court, the parties shall tender requested instructions in writing…." Rule 5-608(B).

> "Paragraph A of this rule, codifying prior court decisions, requires the district court to instruct the jury on the law essential for a conviction of the crimes submitted to the jury even if no requested instructions are presented by the parties. See *Territory v. Baca*, 11 N.M. 559, 71 P. 460 (1903). In *State v. Gunzelman*, 85 N.M. 295, 512 P.2d 55 (1973), the supreme court held that the failure of the district court to properly instruct on all of the essential elements of the crime charged was jurisdictional and could be raised for first time on appeal. See also *State v. Walsh*, 81 N.M. 65, 463 P.2d 41 (Ct. App. 1969). Although this rule only requires the court to include instructions essential for conviction "on his own motion", **the rule would not prevent the court from including other instructions supported by the evidence when no instruction is tendered**." (*Emphasis added.*)

Committee Commentary to Rule 5-608.

Where there is evidence presented supporting a defendant's theory of his defense which, if proved, would require acquittal, or a reduction in the degree of crime, it is error to refuse to instruct on such position. *State v. Ortega*, 77 N.M. 7, 26, 419 P.2d 219, 229 (1966). While an accused is entitled to instruction on his theory of the case if evidence exists to support it, the court need not instruct if there is absence of such evidence. *State v. Gardner*, 85 N.M. 104, 107, 509 P.2d 871, 874 (1973). The failure to instruct upon a specific defense cannot be complained of unless the defendant has tendered a proper instruction on the issue. *State v. Selgado*, 76 N.M. 187, 189, 413 P.2d 469, 470 (1966); *State v. Ramirez*, 79 N.M. 475, 476, 444 P.2d 986, 987 (1968).

"[A] statute which deprives one charged with a crime of a defense available according to law at the time the act was committed, is prohibited as ex post facto. Jury instructions which deprive an accused of a defense available at the time of his act are also prohibited as ex post facto." *State v. Norush*, 97 N.M. 660, 662, 642 P.2d 1119, 1121 (Ct. App. 1982) (citing *Marks v. United States*, 430 U.S. 188 (1977); *Splawn v. California*, 431 U.S. 595 (1977)).

Generally, the defendant does not bear the burden of proof with respect to such things as self-defense or accident. The defendant must only introduce evidence that will raise in the minds of the jurors a reasonable doubt about the issue. See, e.g., *State v. Stanley*, 2001-NMSC-037; *State v. Munoz*, 1998-NMSC-041; *State v. Parish*, 1994-NMSC-072; *State v. Acosta,* 123 N.M. 273, 939 P.2d 1081 (Ct. App 1997). But see *Patterson v. New York*, 432 U.S. 197 (1977) (cited by several New Mexico cases for the proposition that under the federal constitution, a state may properly place the burden on defendant to prove an exculpatory affirmative defense). Nonetheless, while "[e]ntrapment is an affirmative defense[, t]his defense does not, however, shift the burden of proof to the accused. When the defense is raised or asserted, the burden is upon the government to prove beyond a reasonable doubt that entrapment did not occur." *State v. Carrillo*, 80 N.M. 697, 698, 460 P.2d 62, 63 (Ct. App. 1969).

3.3 Abandonment, Renunciation and Withdrawal

While similar in concept, abandonment, renunciation and withdrawal are defenses that differ in their applicability to offenses and in their specific requirements.

3.3.1 Voluntary Abandonment (Attempt Crimes)

Although more clearly recognized in other jurisdictions, New Mexico courts have yet to fully address this defense.

In one early case however, a requested jury instruction on abandonment was properly refused by the court where defendant was charged with, among other things, aiding and abetting in an attempted rape, and the evidence was uncontradicted that codefendant ripped off victim's shirt and attempted to take off her pants before he stopped his aggression, that the defendant had been in the automobile prior to this action, and was in close proximity at the time, having

left the automobile at the request of codefendant, therefore implicating himself in and giving his tacit consent to codefendant's actions. *State v. LeMarr*, 83 N.M. 18, 487 P.2d 1088 (1971).

The instruction given by the court (which does not currently exist as a uniform jury instruction) read as follows: "When a person has once committed acts which constitute an attempt to commit a crime, he cannot avoid responsibility by not proceeding further with his intent to commit the crime, either by reason of voluntarily abandoning his purpose or because of a fact which prevented or interfered with his completing the crime." The instruction requested by the Defendant, but properly refused by the Court, read: "Where a person intends to commit a crime but before his acts and conduct become an attempt and no act has been committed toward the ultimate commission of the crime, he makes no effort to accomplish it but abandons his original intent, the crime of attempt has not been committed." *LeMarr* at 20, 1090.

3.3.2 Renunciation (Solicitation Crimes)

The renunciation defense applies to the statutory crime of solicitation. In New Mexico, renunciation of criminal solicitation is provided for specifically within the solicitation statute. Like attempt and conspiracy, solicitation is an initiatory crime that can be charged in conjunction with sexual assault offenses and other related offenses. The solicitation statute provides both for what constitutes and what does not constitute the defense:

- "In any prosecution for criminal solicitation, it is an affirmative defense that under circumstances manifesting a voluntary and complete renunciation of criminal intent, the defendant:
    - notified the person solicited; and
    - gave timely and adequate warning to law enforcement authorities or otherwise made a substantial effort to prevent the criminal conduct solicited.

  The burden of raising this issue is on the defendant, but does not shift the burden of proof of the state to prove all of the elements of the crime of solicitation beyond a reasonable doubt." §30-28-3(B).

- "It is not a defense that the person solicited could not be guilty of the offense solicited due to insanity, minority or other lack of criminal responsibility or incapacity. It is not a defense that the person solicited is unable to commit the crime solicited because of lack of capacity, status or other characteristic needed to commit the crime solicited, so long as the person soliciting or the person solicited believes that he or they have such capacity, status or characteristics." §30-28-3(C).

3.3.3 Withdrawal (Conspiracy Crimes)

"Conspiracy consists of knowingly combining with another for the purpose of committing a felony within or without this state." §30-28-2(A). "An overt act is not required, and the crime is complete when the felonious agreement is reached." *State v. Walters*, 2007-NMSC-050, ¶42 (*citations omitted*); see also *State v. Lopez*, 2007-NMSC-049, ¶21. *Walters* and

Lopez both involved various child abuse convictions, including first degree criminal sexual penetration of a child under 13.

Although the use note indicates that **no instruction is to be given**, UJI 14-2816 does describe withdrawal from conspiracy. This jury instruction indicates that a person may withdraw from a conspiracy, rendering that person not liable for any act by a co-conspirator after the withdrawal. To withdraw a person must:

- in good faith notify the others he knows are involved that he is no longer in the conspiracy and urge them to give it up; or
- make proper efforts to prevent the carrying out of the conspiracy and end his participation in such a way as to remove the effect of his assistance.

The state carries the burden to prove beyond a reasonable doubt that the person did not withdraw from the conspiracy. UJI 14-2816. The committee commentary to UJI 14-2816 states among other things that: "Withdrawal may constitute a defense to the charge of conspiracy in some jurisdictions, but the defense is not available in jurisdictions in which conspiracy is complete as soon as the agreement is reached, and without an overt act." The committee commentary also states: "No instruction on this subject is necessary because the theory of liability as a co-conspirator for the acts of others is not expressly submitted to the jury. UJI 14-2811, liability as a co-conspirator, is not to be given. The theory of liability is covered in the instructions on aiding or abetting (see commentary to UJI 14-2822) and the concept of withdrawal as a defense is covered in those instructions. If the defendant has effectively withdrawn, then he has not helped, encouraged or caused the commission of the offense, and he is not guilty." Committee Commentary to UJI 14-2816.

3.4 Accident

"Accident does not appear to be a recognized affirmative defense in New Mexico." *State v. Stanley*, 2001-NMSC-037, ¶30. According to *State v. Munoz*, 1998-NMSC-041, accident is not an affirmative defense for which defendant bears the burden of proof. Rather, asserting an accident theory may cast doubt upon the proof of the elements of the crime. *Munoz* at ¶15. Note that excusable homicide is defined in terms of 'accident or misfortune.' §30-2-5.

In some jurisdictions where the accident defense is more clearly recognized it would be more commonly used in assault and homicide cases. However, it might sometimes be used in sexual assault cases in which, for instance, the defendant alleges an unintentional or accidental sexual contact or penetration that occurred under what is normally thought to be lawful circumstances, such as performing a medical procedure, bathing someone, or changing a child's diaper.

3.5 Alibi/Entrapment

Rule 5-508, titled "Notice of alibi; entrapment defense" provides as follows:

- "**Notice.** In criminal cases not within magistrate court trial jurisdiction, upon the written demand of the district attorney, specifying as particularly as is known to the district attorney, the place, date and time of the commission of the crime charged, a defendant who intends to offer evidence of an alibi or entrapment as a defense shall, not less than ten (10) days before trial or such other time as the district court may direct, serve upon such district attorney a notice in writing of the defendant's intention to introduce evidence of an alibi or evidence of entrapment.
- "**Content of notice.** A notice of alibi or entrapment shall contain specific information as to the place at which the defendant claims to have been at the time of the alleged offense and, as particularly as known to defendant or the defendant's attorney, the names and addresses of the witnesses by whom the defendant proposes to establish an alibi or raise an issue of entrapment. Not less than five (5) days after receipt of defendant's witness list or at such other time as the district court may direct, the district attorney shall serve upon the defendant the names and addresses, as particularly as known to the district attorney, of the witnesses the state proposes to offer in rebuttal to discredit the defendant's alibi or claim of entrapment at the trial of the cause.
- "**Continuing duty to give notice.** Both the defendant and the district attorney shall be under a continuing duty to promptly disclose the names and addresses of additional witnesses which come to the attention of either party subsequent to filing their respective witness lists as provided in this rule.
- "**Failure to give notice.** If a defendant fails to serve a copy of such notice as herein required, the court may exclude evidence offered by such defendant for the purpose of proving an alibi, except the testimony of the defendant himself. If such notice is given by a defendant, the district court may exclude the testimony of any witness offered by the defendant for the purpose of proving an alibi or entrapment if the name and address of such witness was known to defendant or the defendant's attorney but was not stated in such notice. If the district attorney fails to file a list of witnesses and serve a copy on the defendant as provided in this rule, the court may exclude evidence offered by the state to contradict the defendant's alibi or entrapment evidence. If notice is given by the district attorney, the court may exclude the testimony of any witnesses offered by the district attorney for the purpose of contradicting the defense of alibi or entrapment if the name and address of the witness is known to the district attorney but was not stated in such notice. For good cause shown the court may waive the requirements of this rule.
- "**Admissibility as evidence.** The fact that a notice of alibi was given or anything contained in such notice shall not be admissible as evidence in the trial of the case."

Rule 5-508. See also Rule 10-219 for a similar rule applicable to delinquency proceedings.

3.5.1 Alibi

An alibi is not a technical or legal defense in New Mexico, but rather an attempt to cast doubt on the proof of the elements of the crime. *State v. McGuire,* 110 N.M. 304, 313, 795 P.2d 996, 1005 (1990)(involving among other convictions, a conviction for second degree criminal sexual penetration).

> "The New Mexico Supreme Court has held that the defendant's alibi is a question for the jury. *State v. Garcia,* 80 N.M. 21, 450 P.2d 621 (1969). The court has also held that it is improper to instruct the jury that the burden is on the defendant to prove his alibi. *State v. Smith,* 21 N.M. 173, 153 P. 256 (1915). There are no New Mexico decisions holding that the jury must be instructed on the question of alibi. Analytically, an alibi is not a technical or 'legal' defense but it is used to cast doubt on the proof of elements of the crime. See, e.g., *People v. Williamson,* 168 Cal. App. 2d 735, 336 P.2d 214 (1959). Consequently, the committee believed that **no instruction on alibi should be given** since it merely comments on the evidence."

Committee Commentary to UJI 14-5150 (*emphasis added*).

Uniform Jury Instruction 14-5150 provides: "Evidence has been presented concerning whether or not the defendant was present at the time and place of the commission of the offense charged. If, after a consideration of all the evidence, you have reasonable doubt that the defendant was present at the time the crime was committed, you must find him not guilty." However, the use note to this instruction states that "[n]o instruction on this subject shall be given." The Supreme Court has also confirmed that no alibi instruction should be given to the jury. See *McGuire* at 313, 1005.

Despite the fact that UJI 14-5150 makes it clear that New Mexico does not recognize alibi as a 'legal or technical defense,' many reported cases (and Rule 5-508) still speak about alibi in terms of a defense. Several such cases are summarized as follows:

- Generally, evidence of collateral offenses is inadmissible to prove guilt of a specific crime except where proof of collateral offenses tends to identify the person charged with commission of the crime on trial. Such evidence is also admissible to rebut the **defense of alibi**. *State v. Garcia*, 80 N.M. 21, 23, 450 P.2d 621, 623 (1969) (*emphasis added*).

- Where indictment charged defendant with sexual abuse of a child, defendant was not prejudiced or denied due process by state's failure to reduce charging period from 16 months to a more definite 4 months because defendant could not have raised a viable **alibi defense**. *State v. Ervin*, 2002-NMCA-012, ¶18 (*emphasis added*).

- Because the defendant offered the **defense of an alibi** in case involving convictions for kidnapping and four counts of criminal sexual penetration, he was not entitled to a lesser-included offense instruction on the ground that the jury might have rejected another part of the complainant's testimony. *State v. Wilson*, 117 N.M. 11, 15, 868 P.2d 656, 660 (Ct. App. 1993) (*emphasis added*).

- In applying the alibi rule so as to exclude evidence of alibi not disclosed to the district attorney and thus giving defendant a choice between foregoing the **defense** or taking the stand himself to present it, the trial court did not violate defendant's privilege

> against self-incrimination. *State v. Smith*, 88 N.M. 541, 544, 543 P.2d 834, 837 (Ct. App. 1975) (*emphasis added*).

3.5.2 Entrapment

For more information on entrapment as a defense to sexual offenses, see *'Entrapment defense in sex offense prosecutions'* 12 A.L.R.4th 413. *In re Alberto L.,* 2002-NMCA-107, provides a recent analysis of the law of entrapment, discussing both subjective and objective entrapment. This Court of Appeals case relies on earlier Supreme Court cases such as *State v. Vallejos*, 1997-NMSC-040, ¶5. However, no New Mexico case addresses entrapment specifically in the context of sexual assault or other criminal sexual offenses. UJI 14-5160 and 14-5161 both pertain to the entrapment defense, and one or the other or both of these instructions may be appropriate when the defense of entrapment is raised.

3.6 Consent

3.6.1 Statutory Language Regarding Consent

The term "consent" appears in some statutory language relating to sexual assault crimes, but not in other statutory language. Contrast the crimes of criminal sexual penetration and criminal sexual contact with respect to the consent issue.

- The criminal sexual contact statute includes the term "**without consent**" when describing the elements of the crime. §30-9-12(A).
- The criminal sexual penetration statute does **not** contain the term "without consent." §30-9-11(A).

Absence of consent was an element of the rape statute, which has now been repealed, but absence of consent is not an element of the crime of criminal sexual penetration as defined by the legislature. *State v. Jiminez*, 89 N.M. 652, 655, 556 P.2d 60, 63 (Ct. App. 1976); *State v. Gillette*, 102 N.M. 695, 700, 699 P.2d 626, 631 (Ct. App. 1985)

The term 'force or coercion' is a key defined term for some forms of sexual assault. Consent appears in one section of the 'force or coercion' definition applicable to certain criminal sexual penetration and criminal sexual contact offenses.

- 'Force or coercion' means among other things: "the perpetration of criminal sexual penetration or criminal sexual contact by a psychotherapist on his patient, **with or without the patient's consent**, during the course of psychotherapy or within a period of one year following the termination of psychotherapy." §30-9-10(A)(5).
- Also, as a part of the 'force or coercion' definition the statute provides that: "Physical or verbal resistance of the victim is not an element of force or coercion." §30-9-10(A).

3.6.2 Jury Instruction Related to Consent

"[E]ffective for cases filed after January 20, 2005, the Supreme Court has approved instructions for the defense of consent in [criminal sexual penetration] cases that are analogous to the defense of self-defense." *State v. Jensen*, 2005-NMCA-113. The referenced instruction is titled "Unlawfulness as an element," and provides as follows:

> "In addition to the other elements of ____________(*name of offense*) [as charged in Count _______], the state must prove beyond a reasonable doubt that the act was unlawful.
>
> For the act to have been unlawful it must have been done [**without consent** and] [with the intent to arouse or gratify sexual desire]
> [or]
> [to intrude upon the bodily integrity or personal safety of ________(*name of victim*)]
> [or]
> [__________________ (*other unlawful purpose*)].
>
> ____________________ (*name of offense*) does not include a [touching] [penetration] [confinement] [_________________ (*relevant act*)] for purposes of [reasonable medical treatment] [nonabusive (parental care) (or) (custodial care)] [lawful arrest, search or confinement] [__________________ (*other lawful purpose*)]."

UJI 14-132 (*emphasis added in bold*).

3.6.3 Case Law on Consent Defense (all the following reported opinions are based upon cases filed prior to the revised jury instructions effective for cases filed after January 20, 2005)

A recent Court of Appeals case, *State v. Jensen*, 2005-NMCA-113, provides some guidance on the current legal status of the consent defense in sexual assault cases, although it is important to note that the issue presented in this case pertained to ineffective assistance of counsel rather than the consent defense directly.

The *Jensen* Court confirmed that:

> "our cases have long held that absence of consent is not an element of the crime of CSP. See *State v. Gillette*, 102 N.M. 695, 700, 699 P.2d 626, 631 (Ct. App. 1985) (holding that 'the defense of consent is not available to defendant because lack of consent is not an element of [CSP]'); *State v. Jiminez*, 89 N.M. 652, 655, 556 P.2d 60, 69 (Ct. App. 1976) (recognizing that absence of consent by the victim is not an element in the CSP statute and therefore holding that the district court did not err in refusing to instruct the jury that the State must prove that sexual intercourse was without the victim's consent in order to convict the defendant of CSP); see also §30-9-10(A)

> ('Physical or verbal resistance of the victim is not an element of force or coercion[.]')."

Jensen at ¶19.

The *Jensen* Court went on to say,

> "the jury in the present case was instructed that the State must prove beyond a reasonable doubt that Defendant caused Wife to engage in sexual intercourse and used physical force or physical violence against Wife. Our cases have held that this instruction adequately addressed the question of consent, in that to prove that a defendant caused the victim to engage in sexual intercourse and used force is to negate a consensual encounter. See *State v. Crain*, 1997-NMCA-101, ¶12, (holding that the instructions on the essential elements of CSP given to the jury 'adequately covered the concept of lack of consent,' and the defendant 'reinforced this concept in his closing argument by asserting that the State had the burden of proving that the intercourse was not consensual'). Upon this state of the law, we cannot say that it was below the standard of professional competence to fail to request a separate instruction on lack of consent."

Jensen at ¶20.

The defendant in *Jensen:*

> "nonetheless contends that he is entitled to assert consent as an affirmative defense, in the same manner that he would be able to assert defenses of insanity or self-defense. See UJI 14-5101 NMRA (insanity); UJI 14-5171 NMRA (justifiable homicide; self-defense). In support of his affirmative defense of consent, Defendant relies on *State v. Osborne*, 111 N.M. 654, 660, 808 P.2d 624, 630 (1991) (indicating that even when a defense does not deny the existence of an element of the crime, it does not preclude the establishment of an excuse or justification under traditional affirmative defenses), and *State v. Parish*, 118 N.M. 39, 43, 878 P.2d 988, 992 (1994) (indicating that excuse or justification ought to be decided by the factfinder when the evidence permits). Although not raised by Defendant, we recognize that effective for cases filed after January 20, 2005, the Supreme Court has approved instructions for the defense of consent in CSP cases that are analogous to the defense of self-defense. See, e.g., UJI 14-132 (Feb. 2005 Supp.) (defining unlawfulness as without consent and one of three other elements); UJI 14-946 (Feb. 2005 Supp.) (indicating that the element of unlawfulness should be inserted into the elements instruction for an offense of which a defendant is convicted 'if the evidence raises a genuine issue of unlawfulness'); Order reprinted at p. 237 of Feb. 2005 Supp. (indicating effective date of new instructions)."

Jensen at ¶21.

The *Jensen* opinion indicates that there is a difference between the negation of an element of a crime and the assertion of an affirmative defense. "'An affirmative defense ordinarily refers to a state of facts provable by defendant that will bar plaintiff's recovery once a right to recover is established.' *Beyale v. Ariz. Pub. Serv. Co.,* 105 N.M. 112, 114, 729 P.2d 1366, 1368 (Ct. App. 1986). As indicated, Defendant did not defend on the basis that he forcibly made Wife have intercourse with him but that she consented to a forced encounter, which would be a true affirmative defense. Instead, as indicated in the only testimony going to the issue, he claimed that he did not use force, and instead Wife consented to the intercourse, a defense in the sense of negating the element of force contained as part of the State's prima facie case." *Jensen* at ¶25.

"A person is entitled to withdraw his or her consent or express a lack of consent to an act of criminal sexual penetration at any point prior to the act itself, but force or coercion exerted prior to the act itself will support a conviction for kidnapping or false imprisonment. When the legislature defined CSP II, felony, it indicated its intent that force or coercion executed prior to the act of sexual intercourse without consent but closely associated with it, was the aggravating factor distinguishing CSP III from CSP II, felony." *State v. Pisio*, 119 N.M. 252, 261-262, 889 P.2d 860, 869-870 (Ct. App. 1994).

3.6.4 Evidentiary Issue Regarding Consent Defense

An evidentiary issue has arisen in several New Mexico criminal sexual penetration cases regarding whether or not past sexual conduct is relevant to the consent defense. The Court of Appeals addresses this issue as follows:

> "The proper approach, in our opinion, is to recognize that past sexual conduct, in itself, indicates nothing concerning consent in a particular case. This is the starting point because relevancy is not an inherent characteristic of any item of evidence, but exists only as a relation between an item of evidence and a matter properly provable in the case.
>
> "If defendant claims a victim's past sexual conduct is relevant to the issue of the victim's consent, it is up to defendant to make a preliminary showing which indicates relevancy. This is similar to the approach required of a defendant to raise 'a question' concerning a defendant's competency to stand trial. The question of relevancy is not raised by asserting that it exists, there must be a showing of a reasonable basis for believing that past sexual conduct is pertinent to the consent issue."

State v. Herrera, 92 N.M. 7, 16, 582 P.2d 384, 393 (Ct. App. 1978) (*citations omitted*). See also *State v. Gillette*, 102 N.M. 695, 701, 699 P.2d 626, 632 (Ct. App. 1985).

For more discussion of evidentiary issues, particularly rape shield laws, see chapter 6 of this benchbook.

3.7 Double Jeopardy

3.7.1 Introduction

New Mexico addresses double jeopardy issues both in a statute and in the state constitution.

> "No person shall be twice put in jeopardy for the same crime. The defense of double jeopardy may not be waived and may be raised by the accused at any stage of a criminal prosecution, either before or after judgment. When the indictment, information or complaint charges different crimes or different degrees of the same crime and a new trial is granted the accused, he may not again be tried for a crime or degree of the crime greater than the one of which he was originally convicted."

§30-1-10. See also New Mexico Constitution, Art. II, §15.

"When compared to recent United States Supreme Court Fifth-Amendment jurisprudence, New Mexico's constitutional and statutory protection against double jeopardy, on its face, is of a different nature, more encompassing and inviolate." *State v. Nunez*, 2000-NMSC-013, ¶27. *Nunez* distinguished a recent federal case as follows: In *Montoya v. New Mexico*, 55 F.3d 1496 (10th Cir. 1995), "the Tenth Circuit held that Montoya had waived his double-jeopardy claim under the United States Constitution because he agreed, in his original plea bargain, to a sentence enhancement if he should ever violate probation. The Tenth Circuit declined to apply the New Mexico non-waiver statute, Section 30-1-10, because it raised a statutory-rather than constitutional-claim, and 'state claims are not cognizable in habeas proceedings unless they are constitutional in nature.' *Montoya* is distinguishable from the cases before this Court because it was decided under the United States Constitution, not under the laws of the State of New Mexico." *Nunez* at ¶96. The *Nunez* decision appears that it cannot be too broadly applied as several cases have limited *Nunez* to its specific factual and statutory application.

Numerous published appellate opinions address the double jeopardy issue in a wide array of cases and on a wide array of aspects of the double jeopardy prohibition. Some cases are decided under the state statutory and constitutional provisions, while others are decided under the federal constitutional provision. For example, the New Mexico Supreme Court stated in *State v. McClendon*, 2001-NMSC-023, that "[w]e have not previously construed our Double Jeopardy Clause, Article II, Section 15, more broadly than its federal counterpart in the context of multiple punishments. See *Swafford v. State*, 112 N.M. 3, 7 n.3, 810 P.2d 1223, 1227 n.3 (1991). Although Defendant makes multiple references to the state constitution, he does not argue that his rights are not adequately protected by the federal provision, nor does he justify a departure from federal precedent. See *State v. Gomez*, 1997-NMSC-006, ¶19. Therefore, we address Defendant's claim only under the federal Double Jeopardy Clause." *McClendon*, footnote 3 to ¶2.

3.7.2 Double Jeopardy Legal Summary

In 2006, the New Mexico Supreme Court briefly summarized the state of double jeopardy law.

> "Our courts have delineated three separate protections afforded by the double jeopardy prohibition: (1) protection against a second prosecution for the same offense after acquittal; (2) protection against a second prosecution for the same offense after conviction; and (3) protection against multiple punishments for the same offense. *Swafford*, 112 N.M. at 7, 810 P.2d at 1227 (citing *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969), *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794 (1989)). Within the multiple punishment context, there are two types of cases: (1) multiple violations of the same statute, referred to as "unit of prosecution" cases; and (2) violations of multiple statutes, referred to as "double-description" cases. *Id.* at 8, 810 P.2d at 1228. Due to the fact that there are different values implicated for double jeopardy depending on the context and the type of case, different standards and tests have evolved. 'New Mexico multiple punishment theory is marked by a profusion of terms and tests each with its own formulaic approach purportedly serving different double jeopardy or policy interests.' *Id.* at 10, 810 P.2d at 1230. These tests were thoroughly discussed in *Swafford*, with this Court adopting a two-part test for double-description multiple punishment cases (the '*Swafford* test'). *Id.* at 13, 810 P.2d at 1233."

State v. Armendariz, 2006-NMSC-036, ¶20.

3.7.3 Selected Sexual Assault Double Jeopardy Cases

There are several appellate opinions where the double jeopardy issue arose in sexual assault cases. The discussion below includes only selected sexual assault cases, thus additional research would be advised to fully explore the double jeopardy issue.

- **Multiple Punishment Unit of Prosecution Case:** In *McClendon*, defendant claims that his two convictions for criminal sexual penetration by fellatio violate the federal double jeopardy clause. Based upon *Herron v. State*, 111 N.M. 357, 805 P.2d 624 (1991), the *McClendon* court found no double jeopardy violation. *Herron* stated that there are two distinct facets of multiple punishment jurisprudence. *McClendon* is a unit of prosecution case (as contrasted with a double-description case) meaning that defendant has been charged with multiple violations of a single statute based on a single course of conduct. "§30-9-11 cannot be said as a matter of law to evince a legislative intent to punish separately each penetration occurring during a continuous attack absent proof that each act of penetration is in some sense distinct from the others." *Herron* at 361, 628. To aid in determining whether each penetration is distinct from the others, *Herron*, identified a number of factors relevant to the inquiry:

(1) temporal proximity of penetrations (the greater the interval between acts the greater the likelihood of separate offenses);
(2) location of the victim during each penetration (movement or repositioning of the victim between penetrations tends to show separate offenses);
(3) existence of an intervening event;
(4) sequencing of penetrations (serial penetrations of different orifices, as opposed to repeated penetrations of the same orifice, tend to establish separate offenses);
(5) defendant's intent as evidenced by his conduct and utterances; and
(6) number of victims (although not relevant here, multiple victims will likely give rise to multiple offenses).

Herron at 361, 628 (*citations omitted*). See also *State v. Garcia*, 2007 N.M. App. Unpub. LEXIS 11 (Aug. 29, 2007)(applying the *Herron* factors in a recent case involving convictions of criminal sexual penetration of a minor and criminal sexual contact of a minor).

- **Multiple Punishment Double Description Case:** In *Swafford*, defendant was convicted of both incest and criminal sexual penetration, as well as several other crimes. *Swafford* sets out a double description multiple punishment case (where defendant is charged with violations of multiple statutes that may or may not be deemed the same offense for double jeopardy purposes) and articulates a two part test for such cases. Under this test it must first be determined whether the conduct was unitary, meaning whether the same criminal conduct is the basis for both charges. If the conduct is not unitary, then the inquiry is at an end and there is no double jeopardy violation. If it is unitary, then the second part of the test must be applied which requires examination of the relevant statutes to determine whether the legislature intended to create separately punishable offenses. Only if the first part of the test is answered in the affirmative, and the second in the negative, will the double jeopardy clause prohibit multiple punishment in the same trial.

  Absent clear legislative intent, then one must follow the rule of statutory construction known as the '*Blockburger* test,' taken from *Blockburger v. United States,* 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932). This test focuses strictly upon the elements of the statutes. The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not. Based upon the facts of the case and the application of the above test, the Swafford court found "[s]eparate convictions and consecutive sentences for incest and criminal sexual penetration are permissible." *Swafford v. State,* 112 N.M. 3, 34, 810 P.2d 1223, 1235. See also *State v. Armendariz*, 2006-NMSC-036.

  Where defendant was convicted of first-degree kidnapping, second-degree criminal sexual penetration, and willful and deliberate first-degree murder, the *McGuire* court

held that under the facts of the case conduct for kidnapping and criminal sexual penetration was not unitary. Here the defendant abducted a woman for the purpose of raping her, took her to a remote location, and then raped her. The court said that the kidnapping was completed at the time the defendant took the woman, but the criminal sexual penetration did not occur until the defendant caused the woman to engage in sexual intercourse. The two events were sufficiently separated by time and space to be considered not unitary. *State v. McGuire,* 110 N.M. 304, 309, 795 P.2d 996, 1001 (1990).

- **Elements of Multiple Offenses:** Defendant's right to freedom from double jeopardy was not violated by punishment for attempted first-degree murder, aggravated battery with a deadly weapon, and criminal sexual penetration. *State v. Traeger*, 2000-NMCA-015, *aff'd in part, rev'd in part on other grounds*, 2001-NMSC-022 (2001).

> "Although we agree with Defendant's argument that some of the same conduct may have been used by the jury to convict him of more than one offense, we disagree that Defendant was subjected to double jeopardy. We do so because, even if Defendant is correct in asserting that the abrasion to Wife's vagina was not a sufficient injury to raise the CSP to CSP II, the multiple punishments were authorized by the Legislature.
>
> "To determine legislative intent, we make use of certain presumptions. The principal presumption is that the Legislature intended to permit punishment for two different statutory offenses if conviction of each offense requires proof of an element that is not required for proof of the other offense. See *Swafford*, 112 N.M. at 14, 810 P.2d at 1234. This is the test first adopted in *Blockburger v. United States*, 284 U.S. 299, 303-04, 76 L. Ed. 306, 52 S. Ct. 180 (1932). See *Swafford*, 112 N.M. at 8, 810 P.2d at 1228. Our Supreme Court has observed that we should examine the elements of each statutory offense as the offense was charged against the defendant, even though the statute might provide for alternative means of committing the offense. *State v. Carrasco*, 1997-NMSC-047, ¶27 ('We focus on the legal theory of the case and disregard any inapplicable statutory elements.')….
>
> "Even under the *Carrasco* limitations, however, the charges in this case satisfy the *Blockburger* test. An examination of the elements of the offenses as charged against Defendant shows that the CSP II charge required proof of at least one element not required by the other offenses, and vice versa….
>
> "Conversely, the other offenses contained elements not required to establish CSP II." *Traeger* at ¶¶15-18.

With respect to criminal sexual penetration and false imprisonment convictions,

> "[d]efendant contends that there was insufficient evidence to support separate charges for false imprisonment and CSP II. It is true that 'ordinarily, almost any act of CSP will involve a restraint or confinement that would constitute false imprisonment.' *State v. Corneau*, 109 N.M. 81, 86, 781 P.2d 1159, 1164 (Ct. App. 1989). However, in this case, as in *Corneau*, 'evidence exists in the record to support a finding by the jury that the underlying felony of false imprisonment was separate and apart from any false imprisonment necessarily involved in almost every act of CSP.' *Id.* Wife testified that Defendant would not let her out of the bedroom for a period of time after the CSP occurred. This was sufficient evidence to support a conviction for false imprisonment separate and apart from the false imprisonment that occurred simultaneously with the CSP. *See id.* ('The restraint need be for only a brief time.')."

Traeger at ¶20.

3.8 Duress

Duress is a defense available in New Mexico except when the crime charged is a homicide or a crime requiring the intent to kill. *Esquibel v. State,* 91 N.M. 498, 576 P.2d 1129 (1978), *overruled on other grounds*, *State v. Wilson,* 116 N.M. 793, 867 P.2d 1175 (1994). The elements of the duress defense are:

- Evidence has been presented that the defendant was forced to _________________ (include acts that constitute offense) under threats. If the defendant feared immediate great bodily harm to himself or another person if he did not commit the crime and if a reasonable person would have acted in the same way under the circumstances, you must find the defendant not guilty.

- The burden is on the state to prove beyond a reasonable doubt that the defendant did not act under such reasonable fear.

UJI 14-5130. See also *State v. Duncan,* 111 N.M. 354, 355, 805 P.2d 621, 622 (1991) (stating that the elements of the duress defense are: "(1) that the defendant committed the crime under threats; (2) that the defendant feared immediate great bodily harm to himself or another person if he did not commit the crime; and (3) that a reasonable person would have acted in the same way under the circumstances."). "The character of the coercer is not an element of the defense of duress." *Duncan* at 355, 622.

"To support a prima facie case of duress, there must be some reasonable nexus between the harm feared and the crime that was committed in response to that fear." *State v. Castrillo,* 112 N.M. 766, 772, 819 P.2d 1324, 1330 (1991). "To warrant submission to the jury of the defense of duress, a defendant must make a prima facie showing that he was in fear of immediate and great bodily harm to himself or another and that a reasonable person in his position would have acted the same way under the circumstances." *Castrillo* at 769, 1327.

Once the prima facie case is established, the burden shifts to the state to prove beyond a reasonable doubt that the defendant did not act under such reasonable fear. UJI 14-5130.

Although, what constitutes present, imminent and impending compulsion depends on circumstances of each case, long histories of beatings may be sufficient to create a jury question regarding the duress defense when the most recent beatings occurred within two to three days prior to the crime. See, e.g., *Esquibel* at 501, 1132 (holding duress is a defense, and the evidence was sufficient to present a jury issue on the immediacy of the danger where there was a long history of beatings of defendant by guards and the most immediate episode was two to three days before defendant's escape from the penitentiary); *State v. Torres*, 99 N.M. 345, 657 P.2d 1194 (Ct. App.1983) (evidence that woman had been beaten by man she referred to as her common-law husband over a period of seven years, the last of which occurred two or three days before the crime, was sufficient to present question for the jury; trial court erred in instructing that husband had to be present in the store at the time of the fraud).

3.9 Impossibility/Impotency

In the very early case of *State v. Ballamah*, 28 N.M. 212, 210 P. 391 (1922), appellant contended that impotency was a good defense to the charge of assault with intent to rape and that the court erred in refusing to permit him to show that fact. The Court held that "impotency or lack of physical powers of the defendant may be shown but not as a complete defense to a charge of assault with intent to rape." *Ballamah* at 216, 392. Evidence relative to the question of intent with which an act is done is admissible. The state has the burden to prove that the assault by appellant was with intent to rape. Evidence of appellant's physical condition was relevant to such intent and was thus admissible. *Ballamah* at 216, 392. See also *State v. Walton,* 43 N.M. 276, 92 P2d 157 (1939). In contrast, see *State v. Scarborough,* 55 NM 201, 230 P2d 235 (1951), finding that temporary impotency resulting from extreme intoxication is no defense to a charge of rape.

More recently in *State v. Palmer*, 1998-NMCA-052, the defendant raised a claim regarding the defense of physical impossibility of penetration (impotence) at the time of the alleged criminal sexual penetration. However, the court's decision in *Palmer* pertained to the impact of a supposed delay on this defense, rather than directly addressing the viability or elements of the defense itself.

In a case involving attempt to commit a felony, the Supreme Court determined "that New Mexico's attempt statute is consistent with the view that when a defendant does everything that is required to commit a crime but is frustrated due to the fact that completion is impossible, he can nevertheless be found guilty of attempt…. When the objective is clearly criminal, impossibility is not a proper defense." *State v. Lopez*, 100 N.M. 291, 292-93, 669 P.2d 1086, 1087-88 (1983). See also *Cummings v. State,* 2007-NMSC-048, ¶23. The *Lopez* court went on to adopt language from a federal case indicating that it was inappropriate to attempt to distinguish between legal impossibility and factual impossibility. *Lopez* at 293, 1088.

3.10 Insanity/Diminished Capacity

3.10.1 Insanity Defense

"In New Mexico, the standards governing the defense of insanity are well established. This Court said in *State v. White*, 58 N.M. 324, 330, 270 P.2d 727, 731 (1954), that in order for a jury to find an accused blameworthy for his acts, it must be satisfied that: the accused, as a result of disease of the mind ... (a) did not know the nature and quality of the act or (b) did not know that it was wrong or (c) was incapable of preventing himself from committing it." *State v. Dorsey,* 93 N.M. 607, 609, 603 P.2d 717, 719 (1979).

The Rules of Criminal Procedure further provide that:

- "Notice of the defense of 'not guilty by reason of insanity at the time of commission of an offense' must be given at the arraignment or within twenty (20) days thereafter, unless upon good cause shown the court waives the time requirement of this rule." Rule 5-602(A)(1).
- "When the defense of 'not guilty by reason of insanity at the time of commission of an offense' is raised, the issue shall be determined in nonjury trials by the court and in jury trials by a special verdict of the jury. If the defendant is acquitted on the ground of insanity, a judgment of acquittal shall be entered, and any proceedings for commitment of the defendant because of any mental disorder or developmental disability shall be pursuant to law." Rule 5-602(A)(2).

3.10.2 Guilty but Mentally Ill

- "A person who at the time of the commission of a criminal offense was not insane but was suffering from a mental illness is not relieved of criminal responsibility for his conduct and may be found guilty but mentally ill." §31-9-3(A).

- "As used in this section, 'mentally ill' means a substantial disorder of thought, mood or behavior which afflicted a person at the time of the commission of the offense and which impaired that person's judgment, but not to the extent that he did not know what he was doing or understand the consequences of his act or did not know that his act was wrong or could not prevent himself from committing the act." §31-9-3(A).

- "A plea or finding of guilty but mentally ill is **not an affirmative defense** but an alternative plea or finding that may be accepted or made pursuant to appropriate evidence when the affirmative defense of insanity is raised or the plea of guilty but mentally ill is made." (*Emphasis added.*) §31-9-3(B).

- "When a defendant has **asserted a defense of insanity**, the court may find the defendant guilty but mentally ill if after hearing all of the evidence the court finds beyond a reasonable doubt that the defendant:

(1) is guilty of the offense charged;

(2) was mentally ill at the time of the commission of the offense; and

(3) was not legally insane at the time of the commission of the offense."

(*Emphasis added*.) §31-9-3(D).

- "When a defendant has **asserted a defense of insanity**, the court, where warranted by the evidence, shall provide the jury with a special verdict form of guilty but mentally ill and shall separately instruct the jury that a verdict of guilty but mentally ill may be returned instead of a verdict of guilty or not guilty, and that such a verdict requires a finding by the jury beyond a reasonable doubt that the defendant committed the offense charged and that the defendant was not legally insane at the time of the commission of the offense but that he was mentally ill at that time." (*Emphasis added*.) §31-9-3(E).

3.10.3 Distinguishing Guilty but Mentally Ill and Insanity

If there is an issue as to the defendant's mental condition at the time the act was committed, the jury is given alternative verdict forms for each crime charged. The possible alternative verdicts are:

- Guilty
- Not guilty
- Not guilty by reason of insanity
- Guilty but mentally ill

UJI 14-5101. The Committee Commentary to this instruction indicates that "[i]nitially, there is a presumption that the defendant is sane. See *State v. Dorsey,* 93 N.M. 607, 603 P.2d 717 (1979) and *State v. James,* 83 N.M. 263, 490 P.2d 1236 (Ct. App. 1971) (relied on in *State v. Pierce,* 109 N.M. 596, 788 P.2d 352 (1990)). Once the defendant introduces some competent evidence to support the defense of insanity, the burden of proof shifts to the state to prove beyond a reasonable doubt that the defendant was sane at the time the act was committed. See *State v. Lopez,* 91 N.M. 779, 581 P.2d 872 (1978); *State v. Wilson,* 85 N.M. 552, 514 P.2d 603 (1973). However, the state is not required to present any evidence on the issue, and it may instead simply rely on the presumption. *State v. Wilson, supra*." UJI 14-5101, Committee Commentary.

"Comparison of the definitions of insanity and mental illness clearly illustrates the difference and demonstrates that the jury has found an element of causation when it finds a defendant legally insane that is not present if the defendant has been found guilty but mentally ill. For a defendant to be determined insane, the jury must find a lack of criminal responsibility because, *as a result of the illness*, the defendant did not know the nature and quality of the act and that the act was wrong, or the defendant was not capable of preventing herself from committing the act. To be found guilty but mentally ill, on the other hand, the

jury must determine that the defendant, although suffering from impaired judgment, did not meet the additional criteria for legal insanity." *State v. Neely*, 112 N.M. 702, 707, 819 P.2d 249, 254 (1991).

3.10.4 Selected Case Law Involving Sexual Assault and the Insanity Defense

A few reported decisions exist where the insanity defense arose in the context of a sexual assault charge. The following provide a couple of examples.

- In *State v. Gilbert*, 100 N.M. 392, 671 P.2d 640 (1983) where defendant was convicted of kidnapping with firearm enhancement, sexual penetration with firearm enhancement, and first degree murder, defendant was not entitled to a bifurcated trial on the issues of sanity and guilt or innocence; defendant presented no evidence of insanity in his case in chief and the court followed the rules of criminal procedure in effect at that time.

- In *State v. Day*, 90 N.M. 154, 560 P.2d 945 (1977), where defendant was convicted of aggravated burglary and second degree criminal sexual penetration, the court held that the instructions confused the jury and this confusion deprived defendant of a fair trial on the insanity issue. The confusion surrounded issues of the jury's role, burden of proof, evidence, and presumptions with respect to the insanity issue.

3.10.5 Issues Related to the Insanity Defense and Other Offenses Related to Sexual Assault

- Specifically with respect to the crime of solicitation, the solicitation statute provides that "[i]t is not a **defense** that the person solicited could not be guilty of the offense solicited due to **insanity**, minority or other lack of criminal responsibility or incapacity. It is not a defense that the person solicited is unable to commit the crime solicited because of lack of capacity, status or other characteristic needed to commit the crime solicited, so long as the person soliciting or the person solicited believes that he or they have such capacity, status or characteristics." (*Emphasis added*.) §30-28-3(C).

- Notice of incapacity to form specific intent. If the defense intends to call an expert witness on the issue of whether the defendant was incapable of forming the specific intent required as an element of the crime charged, notice of such intention shall be given at the time of arraignment or within twenty (20) days thereafter, unless upon good cause shown, the court waives the time requirement of this rule. Rule 5-602(F).

3.11 Intoxication

3.11.1 Voluntary Intoxication

"Under New Mexico law, the defense of voluntary intoxication depends upon whether the crime is characterized as a general intent crime or one characterized as a specific intent crime. If the crime is a specific intent crime, the defense is available to negate the so-called specific intent." UJI 14-5105, Committee Commentary (UJI 14-5105 is an instruction titled voluntary intoxication; however, the use note to this instruction indicates that "[n]o instruction on this subject shall be given.")

"The UJI instructions cover the defense for the specific intent crimes.… For nonhomicide crimes, UJI 14-5111 is used where intoxication can negate the element of intent to do a further act or achieve a further consequence." UJI 14-5105, Committee Commentary. "Prior to the adoption of these instructions, it was a common practice to advise the jury that intoxication was not a defense to a general intent crime. The committee believed that the better practice would be to not give an instruction for those crimes. In the event that one of the crimes being considered by the jury is a specific intent crime, UJI 14-5110 or 14-5111 will limit the defense to that crime. If there is no specific intent crime, and evidence of voluntary intoxication is admitted on some issue other than intent, the committee believed the instruction would be misleading." *Id.*

Criminal sexual penetration crimes and criminal sexual contact crimes are general intent crimes. See *State v. Pierce*, 110 N.M. 76, 792 P.2d 408 (1990) and *State v. Keyonnie*, 91 N.M. 146, 571 P.2d 413 (1977). However, if the crime charged is assault with intent to commit a violent felony (e.g. criminal sexual penetration), then it is a specific intent crime. See *State v. Schackow*, 2006-NMCA-123. Also, if the crime charged is attempted criminal sexual penetration, it is a specific intent crime. *Schackow*.

"Voluntary intoxication from use of alcohol or drugs is not a defense to the question of whether a defendant had a general criminal intent. *State v. Roybal*, 66 N.M. 416, 349 P.2d 332 (1960); *State v. Scarborough*, 55 N.M. 201, 230 P.2d 235 (1951); *State v. Crespin*, 86 N.M. 689, 526 P.2d 1282 (Ct.App.1974); see *State v. Tapia*, 81 N.M. 274, 466 P.2d 551 (1970)." *State v. Kendall*, 90 N.M. 236, 240, 561 P.2d 935, 939 (Ct. App. 1977), *rev. on other grounds*, 90 N.M. 191, 561 P.2d 464 (1977). Intoxication can be used in specific intent crimes to negate the existence of such an intent. *State v. Rayos*, 77 N.M. 204, 206, 420 P.2d 314, 315 (1967). Where a defendant claims that he was so intoxicated as to be unable to form the necessary intent, then the question of intent is a matter for the jury. *Rayos* at 206, 315. An instruction that rape requires no specific intent and that voluntary drunkenness is neither excuse nor justification for crime of rape was correct. *State v. Ramirez*, 84 N.M. 166, 500 P.2d 451 (Ct. App. 1972).

3.11.2 Involuntary Intoxication

In reference to UJI 14-5111, it is stated that "this instruction embodies the defense of involuntary intoxication or mental disease short of 'complete insanity' which will negate a specific intent in a nonhomicide crime. *See, e.g., State v. Ortega,* 79 N.M. 707, 448 P.2d 813 (Ct. App. 1968)." UJI 14-5111, Committee Commentary. UJI 14-5106 defines involuntary intoxication; this defining instruction is to be added to the essential elements instruction for the offense when appropriate.

3.12 Mistake (Ignorance)

3.12.1 Mistake of Fact

Mistake of fact is a defense in New Mexico recognized in UJI 14-5120, which reads as follows:

> "Evidence has been presented that the defendant believed that __________________. The burden is on the state to prove beyond a reasonable doubt that the defendant did not [act] [fail to act] under an honest and reasonable belief in the existence of those facts. If you have a reasonable doubt as to whether the defendant's [action] [or] [failure to act] resulted from a mistaken belief of those facts, you must find the defendant not guilty."

UJI 14-5120.

Generally, ignorance or mistake of fact is a defense when it negates the existence of a mental state essential to the crime charged. A twenty year-old defendant's conviction of fourth-degree criminal sexual penetration was reversed, where the trial court did not consider his defense of mistake of fact, which was based on evidence that he had asked the fifteen year-old victim her age and was told by her and another person that she was seventeen. *Perez v. State*, 111 N.M. 160, 803 P.2d 249 (1990). However, for a strict liability offense, a defendant is not entitled to raise a mistake of fact defense. See *State v. Torres*, 2003-NMCA-101.

3.12.2 Mistake of Law

The general rule exists that for general intent crimes, ignorance of the law is no defense. *State v. McCormack*, 101 N.M. 349, 682 P.2d 742 (Ct. App. 1984). The Criminal Uniform Jury Instruction titled General Criminal Intent provides:

> "In addition to the other elements of __________________ *(identify crime or crimes),* the state must prove to your satisfaction beyond a reasonable doubt that the defendant acted intentionally when he committed the crime. A person acts intentionally when he purposely does an act which the law declares to be a crime [, **even though he may not know that his act is unlawful**]. Whether

> the defendant acted intentionally may be inferred from all of the surrounding circumstances, such as the manner in which he acts, the means used, [and] his conduct [and any statements made by him]." (*Emphasis added in bold*.)

UJI 14-141. While the footnotes indicate that the bracketed portions are used only if appropriate, the emphasized portion of the jury instruction provides the option to include that ignorance of the law is no defense. Additionally, UJI 14-5121, titled "Ignorance or mistake of law" indicates that "no jury instruction on this subject shall be given."

3.13 Statute of Limitations

The general statute of limitations for crimes provides that no person shall be prosecuted, tried or punished in any New Mexico court unless the indictment is found or information or complaint is filed within the time provided:

- for a second degree felony, within six years from the time the crime was committed;
- for a third or fourth degree felony, within five years from the time the crime was committed;
- for a misdemeanor, within two years from the time the crime was committed;
- for a capital felony or a first degree violent felony, no limitation period shall exist and prosecution for these crimes may commence at any time after the occurrence of the crime.

§30-1-8. The applicable statute of limitations is the one in effect at the time the defendant allegedly committed the crime. See *State v. Hill,* 2005-NMCA-143 (involving a case of criminal sexual penetration of a minor).

The statute of limitations may be tolled for such reasons as:

- the defendant fleeing or concealing himself from the state; or
- procedural issues with the indictment, information, complaint, judgment or prosecution.

§30-1-9. See *State v. Cawley*, 110 N.M. 705, 799 P.2d 574 (1990)(holding, in a case involving convictions for rape of a child, criminal sexual contact of a minor, and contributing to the delinquency of a minor, that application of §30-1-9 to a situation where defendant was absent from the state for a period of approximately 11 years did not constitute a violation of defendant's constitutional guarantee of equal protection of the laws.)

Specifically for offenses against children the applicable time period for commencing prosecution pursuant to §30-1-8 shall not commence to run for an alleged violation of §§30-6-1, 30-9-11 or 30-9-13 until the victim attains the age of eighteen or the violation is reported to a law enforcement agency, whichever occurs first. §30-1-9.1 (applies only to crimes committed on or after June 19, 1987).

Specifically with respect to criminal sexual penetration, when DNA evidence is available and a suspect has not been identified, the applicable time period for commencing a prosecution pursuant to §30-1-8 shall not commence to run for an alleged violation of §30-9-11 until a DNA profile is matched with a suspect. §30-1-9.2(A). 'DNA' means deoxyribonucleic acid. §30-1-9.2(B). The legislature made the provisions of this act applicable to an alleged violation of §30-9-11 for which the applicable time period for commencing a prosecution as provided in §30-1-8, has not expired as of July 1, 2003. Laws 2003, ch. 257, §2.

Additionally, an action for damages based on personal injury caused by childhood sexual abuse shall be commenced by a person before the latest of the following dates:

- the first instant of the person's twenty-fourth birthday; or
- three years from the date of the time that a person knew or had reason to know of the childhood sexual abuse and that the childhood sexual abuse resulted in an injury to the person, as established by competent medical or psychological testimony.

§37-1-30(A). "Childhood sexual abuse" means behavior that, if prosecuted in a criminal matter, would constitute a violation of:

- §30-9-11 regarding criminal sexual penetration of a minor
- §30-9-13 regarding criminal sexual contact of a minor; or
- the Sexual Exploitation of Children Act, §30-6A-1.

§37-1-30(B). For recent decisions on the application of §37-1-30, see *Grygorwicz v. Trujillo*, 2006-NMCA-089; *Kevin J. v. Sager*, 2000-NMCA-012; *Yruegas v. Vestal*, 356 F. Supp. 2d 1238 (D.N.M. 2004).

CHAPTER 4

PRE-TRIAL RELEASE ORDERS, BOND AND DISCOVERY

This chapter covers:

- Procedures for issuing conditional release orders.
- Factors to consider in determining conditions of release.
- Contents of conditional release orders.
- Modifications of conditional release orders.
- Victim's role.
- Enforcement proceedings.
- Denying bond.
- Discovery in sexual assault cases.

4.1 Introduction

This chapter presents information on statutory provisions and case management practices that allow a court, before trial, to enhance the safety of a sexual assault victim (and the public), while also protecting a defendant's rights. Accordingly, the majority of this chapter focuses on bond and pretrial release orders. The remainder of the chapter presents information on pretrial discovery. **Note:** The discussion in this chapter assumes that the defendant is an adult.

In every criminal proceeding, one of the first responsibilities of the judge is to set conditions for pretrial release of the accused. Of course, as in any criminal case, the accused is always entitled to a presumption of innocence. Moreover, the New Mexico Constitution entitles a defendant to release on bail except in certain defined circumstances.

4.2 Procedures for Issuing Conditional Release Orders

For general information on conditional release pending trial, see the *New Mexico Magistrate and Metropolitan Court Benchbook*, §2.6; the *Municipal Court Benchbook*, §3.1; and the

Municipal Court Bond Book, Part VII. For information specific to conditional release in domestic violence situations, see the *New Mexico Domestic Violence Benchbook*, Chapter 9. All of these resources are available online at the Judicial Education Center website, http://jec.unm.edu.

As in every other criminal case, each court issues orders for conditional pretrial release under the applicable court rule. These are Rule 5-401 et seq. (district courts), Rule 6-401 et seq. (magistrate courts), Rule 7-401 et seq. (metropolitan court), and Rule 8-401 et seq. (municipal courts). For the purpose of this chapter, all these rules are identical in all but a few respects. For simplicity, therefore, further references to these rules in this chapter will be to the district court rules, Rule 5-401 et seq.

Under Rule 5-401, the court must order the release of any person who is entitled to bail under Article II, §13 of the New Mexico Constitution, either on personal recognizance or upon execution of an unsecured appearance bond, unless the court determines in writing that such release will not reasonably assure the appearance of the accused or "will endanger the safety of any other person or the community." See §4.8 for a discussion of the constitutional provision. If the court makes such a written determination, the rule permits the court to impose such conditions as "will reasonably assure . . . the safety of any person and the community."

Rule 5-401(B) requires the court to set bond at the least burdensome level, among the three alternatives set forth in the rule, needed to assure the defendant's appearance and the safety of others. Any discussion of the issues that arise in setting the amount or form of money bail is beyond the scope of this benchbook. Limited jurisdiction judges should refer to the *New Mexico Magistrate and Metropolitan Court Benchbook*, §2.6; the *Municipal Court Benchbook*, Chapter 3; or the *Municipal Court Bond Book*, Parts II through V, for further guidance on this topic. All of these resources are available online at the Judicial Education Center website, http://jec.unm.edu.

Rule 5-401(D) offers a list of additional conditions that the court may impose upon the defendant, either when authorizing, or at any time during, the defendant's pre-trial release. These additional conditions are listed below in §4.4. Given the potential dynamics and seriousness of sexual assault cases, the court should be very careful to consider whether any of these additional conditions should be imposed under the circumstances of the individual case, to "reasonably ensure the safety" of the alleged victim or others.

4.2.1 Setting Conditions Early

Bond conditions may be imposed at the time of the defendant's first appearance in court or at any time during the pendency of the criminal case. See, e.g., Rule 5-401(A), (G), (H). Where the judge sees indications suggesting that the defendant may either place the alleged victim or others in danger or attempt to influence their testimony, the judge may direct some additional cautions about the conditions of release toward the accused even at this early stage in the proceedings.

4.2.2 Appointing Designees to Set Bond and Conditions of Release

Rule 5-401(L) authorizes judges to designate, with certain exceptions, responsible persons to set bond and establish conditions of release. The judge should carefully weigh the potential risks presented by sexual assault cases when deciding whether to rely on such designees and when selecting the responsible persons to serve in that capacity.

4.2.3 Appointing Counsel for the Defendant

For a discussion of the judge's responsibility to offer the opportunity for the defendant to obtain counsel, limited jurisdiction judges should refer to the *New Mexico Magistrate and Metropolitan Court Benchbook* at §2.1-3(C) and (D) or the *Municipal Court Benchbook* at §§2.3.2 and 2.3.3. The procedures set out in those resources are designed to protect defendants' right to counsel. Where indigent defendants are unable to retain their own counsel, courts should appoint counsel for them at the earliest opportunity. Expediting the appointment of counsel serves the dual purposes of protecting the defendant's rights while avoiding delays in the proceedings. Because long pretrial delays leave witnesses and others involved with the case vulnerable to coercion and re-victimization, expedited docketing and case processing can enhance safety in sexual assault cases. To expedite proceedings, some courts appoint counsel at a defendant's first appearance in court, regardless of the defendant's stated intention of retaining an attorney. This practice not only safeguards a defendant's right to counsel, but can also prevent unnecessary delays if the defendant fails to make timely efforts to retain counsel. Early appointment of counsel also protects the defendant's ability to prepare a defense. Defendants who eventually retain counsel at their own expense can then later, in the court's discretion, substitute counsel. In addition to the protection of defendant's rights, early appointment of counsel may also help address victim's rights, such as timely disposition of the case and reasonable protection from the accused throughout the judicial process. See Victims of Crime Act, §31-26-1, et. seq.

4.2.4 Required Written Statements by Judge

The Rules of Criminal Procedure require the judge to issue a written release order explaining the conditions of release. When the judge imposes special conditions on the pretrial release of the defendant, Rule 5-401(E) requires the judge to include all of the following in the written release order:

- A clear and specific statement of the specific conditions imposed.

- The consequences of violating a condition of release. The defendant must be informed *in writing* of the penalties for violating a condition of release, including the penalties for committing an offense while on pretrial release; the consequences for the violation, including immediate issuance of an arrest warrant by the court; and the consequences of intimidating any witness, victim or informant, or otherwise obstructing justice.

- The circumstances that required the judge to impose the additional conditions of release that are designed to protect the alleged victim or any other conditions of release more restrictive than personal recognizance.

For all courts, completing and providing to the defendant Criminal Forms 9-302 or 9-303 partially fulfill this requirement, but the judge must be careful to find space on the form, or use an attachment, to include the reasons for imposing conditions more restrictive than release on personal recognizance. Supreme Court Order No. 07-8300-29, dated October 19, 2007, amended Criminal Forms 9-302 or 9-303. The amended forms are effective on and after December 10, 2007.

4.3 Factors to Consider in Determining Conditions of Release

Rule 5-401 states that the court may impose conditions on pretrial release to reasonably assure the appearance of the person as required and the safety of any person and the community. In making its determination, Rule 5-401(C) requires the court to take into account the available information concerning all of the following factors:

1) "the nature and circumstances of the offense charged, including whether the offense is a crime of violence or involves a narcotic drug;
2) the weight of the evidence against the person;
3) the history and characteristics of the person, including:
   a) the person's character and physical and mental condition;
   b) the person's family ties;
   c) the person's employment status, employment history and financial resources;
   d) the person's past and present residences;
   e) the length of residence in the community;
   f) any facts tending to indicate that the person has strong ties to the community;
   g) any facts indicating the possibility that the person will commit new crimes if released;
   h) the person's past conduct, history relating to drug or alcohol abuse, criminal history and record concerning appearance at court proceedings; and
   i) whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal or completion of an offense under federal, state or local law;
4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release; and
5) any other facts tending to indicate the person is likely to appear." Rule 5-401(C).

The court should attempt to ascertain immediately whether the defendant is already under a conditional pretrial release order or an order of protection, or is on probation or parole for similar offenses in any jurisdiction. Since this would be incriminating information, the judge should not ask the defendant for this information unless the defendant has knowingly waived his/her rights against self-incrimination and to assistance of counsel. The history provided by such an inquiry could indicate whether the charge before the court might be part of a pattern of conduct. Such a pattern could suggest a continuing threat to the alleged victims, and

should be carefully considered by the court when setting conditions of release. Of course, if an arrest occurs as a result of an alleged violation of an existing order, the court should take appropriate action in response to the violation as well.

As in any criminal case, the court's obligation in setting pretrial conditions of release in sexual assault cases is to strike an appropriate balance between two opposing interests: imposing adequate restraints both to assure the defendant's appearance and to protect others from harm, while inflicting the minimum necessary burdens on a person who has been charged with -- but not convicted of -- a crime.

In cases involving non-stranger or acquaintance sexual assault (not distinguished under New Mexico statutes from sexual assault by a stranger), judges are encouraged to communicate that they regard sexual assault by non-strangers as seriously as sexual assault by strangers. Since sexual assault may, in some cases, be closely related to domestic violence the more detailed information found in §§9.3 and 9.4.2 of the *New Mexico Domestic Violence Benchbook* may be helpful in considering appropriate factors for determining release conditions and promoting pretrial safety.

4.4 Contents of Conditional Release Orders

The court has broad authority to impose conditions of release under Rule 5-401 and the corresponding rules for limited jurisdiction courts. The following discussion summarizes the provisions of the rules governing the contents of conditional release orders.

Rule 5-401 (and corresponding rules for limited jurisdiction courts) applies to bail and conditions of release. Criminal Form 9-302 provides the official form in all courts for orders setting conditions of release and appearance bonds when the defendant is to be released on personal recognizance or an unsecured appearance bond. Where the defendant is released on a secured appearance bond or bail bond, Form 9-303 applies. These forms, when completed, contain the information required to be disclosed to the defendant under Rule 5-401(E), provided that the judge inserts the explanation of the circumstances requiring imposition of the conditions of release other than personal recognizance.

Rule 5-401(D) further gives the court broad authority to impose any conditions or combination of conditions it determines are necessary to "reasonably assure the appearance of the person as required, and the safety of any other person and the community and the orderly administration of justice." Applying this standard, the court may order any of the following additional conditions in releasing the defendant:

1) “the condition that the person not commit a federal, state or local crime during the period of release; and
2) the least restrictive of, or combination of, the following conditions the court finds will reasonably assure the appearance of the person as required, the safety of any other person and the community and the orderly administration of justice:
    a) a condition that the person remain in the custody of a designated person who agrees to assume supervision and to report any violation of a release condition to

the court, if the designated person is able reasonably to assure the court that the person will appear as required and will not pose a danger to the safety of any other person or the community;

b) a condition that the person maintain employment, or, if unemployed, actively seek employment;
c) a condition that the person maintain or commence an educational program;
d) a condition that the person abide by specified restrictions on personal associations, place of abode or travel;
e) a condition that the person avoid all contact with an alleged victim of the crime and with a potential witness who may testify concerning the offense;
f) a condition that the person report on a regular basis to a designated pretrial services agency or other agency agreeing to supervise the defendant;
g) a condition that the person comply with a specified curfew;
h) a condition that the person refrain from possessing a firearm, destructive device or other dangerous weapon;
i) a condition that the person refrain from any use of alcohol and any use of a narcotic drug or other controlled substance without a prescription by a licensed medical practitioner;
j) a condition that the person undergo available medical, psychological or psychiatric treatment, including treatment for drug or alcohol dependency, and remain in a specified institution if required for that purpose;
k) a condition that the person submit to random urine analysis or alcohol test upon request of a person designated by the court;
l) a condition that the person return to custody for specified hours following release for employment, schooling, or other limited purposes; and
m) a condition that the person satisfy any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community." Rule 5-401(D).

4.5 Modification of Conditional Release Orders

Because of the possibility of re-offense in criminal cases involving allegations of sexual assault, modification of conditional release orders should only be granted on the basis of objectively valid reasons. This section addresses requests for modification of release orders that contain conditions for the protection of a named individual.

There are several ways in which a judge may modify the order setting conditions of release. Procedures available to limited jurisdiction judges are addressed in the *New Mexico Magistrate and Metropolitan Court Benchbook* at §2.6-1(D)(6), and the *Municipal Court Benchbook* at §§3.1.6, .7 and .8. These benchbook sections explain the procedures in general as reconsideration of the amount of bond is beyond the scope of this text. Thus, the discussion here is limited to special considerations pertaining to reconsideration of additional conditions of release related to "no contact" orders.

Pending trial, a defendant may seek modification to the conditions of release to allow him or her to return home or have contact with the alleged victim or their children. In such

situations the court should inquire carefully into whether the defendant's overall conduct conforms to any expressions of remorse and of the defendant's stated desire to return to his or her family. If the court has found good cause to order the defendant out of the home in the first place, the defendant should be able to demonstrate why that cause no longer exists. It is possible for a defendant who returns to the home to change prior patterns of behavior that may have caused the judge to issue a no-contact order, but it is also possible for those patterns to reassert themselves, especially under the stress of pending criminal charges. When reconsidering conditions of release, the court can address this possibility by considering the lifting of only some conditions, while maintaining other constraints. These remaining constraints should be strong enough to continue to signal to the defendant that the charges are serious, and that any act of violence by the accused while on pretrial release will be dealt with decisively by the court.

4.6 Victim's Role

Some courts consider the wishes of the alleged victim as a relevant factor in determining whether to issue or modify a "no contact" order or change other conditions of release. Other courts have elected not to hear from the alleged victim in setting release conditions and instead refer victim concerns to the prosecutor. The Victims of Crime Act, §31-26-1, et. seq., gives alleged victims the right to address the court regarding their rights under that Act at any scheduled court proceeding in a criminal case filed on or after June 17, 2005. Presumably, this gives alleged victims the right to address the court before trial about pretrial conditions because one of the victim's rights enumerated under the Act is the right to "be reasonably protected from the accused throughout the criminal justice process." §31-26-4(C).

Even where the alleged victim is allowed to speak, the court must emphasize to the accused that the alleged victim is not a party to the criminal proceedings and that the conditions imposed are imposed by the court. A defendant who realizes that the alleged victim cannot control court proceedings may be discouraged from attempting to obstruct justice in the case.

In addition, a victim may, as appropriate, seek to obtain an order of protection in addition to the conditional release order. See, e.g., Family Violence Protection Act, §40-13-1, et. seq.

Recent legislation with a *July 1, 2008 effective date* (HB 227, 2008 General Session) amends the definition of 'domestic abuse' found in §40-13-2 to include "an incident of stalking or sexual assault whether committed by a household member or not" thus allowing a victim of stalking or sexual assault to petition for a protective order under the Family Violence Protection Act even if they are not a defined household member as is required for other forms of domestic abuse.

For more information on victim's rights refer to Chapter 5 of this benchbook.

4.7 Enforcement Proceedings

A release order with conditions for the protection of a named person will only be effective if the defendant knows that violation of the order will result in sanctions. Lax enforcement of such orders may actually increase danger by providing the protected person with a false sense of security. Accordingly, strict, swift enforcement procedures are important tools to promote victim and community safety as well as offender accountability.

Procedures for issuing a bench warrant for the defendant's arrest, imposing additional conditions of release, forfeiting bond or otherwise enforcing the terms of the pretrial release order are discussed in the *New Mexico Magistrate and Metropolitan Court Benchbook* at §2.6-1(F) and (G), or the *Municipal Court Benchbook* at §§3.1.7 and .8.

4.8 Denying Bond

The New Mexico Constitution guarantees a defendant's right to be released on bond pending trial. N.M. Constitution, Article II, §13. The court may only deny bail in non-capital cases for up to sixty days after the defendant's incarceration, by an order entered within seven days of incarceration, and only in specified cases where the defendant, who is accused of a felony, has been previously convicted of felonies.

Specifically, if the defendant has been previously convicted of two or more felonies committed within New Mexico, neither of which arose from the same or a common transaction with the case for which the defendant is now before the court, the court may deny bail for sixty days. The constitution also allows denial of bail altogether for the sixty-day period if the defendant has been convicted of only one prior felony within the state, if the current charge involves a felony alleged to have been committed with a deadly weapon. The sixty-day limit may be extended to the extent that the trial has been delayed at the request of the defendant. New Mexico law defines "felony" in §30-1-6(A) as follows:

> "A crime is a felony if it is so designated by law or if upon conviction thereof a sentence of death or of imprisonment for a term of one year or more is authorized."

"Deadly weapon" is defined in §30-1-12(B) as:

> "any firearm, whether loaded or unloaded; or any weapon which is capable of producing death or great bodily harm, including but not restricted to any types of daggers, brass knuckles, switchblade knives, bowie knives, poniards, butcher knives, dirk knives and all such weapons with which dangerous cuts can be given, or with which dangerous thrusts can be inflicted, including swordcanes, and any kind of sharp pointed canes, also slingshots, slung shots, bludgeons; or any other weapons with which dangerous wounds can be inflicted."

If the defendant does not have prior felony convictions such as those specified in the above-referenced section of the Constitution, the court may not deny bond altogether for any period, but must set bond at a level that conforms to the requirements of the statutes and rules.

In cases where the defendant is alleged to have committed a capital offense, the Supreme Court has held that:

> "the charge of a capital offense raises a rebuttable presumption that the proof is evident and the presumption great that the defendant so charged committed the capital offense, and one so accused is not entitled to bail until that presumption is overcome . . . ."

Tijerina v. Baker, 78 N.M. 770, 773 (1968); *State v. David,* 102 N.M. 138, 143 (Ct. App. 1984). When resolving the issue of whether the defendant is entitled to bail, the defendant is entitled to due process of law, including notice and an opportunity to be heard, and to be represented by counsel. *David* at 143-144. Strict rules of evidence do not apply at such hearings. Rule 5-401(N).

Even if bail may not be totally denied initially under Article II, §13, it may be revoked after notice and a hearing "when necessary to prevent interference with the administration of justice." *Tijerina* at 773; *David* at 142.

4.9 Discovery in Sexual Assault Cases

Article 5 of the Rules of Criminal Procedure governs discovery in sexual assault cases as is true for all other criminal cases. This benchbook will not provide a comprehensive discussion of discovery in all criminal cases. Generally only issues with specific application to sexual assault cases will be addressed here.

4.9.1 Selected Discovery Concepts in Criminal Cases

Discovery in criminal cases is governed by rule rather than by constitutional provision. "The granting of discovery in a criminal case is a matter peculiarly within the discretion of the trial court." *State v. Bobbin*, 103 N.M. 375, 378, 707 P.2d 1185, 1187 (Ct. App. 1985) (involving charges of criminal sexual penetration in the second degree, aggravated assault, and false imprisonment). "Furthermore, criminal defendants do not have a constitutional right to discovery. Pre-trial discovery in favor of a criminal defendant is not required by due process…. New Mexico appellate courts have also ruled that, in criminal cases, depositions are only to be used in exceptional circumstances. In addition, defendant's right to depose a witness is not a constitutional right." *Bobbin* at 378, 1188 (*citations omitted*).

Rule 5-501, Disclosure by the State, and Rule 5-502, Disclosure by the Defendant, provide for both:

- Information subject to disclosure; and
- Information not subject to disclosure.

A broad range of information must be disclosed in a criminal case by both the state and the defendant, including exculpatory evidence. Of particular importance in some sexual assault cases is the information that is not subject to disclosure.

Specifically under Rule 5-501(F), "the prosecutor shall not be required to disclose any material required to be disclosed by [Rule 5-501] if:

- the disclosure will expose a confidential informer; or
- there is substantial risk to some person of physical harm, intimidation, bribery, economic reprisals or unnecessary annoyance or embarrassment resulting from such disclosure, which outweighs any usefulness of the disclosure to defense counsel."

As for the information not subject to disclosure by the defendant, Rule 5-502(C) provides: "Except as to scientific or medical reports, this rule does not authorize the discovery or inspection:

- of reports, memoranda or other internal defense documents made by the defendant, his attorneys or agents, in connection with the investigation or defense of the case; or
- of statements made by the defendant to his agents or attorneys."

Rule 5-503(C) specifically delineates the scope of discovery as follows:

> "Unless otherwise limited by order of the court, parties may obtain discovery regarding any matter, not privileged, which is relevant to the offense charged or the defense of the accused person…. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

Rule 5-503 also provides for the taking of statements and depositions. "Any person, other than the defendant, with information which is subject to discovery shall give a statement." However, depositions are only able to be taken upon agreement of the parties or by "order of the court … upon a showing that it is necessary to take the person's deposition to prevent injustice." Rule 5-503(A) and (B). In addition, "[a]t any time during a deposition or statement, on motion of a party, the witness or the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass or oppress the witness or the deponent, the court in which the action is pending, or the court in the county where the deposition or statement is being taken, may order the examination to cease or may limit the scope and manner of the taking of the deposition or statement pursuant to Rule 5-507." Rule 5-503(G).

4.9.2 Protective Orders Related to Discovery

"Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a

deposition or statement, the court in the district where the deposition or statement is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, undue burden or expense, the risk of physical harm, intimidation, bribery or economic reprisals. The order may include one or more of the following restrictions:

- that the deposition or statement requested not be taken;
- that the deposition or statement requested be deferred;
- that the deposition or statement may be had only on specified terms and conditions, including a designation of the time or place;
- that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;
- that the deposition or statement be conducted with no one present except persons designated by the court;
- that a deposition or statement after being sealed be opened only by order of the court;
- a trade secret or other confidential research, development or commercial information not be disclosed or be disclosed only in a designated way; and
- that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court."

Rule 5-507(A). The Committee Commentary to Rule 5-507 states that this "rule provides a protective order procedure only for the taking of depositions. Some of the same criteria for denying a party the opportunity to take a deposition are also used for denying discovery of evidence held by the state under Paragraph E of Rule 5-501." Rule 5-507, Committee Commentary.

State v. Herrera, 92 N.M. 7, 582 P.2d 384 (Ct. App. 1978), addressed the issue of limiting a deposition in a case involving convictions for kidnapping, criminal sexual penetration and robbery. The court confirmed that a "[d]efendant has no constitutional right to depose the victim in a criminal case; this right exists solely under [Rule 5-503]. *Herrera* at 14, 391 (*citations omitted*). See also *State v. Bobbin*, 103 N.M. 375, 378, 707 P.2d 1185, 1188 (Ct. App. 1985). Rule 5-503 "permits the trial court to limit discovery of relevant matter." *Herrera* at 14, 391. Rule 5-507 authorizes limitations on depositions. "Apart from the question of relevancy, the trial court limited inquiry into the victim's past sexual conduct because defendant's reason for the inquiry was to harass the victim and possibly frighten her from appearing as a witness. Harassment and intimidation are grounds for restricting a deposition." *Id.*

"Reasonable restrictions on the exercise of a constitutional right are permissible. Similarly, reasonable limitations, authorized by rule, on questions to be asked at a deposition do not deprive the defendant of due process." *Id* (*citations omitted*).

4.9.3 Videotaped Depositions of Minors

Rule 5-504, Rule 10-217 and §30-9-17 provide for the taking of videotaped depositions of minors, in some circumstances. For more information about this topic, refer to the *New Mexico Child Welfare Handbook*, Chapter 27.

4.9.4 Work Product Doctrine in Criminal Cases

The New Mexico Supreme Court held recently that the work product doctrine applies in criminal actions. However, "the doctrine is not the same as in civil actions. Material which the rules require the State to disclose is not protected by the work product doctrine…. We conclude material that is opinion work product should have the same protection as in civil actions; that material enjoys nearly absolute immunity." *State v. Blackmer,* 2005-NMSC-008, ¶¶18-19 (involving charges of criminal sexual penetration, criminal sexual contact, kidnapping and false imprisonment).

Additionally, *Blackmer* held that "victim advocates [employed by the district attorney's office] are part of the prosecution team and that the relevant rules of attorney-client confidentiality and State disclosure are applicable." *Blackmer* at ¶22.

Finally, as a result of the *Blackmer* case, the 'statement' definition in Rule 5-501(G) was amended by Supreme Court Order 07-8300-02, effective March 15, 2007. The amendment limits the scope of the definition of 'statement' to verbatim recordings and to exclude notes which are in substance recitals of oral statements. Rule 5-501.

CHAPTER 5

SPECIALIZED PROCEDURES GOVERNING PRELIMNARY EXAMINATIONS AND TRIALS

This chapter covers:

- Closing courtrooms to the public.
- Media coverage in courtrooms.
- Speedy trial rights.
- Sequestration of victims and witnesses.
- Special protections for victims and witnesses while testifying.
- Defendant's right of self-representation and cross-examination of sexual assault victims.
- Victims of Crime Act and related issues.
- Testing and counseling for HIV and sexually transmitted diseases.
- Voir dire concerns in sexual assault cases.

5.1 Introduction

This chapter explores various procedures that a court may use in sexual assault cases. Some of these procedures deal with closing the courtroom and protecting victims, witnesses, and defendants from embarrassment, intimidation, and potentially violent encounters while testifying or while outside the courtroom. Included is information on sequestration rights and special protections for victims and witnesses.

Others topics discussed in this chapter deal with speedy trial rights, a defendant's right to self-representation, and the ordering of a defendant to undergo testing and counseling for various communicable diseases, including sexually transmitted diseases and HIV. The last section of this chapter discusses potential issues that can be explored in voir dire to ensure that a jury panel does not harbor misconceptions about the nature of sexual assault, sexual assault laws, and the behavior and characteristics of alleged sex offenders and victims.

5.2 Closing Courtrooms to the Public

New Mexico Constitution Article II, §14 gives a criminal defendant the right to a public trial. The determination as to whether the general public may be excluded from a trial rests within the discretion of the trial court. In determining whether such discretion was abused, the starting view is:

> “that the interest of a defendant in having ordinary spectators present during trial is not an absolute right but must be balanced against other interests which might justify excluding them.
>
> “Rape constitutes an intrusion upon areas of the victim's life, both physical and psychological, to which our society attaches the deepest sense of privacy. Shame and loss of dignity, however unjustified from a moral standpoint, are natural byproducts of an attempt to recount details of a rape before a curious and disinterested audience. The ordeal of describing an unwanted sexual encounter before persons with no more than a prurient interest in it aggravates the original injury. Mitigation of the ordeal is a justifiable concern of the public and of the trial court.
>
> “Recognition that protection of the dignity of the complaining witness is a substantial justification for excluding spectators does not end our inquiry. Protection of the complaining witness from potential embarrassment does not justify any perceptible increase in the likelihood that the defendant might be convicted. The presence of this justification merely eliminates the implication as a matter of law that the defendant was prejudiced by the exclusion of spectators and leads us to the question of whether the defendant actually was prejudiced by that action.”

State v. Padilla, 91 N.M. 800, 802, 581 P.2d 1295, 1297 (Ct. App. 1978) (*citations omitted*). See also *State v. Apodaca*, 105 N.M. 650, 735 P.2d 1156 (Ct. App. 1987) *overruled on other grounds* (following *Padilla* in concluding that exclusion of the public from trial is in the trial court’s discretion, that the issue for appeal is abuse of discretion, and that the defendant has the burden of proof to show actual prejudice).

5.3 Media Coverage in Courtrooms

Sexual assault cases may tend to garner significant media attention. Pursuant to Supreme Court Rule 23-107, “broadcasting, televising, photographing and recording of court proceedings … are hereby authorized in accordance with the guidelines promulgated herewith which contain safeguards to ensure that this type of media coverage shall not detract from the dignity of the court proceedings or otherwise interfere with the achievement of a fair and impartial hearing.” However, among other things, it is within the presiding district judge’s “sole and plenary discretion to exclude coverage of certain witnesses, including but not limited to the **victims of sex crimes and their families**, police informants, undercover agents, relocated witnesses and juveniles.” Rule 23-107 (*emphasis added*).

5.4 Speedy Trial Rights

5.4.1 Defendant's Right to Speedy Trial

Both the U.S. and New Mexico Constitutions guarantee a criminal defendant the right to a speedy trial. See U.S. Const. Amend. VI; N.M. Const. Art. II, §14. In addition to the constitutional right, Rule 5-604 provides that a criminal trial will begin within 6 months of a list of specified events. The right to a speedy trial pertains to sexual assault crimes, just as it does to all other crimes. However, certain unique issues may arise in sexual assault cases.

For example, the right to a speedy trial based on a 1989 original complaint alleging criminal sexual penetration of a child, which was dismissed, did not run from 1989 to 2002 when charges were re-filed because defendant was not an "accused" and knew he was not an "accused" during the approximately 13-year interval when no criminal sexual penetration of a minor under the age of 13 charges were pending against him. Defendant's speedy trial right did not attach until 2002. *State v. Hill*, 2005-NMCA-143.

5.4.2 Crime Victim's Right to Speedy Trial

The Victims of Crimes Act provides among many things that a "victim shall have the right to … timely disposition of the case…." §31-26-4(B). See also N.M. Const. Art. II, §24.

5.5 Sequestration of Victims and Witnesses

"At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of:

- a party who is a natural person; or
- an officer or employee of a party which is not a natural person designated as its representative by its attorney; or
- a person whose presence is shown by a party to be essential to the presentation of the party's cause."

Rule 11-615.

In conjunction with the above rule on witness sequestration, the victim's statutory right to "attend all public court proceedings the accused has the right to attend" must be considered. §31-26-4(E). See also N.M. Const. Art. II, §24(A)(5).

At the time of the drafting of Rule 5-504 regarding videotaped depositions and their use at trial, "the committee explored the possibility of removing all spectators from the courtroom during the child's testimony. This was rejected as it may not be constitutionally permissible to bar wholly the public and the press from the courtroom without the concurrence of the

defendant under either the New Mexico Constitution or the United States Constitution." Rule 5-504, Committee Commentary.

Recently, a petition was filed with the New Mexico Supreme Court regarding the issue of victim attendance at all proceedings that the accused has the right to attend. The Supreme Court declined to issue a full opinion on the issue, but did issue Amended Order of Remand No. 29,878, dated November 13, 2006, remanding the case to the Thirteenth Judicial District Court in Valencia County. In that order, the Supreme Court stated:

- that the victim has standing to file a motion with the district court seeking to attend all public district court proceedings the accused has the right to attend; and
- that in making its ruling the district court should try to maximize the protections available to the victim and to the accused under the rules of procedure, rules of evidence including Rules 11-611 and 11-615, the state statutes and the state and federal constitutions.

5.6 Special Protections for Victims and Witnesses While Testifying

5.6.1 Victims or Witnesses (Regardless of Age or Disability)

Pursuant to Rule 11-611(A), "the court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to:

- make the interrogation and presentation effective for the ascertainment of the truth,
- avoid needless consumption of time, and
- protect witnesses from harassment or undue embarrassment."

Rule 11-611(A) contains no age or developmental disability restrictions and thus may be applied to all victims and witnesses. Moreover, Rule 11-611(A) contains no restrictions as to the specific type of procedures or protections that may be employed to protect victims and witnesses.

5.6.2 Victims or Witnesses (Minors/Those with Developmental Disabilities)

A. Witness/Victim under Age 16

Rule 5-504 provides that "[u]pon motion, and after notice to opposing counsel, at any time after the filing of the indictment, information or complaint in district court charging a criminal sexual penetration or criminal sexual contact on a child under sixteen (16) years of age, the district court may order the taking of a videotaped deposition of the victim, upon a showing that the child may be unable to testify without suffering unreasonable and unnecessary mental or emotional harm. The district judge must attend any deposition taken pursuant to this paragraph and shall provide such protection of the child as the judge deems necessary." Rule 5-504(A).

"At the trial of a defendant charged with criminal sexual penetration or criminal sexual contact on a child under sixteen (16) years of age, any part or all of the videotaped deposition of a child under sixteen (16) years of age taken pursuant to [Rule 5-504(A)] may be shown to the trial judge or the jury and admitted as evidence as an additional exception to the hearsay rule of the Rules of Evidence if:

- the child is unable to testify before the court without suffering unreasonable and unnecessary mental or emotional harm;
- the deposition was presided over by a district judge and the defendant was present and was represented by counsel or waived counsel; and
- the defendant was given an adequate opportunity to cross-examine the child, subject to such protection of the child as the judge deems necessary."

Rule 5-504(B). See also §30-9-17.

The Committee Commentary to Rule 5-504 states that "the court should consider the following factors in determining whether a videotaped deposition should be taken to avoid a victim child from suffering unreasonable and unnecessary mental or emotional harm:

- the child is unable to testify because of fear;
- there is a substantial likelihood, established by expert testimony, that the child would suffer emotional trauma from testifying;
- the child suffers a mental or other infirmity; or
- conduct by defendant or defense counsel causes the child to be unable to continue testifying."

The trial court judge has discretion to provide protection to a child witness as deemed necessary. For example, although the general rule is that the accused has a right to a face-to-face confrontation, this rule is subject to policy or necessity considerations. See *State v. Tafoya*, 108 N.M. 1, 765 P.2d 1183 (Ct. App. 1988) (concluding that the right to face-to-face confrontation must give way when necessary to protect a child who is a victim of a sex offense from further mental or emotional harm). *Tafoya* held that a defendant is "present" during a deposition when the defendant is in a control booth in constant contact with his attorney and can view all of the proceedings. See also *State v. Fairweather*, 116 N.M. 456, 863 P.2d 1077 (1993). As another example, in a prosecution for criminal sexual penetration of a minor, the appellate court concluded that the trial court did not err by allowing the victim to hold a teddy bear while giving testimony. This was considered a less stringent measure than using videotaped testimony. *State v. Marquez*, 1998-NMCA-010. However, it is important to note that the trial court must make individualized findings concerning the victim's need for special protection. See *State v. Benny E.*, 110 N.M. 237, 794 P.2d 380 (Ct. App. 1990).

Additional information regarding child witnesses and victims may be found in the *New Mexico Child Welfare Handbook*, chapters 27 and 34.

B. Witness with Developmental Disability

"In any judicial proceeding wherein a witness with mental retardation may or will testify, the court on its own motion or on motion of the proponent of the witness with mental retardation, and after hearing, may order the use of one of the alternative procedures for … taking the testimony of the witness with mental retardation described [in §38-6-8(D)], provided that the court finds at the time of the order, by a preponderance of the evidence in the case, that the witness with mental retardation is likely, as a result of submitting to usual procedures for determining competency or as a result of testifying in open court:

- to suffer unreasonable and unnecessary mental or emotional harm; or
- to suffer a temporary loss of or regression in cognitive or behavioral functioning or communicative abilities such that his ability to testify will be significantly impaired."

§38-6-8(B).

The court may order alternative procedures for taking testimony from a witness with mental retardation as follows:

- taking the testimony of the witness with mental retardation while permitting a person familiar to the witness such as a family member, clinician, counselor, social worker or friend to sit near or next to him (this option may be used alone or in conjunction with any of the other following options);
- taking the testimony of the witness with mental retardation in court but off the witness stand;
- if the proceeding is a bench proceeding, taking the testimony of the witness with mental retardation in a setting familiar to the witness; or
- if the proceeding is a jury trial, videotaping of testimony, out of the presence of the jury or in a location chosen by the court or by agreement of the parties.

§38-6-8(D). If the court orders the use of an alternative procedure, "the court shall make and enter specific findings on the record describing the reasons for such order." §38-6-8(C). Section 38-6-8 contains additional procedures and definitions pertinent to the taking of testimony from a witness with mental retardation.

5.6.3 Victim Gesturing and Reenactment

A victim of a sexual assault crime experiences a multitude of emotions, including, to name a few, extreme fear, embarrassment, and humiliation. Because of the potential of making victims recreate these emotions through gesturing and reenactment on the witness stand, the Michigan Sexual Assault Systems Response Task Force, in its report *The Response to Sexual Assault: Removing Barriers to Services and Justice* (2001), p 59 §L, (www.mcadsv.org/products/sa/TASKFORCE.pdf, last visited March 2008), recommends that trial courts adopt the following as a best practice:

> "On the witness stand, victims are not required to show on their own bodies how they were touched or to demonstrate the position in which they were assaulted. This does not imply that a victim may not indicate by gesturing to clarify where contact was made. However, this should be used sparingly and only as necessary to clarify the record."

If a witness is allowed to gesture or reenact while testifying, it is important for the court or counsel to accurately describe on the record the physical actions of the witness. Although sometimes difficult and tedious, a detailed description of the gesturing and reenactment, if done well, will help the attorneys and judges on appellate review or in subsequent civil cases.

5.7 Defendant's Right of Self-Representation and Cross-Examination of Sexual Assault Victims

During cross-examination of a witness, the potential exists for a self-represented defendant to try to use intimidation or subtle coercion through the line of questioning or the manner in which the questions are asked to cause trauma to the witness or to obstruct testimony. This is especially true with child witnesses. This section explores a defendant's right to self-representation, and includes appropriate alternatives to allowing the self-represented defendant to cross-examine victims and witnesses, such as appointing standby counsel and preparing written questions to be read by the court or standby counsel.

The right to self-representation is implicitly guaranteed by the Sixth Amendment. *Faretta v. California*, 422 U.S. 806 (1975). The right is also guaranteed by the New Mexico Constitution Article II, §14. However, the right to self-representation is not absolute. It may be limited or even terminated when, for instance, the defendant engages in "serious and obstructionist misconduct." *Faretta* at 834, n46.

The New Mexico appellate courts have addressed the issue of self-representation in criminal cases on a number of occasions. These opinions confirm that a defendant has a Sixth Amendment right to counsel. And, as a corollary, a defendant also has a Sixth Amendment right to reject counsel and represent him or herself. If a defendant indicates that he or she wishes to proceed pro se, then the court must ascertain whether defendant made this decision knowingly, intelligently and voluntarily. *State v. Vincent*, 2005-NMCA-064, ¶¶11-12. See also *State v. Castillo*, 110 N.M. 54, 791 P.2d 808 (Ct. App. 1990). There are no fixed guidelines to determine whether a defendant has knowingly and intelligently waived the right to counsel, but the New Mexico Court of Appeals, relying on *Castillo,* determined that the trial court should:

- show on the record that a defendant has some sense of the magnitude of the undertaking and the hazards inherent in self-representation;
- ensure that defendant has been informed of the nature of the charges, the statutory offenses included within them, the range of allowable punishments, possible defenses or mitigating factors that might be available to the defendant; and
- admonish the defendant that pro se defendants will be expected to follow the rules of evidence and courtroom procedure.

State v. Plouse, 2003-NMCA-048, ¶23. In cases of self representation, "appointment of standby counsel is preferred, [however,] the presence of advisory counsel in the courtroom does not, by itself, relieve the trial court of its duty to ensure that defendant's waiver is made knowingly and intelligently. Even when standby counsel is appointed, the trial court must ensure that defendant is aware of the hazards and disadvantages of self-representation." *Castillo* at 58, 812 (*citations omitted*).

Although no New Mexico appellate court has decided the boundaries of a self-represented defendant's right to *personally* cross-examine a victim or witness, courts in other jurisdictions have decided that a criminal defendant may be denied the opportunity to personally cross-examine a victim or witness. See, e.g., *Fields v. Murray*, 49 F.3d 1024 (4th Cir. 1995); *State v. Estabrook*, 842 P.2d 1001 (Wash. App. 1993); *Commonwealth v. Conefrey*, 570 N.E.2d 1384 (Mass. 1991).

5.8 The Victims of Crime Act *(§§31-26-1 to 31-26-14)*

The Victims of Crime Act outlines the rights and responsibilities of alleged victims of certain violent crimes. It also outlines the duties of law enforcement, the prosecutor's office, and the court toward the alleged victim when investigating, prosecuting, and trying these violent crimes. The New Mexico Constitution also provides for protection of Victim's Rights. See N.M. Const. Art. II, §24.

5.8.1 Application of the Victims of Crime Act

The Victims of Crime Act applies to alleged victims of many listed crimes (§31-26-3(B)) including:

- Kidnapping
- Criminal Sexual Penetration
- Criminal Sexual Contact of a Minor

5.8.2 Victims' Rights Under the Act

Under the Act (§31-26-4), an alleged victim has the right to:

- Be treated with fairness and respect for the victim's dignity and privacy throughout the criminal justice process;
- Timely disposition of the case;
- Be reasonably protected from the accused throughout the criminal justice process;
- Notification of court proceedings;
- Attend all public proceedings the accused has the right to attend;
- Confer with the prosecutor;
- Make a statement to the court at sentencing and at any post-sentencing hearings for the accused;

- For cases filed on or after June 17, 2005: Make a statement to the court at any scheduled court proceeding regarding the victim's rights under the Act (§31-26-10.1);
- Restitution from the person convicted of the criminal offense that caused the victim's loss or injury;
- Information about the conviction, sentencing, imprisonment, escape or release of the accused;
- Have the prosecutor notify the victim's employer, if requested by the victim, of the necessity of the victim's cooperation and testimony in a court proceeding that may necessitate the absence of the victim from work for good cause;
- Promptly receive any property belonging to the victim that is being held for evidentiary purposes by a law enforcement agency or the prosecutor, unless there are compelling evidentiary reasons for retaining the victim's property; and
- Be informed by the court at a sentencing proceeding that the offender is eligible to earn meritorious deductions from the sentence imposed and the amount of meritorious deductions that may be earned by the offender.

An alleged victim may exercise his or her rights under this Act (§31-26-5) only if he or she:

- Reports the criminal offense within five days of the occurrence, unless the prosecutor determines that the victim had a reasonable excuse for failing to do so;
- Provides the prosecutor with current and updated information regarding the victim's name, address, and telephone number; and
- Fully cooperates and fully responds to reasonable requests by law enforcement agencies and district attorneys.

The rights and duties established under this Act take effect when a suspect is formally charged by a prosecutor with committing a criminal offense against the alleged victim. The rights and duties remain in effect until final disposition of the court proceedings. §31-26-6.

An alleged victim may designate a "victim's representative" to exercise all rights provided under the Act. An alleged victim may revoke such designation of a victim's representative at any time. §31-26-7.

5.8.3 Law Enforcement Duties Under the Act

Under the Victims of Crime Act (§31-26-8) law enforcement officers must fulfill the following specific duties:

- Inform the victim of medical services and crisis intervention services available to victims;
- Provide the victim with the police report number for the criminal offense and a copy of the following statement: 'If within thirty days you are not notified of an arrest in your case, you may call (telephone number for the law enforcement agency) to obtain information on the status of your case'; and

- Provide the victim with the name of the district attorney for the judicial district in which the criminal offense was committed and the address and telephone number for that district attorney's office.

5.8.4 Prosecutors' Duties Under the Act

District attorneys also have specific duties under the Victims of Crime Act (§31-26-9), specifically:

- Within seven working days after a district attorney files a formal charge against the accused for a criminal offense, the district attorney shall provide the victim of the criminal offense with:
  - A copy of Article II, §24 of the N.M. Constitution, regarding victims' rights;
  - A copy of the Victims of Crime Act;
  - A copy of the charge filed against the accused for the criminal offense;
  - A clear and concise statement of the procedural steps generally involved in prosecuting a criminal offense; and
  - The name of a person within the district attorney's office whom the victim may contact for additional information regarding prosecution of the criminal offense.
- For cases filed before June 17, 2005: If requested by the victim, the district attorney's office shall provide the victim with oral or written notice, in a timely fashion, of a scheduled court proceeding attendant to the criminal offense.
- For cases filed on or after June 17, 2005: The district attorney's office *must* provide the victim with timely oral or written notice of a scheduled court proceeding attendant to the criminal offense—whether or not the victim requests such information.

5.8.5 Courts' Duties Under the Act

In cases that fall under the Act that are filed on or after June 17, 2005, the trial court must:

- Inquire on the record whether a victim is present for the purpose of making an oral statement or submitting a written statement respecting the victim's rights;
- If the victim is not present, the court must inquire on the record whether the prosecutor has made an attempt to notify the victim of the proceeding. If the prosecutor cannot verify that an attempt has been made, the court must:
  - Reschedule the hearing; or
  - Continue with the hearing but reserve ruling until the victim has been notified and given an opportunity to make a statement; and
  - Order the prosecutor to notify the victim of the rescheduled hearing.

§31-26-10.1(A).

Note, however, that nothing in the Act requires "the court to continue or reschedule any proceedings if [doing so] would result in a violation of a jurisdictional rule." §31-26-10.1(C).

5.8.6 Confidentiality of Information that Identifies the Victim

In cases where the alleged victim is in hiding from the defendant, the court can promote safety by restricting the defendant's access to information that would identify the victim's whereabouts. For many felony cases, the Victims of Crime Act, §31-26-1, et. seq., declares that the victim of the crime has the right "to be reasonably protected from the accused throughout the criminal justice process." §31-26-4(C). The defendant has the right to prepare a defense, and that will include the opportunity to identify the victim and obtain discovery through counsel in preparation for trial, including a statement from the accuser. So long as those rights are preserved, the court should consider whether the circumstances of the case justify the victim having withheld from disclosure during hearings or in any court files his or her:

- Address;
- Place of employment; and
- Telephone number.

Similarly, the court may consider withholding from the defendant other personal information that may place a victim in danger, including:

- A child's residence address;
- A victim's job training address;
- A victim's occupation;
- Facts about a victim's receipt of public assistance;
- A child's day-care or school address;
- Addresses for a child's health care providers; and
- Telephone numbers for the above entities.

Court records are not the only source of identifying information about crime victims. Victims can often be located by obtaining addresses from children's school, day care, medical, or dental records.

5.8.7 Related Issues

A. Sexual Crimes Prosecution and Treatment Act

The Sexual Crimes Prosecution and Treatment Act, §29-11-1, et. seq., which applies to sexual offenses in §§30-9-10 through 30-9-16, is designed to promote effective law enforcement and prosecution of sexual crimes, assist community victim treatment programs, provide interagency cooperation and training, and encourage proper handling and testing of evidence.

Free Forensic Exams for Victims of Sexual Crimes: One of the Act's requirements is that the Director of the Mental Health Division of the state Department of Health, or a designee, must provide free forensic medical exams to victims of sexual crimes, or arrange for victims to obtain these exams free, or reimburse victims for the cost of these exams. §29-11-7.

Obtaining Services Without Obligation to Prosecute: An additional key provision of the Sexual Crimes Prosecution and Treatment Act reads: "Nothing in [§29-11-5] shall be construed to require criminal prosecution of a suspect of a sexual crime by the victim to whom services are rendered pursuant to the provisions of the Sexual Crimes Prosecution and Treatment Act." §29-11-5. This provision allows the victim of a sexual crime to obtain services under the Sexual Crimes Prosecution and Treatment Act without an obligation to prosecute.

B. Fee Waiver for Certain Crime Victims (§ 30-1-15)

The following costs are waived for the alleged victims of certain crimes:

- the cost of filing a criminal charge against an alleged perpetrator; and
- the cost of issuing or serving a warrant, witness subpoena, or protection order.

The fee waiver applies to alleged victims of the following crimes, among others: sexual offenses described in §§30-9-11 through 30-9-14 and §30-9-14.3.

C. Emergency Contraception for Sexual Assault Survivor (§§ 24-10D-1, et. seq.)

The Sexual Assault Survivors Emergency Care Act provides that "a hospital that provides emergency care for sexual assault survivors shall:

- provide each sexual assault survivor with medically and factually accurate and objective written and oral information about emergency contraception;
- orally and in writing inform each sexual assault survivor of her option to be provided emergency contraception at the hospital; and
- provide emergency contraception at the hospital to each sexual assault survivor who requests it.

§24-10D-3(A). For purposes of this Act, 'sexual assault' is defined as criminal sexual penetration. §24-10D-2(F).

D. Photographic Evidence

While relevant photographic evidence may be admitted in criminal cases unless its probative value is substantially outweighed by the danger of unfair prejudice, Rule 11-403, sexual assault cases call for particular discretion as photographs may depict such intimate details as the alleged victim's genitals.

5.9 Testing and Counseling for HIV and Sexually Transmitted Diseases

This section discusses a court's authority to order testing and counseling for HIV and other sexually transmitted diseases after a defendant has been *formally charged* with certain criminal

offenses. For discussion of this issue after a defendant has been *convicted* of certain criminal offenses, see chapter 8 of this benchbook.

5.9.1 Testing

"A test designed to identify the human immunodeficiency virus or its antigen or antibody may be performed, without his consent, on a person upon the filing of a complaint, information or an indictment alleging that the person committed a state criminal offense:

- involving contact between the penis and the vulva;
- involving contact between the penis and anus;
- involving contact between the mouth and penis;
- involving contact between the mouth and vulva; or
- involving contact between the mouth and anus."

§24-2B-5.2(A). For an analogous provision relating to sexually transmitted diseases, see §24-1-9.2(A).

"If consent to perform a test on an alleged offender cannot be obtained pursuant to the provisions of §§24-2B-2 or 24-2B-3, the victim of the alleged criminal offense described in §24-2B-5.2(A) may petition the court, through the prosecuting office or personally, to order that a test be performed on the alleged offender; provided that the same test is first performed on the victim of the alleged criminal offense. The test may be performed on the alleged offender regardless of the result of the test performed on the victim of the alleged offense. If the victim of the alleged criminal offense is a minor or incompetent, the parent or legal guardian of the victim of the alleged criminal offense may petition the court to order that a test be performed on the alleged offender." §24-2B-5.2(B). For an analogous provision relating to sexually transmitted diseases, see §24-1-9.2(B).

"The court may issue an order based on a finding of good cause after a hearing at which both the victim of the alleged criminal offense and the alleged offender have the right to be present. During the hearing, only affidavits, counter affidavits and medical reports regarding the facts that support or rebut the issuance of an order shall be admissible. The hearing shall be conducted within seventy-two hours after the victim of the alleged criminal offense petitions the court for the order. The petition and all proceedings in connection therewith shall be under seal. The court shall issue the order and the test shall be administered to the alleged offender within ten days after the petition is filed by the victim of the alleged offense, his parent or guardian." §24-2B-5.2(C). For an analogous provision relating to sexually transmitted diseases, see §24-1-9.2(C).

5.9.2 Counseling

"When the victim of the alleged criminal offense or the alleged offender has a positive test result, both the alleged offender and the victim of the alleged criminal offense shall be provided with counseling." §24-2B-5.2(D). For an analogous provision relating to sexually transmitted diseases, see §24-1-9.2(D). "No positive test result shall be revealed to the

person upon whom the test was performed without the person performing the test or the health facility at which the test was performed providing or referring that person for individual counseling about:

- the meaning of the test results;
- the possible need for additional testing;
- the availability of appropriate health care services, including mental health care, social and support services; and
- the benefits of locating and counseling any individual by whom the infected person may have been exposed to the human immunodeficiency virus and any individual whom the infected person may have exposed to the human immunodeficiency virus."

§24-2B-4. For an analogous provision relating to sexually transmitted diseases, see §24-1-9.3.

5.9.3 Disclosure of Test Results

"The results of the test shall be disclosed only to the alleged offender and to the victim of the alleged criminal offense or the victim's parent or legal guardian." §24-2B-5.2(D). For an analogous provision relating to sexually transmitted diseases, see §24-1-9.2(D). "No person to whom the results of a test have been disclosed may disclose the test results to another person except as authorized by the HIV Test Act." §24-2B-7. For an analogous provision relating to sexually transmitted diseases, see §24-1-9.5. "Nothing in the HIV Test Act shall be construed to prevent a person who has been tested from disclosing in any way to any other person his own test results. Any victim of an alleged criminal offense who receives information pursuant to §24-2B-5.2 may disclose the test results as is reasonably necessary to protect his health and safety or the health and safety of his family or sexual partner." §24-2B-8. For an analogous provision relating to sexually transmitted diseases, see §24-1-9.6. In addition, the HIV Act provides that the test results must not be disclosed with any identifiable information except to the listed persons or entities as provided in the Act. §24-2B-6. For an analogous provision relating to sexually transmitted diseases, see §24-1-9.4.

5.10 Voir Dire Concerns in Sexual Assault Cases

Jury selection in criminal cases involving allegations of sexual assault is important, if not critical, because of the potential for jurors to make decisions based on misconceptions and erroneous stereotypes about not only the sexual assault, but also the alleged offenders and victims. One sexual assault expert, Paul DerOhannesian II, in his book *Sexual Assault Trials* (Charlottesville, VA: Lexis, 2d ed, Vol 1, 1998), p. 147, explained as follows:

> "Most jurors [in sexual assault cases] will make decisions based upon feelings, emotions, and previously held beliefs, and not just upon the facts through a rational process. Beliefs and attitudes can change and have changed about sexual assault, which are reflected in significant changes in the laws that apply to sexual assault. These beliefs and attitudes must be assessed."

Although it did not specifically address the jury selection and the voir dire process, Michigan's Sexual Assault Systems Response Task Force, in its report, *The Response to Sexual Assault: Removing Barriers to Services and Justice*, p. 58 §A (www.mcadsv.org/products/sa/TASKFORCE.pdf, last visited March 2008), made the following recommendations as to best practices:

> "Pretrial and trial processes are conducted so that both the victim and the defendant receive a fair and impartial hearing that conforms to constitutional due process standards *and is as free as possible from taint by myths and stereotypes about sexual assault*." *(emphasis added)*

And on p. 58 §E:

> "No judge or court employee makes comments that trivialize sexual assault cases. Such comments include remarks about a victim's mode of dress, prior acquaintance with the defendant, personal habits, etc."

The following discussion presents some ideas and issues regarding sexual assault that a judge (and the parties) may want to explore and examine during voir dire. This discussion is intended only to identify and briefly explain an idea or issue; it is not intended to provide specific questions to ask potential jurors during voir dire. Also, these ideas and issues should not be perceived as precluding discussion of other ideas and issues that pertain to criminal cases generally, such as discussion of the burden and standard of proof, credibility of witnesses, physical and scientific evidence, etc. Because of this, a court may need to set aside more time in sexual assault cases to conduct voir dire.

Note: Many of the following voir dire ideas, issues, and concerns were taken from the National Judicial Education Program's *Understanding Sexual Violence: The Judicial Response to Stranger and Nonstranger Rape and Sexual Assault* (SJI, 1994), Unit IV, which also cites Kalven & Zeisel, *The American Jury* (1966) and LaFree, *Rape and Criminal Justice: The Social Construction of Sexual Assault* (1989).

- **Assumption of Risk -** Some jurors may view the alleged sexual assault in terms of the alleged victim's 'assumption of risk,' in other words, that because the person did certain things—walked alone at night, went to defendant's house or apartment, drank alcohol, used controlled substances, dressed provocatively—he or she 'assumed the risk' of the sexual assault and therefore the defendant should be acquitted. The court (or the parties) may want to question potential jurors about their views on this issue.

- **Victim Resistance -** A juror may be focused on the issue of whether the alleged victim resisted the actions of the alleged perpetrator. This issue might be a holdover from former rape statutes, which often required a complainant to resist the actions of the perpetrator. To prove criminal sexual penetration or criminal sexual contact, however, the state is not required to prove that the alleged victim resisted the actions of the alleged perpetrator. The court (or the parties) may want to question jurors

about whether they are going to expect that the prosecutor prove that the alleged victim resisted the actions of the defendant.

- **Victim Corroboration -** A juror may be preoccupied with the issue of whether the alleged victim's testimony is going to be corroborated by other witness testimony or physical evidence. Specifically, a juror may want to see and hear the witness who first reported the alleged sexual assault to authorities, if the victim was not the first person to report it to authorities. However, to prove criminal sexual penetration or criminal sexual contact, a prosecutor does not have to corroborate the testimony of the victim. §30-9-15. For more information see §6.6 of this benchbook. The court (or the parties) may want to question jurors about whether they believe that the prosecutor must corroborate the alleged victim's testimony with other evidence, testimonial or physical.

- **Physical (or Personal) Injury -** To believe that a sexual assault occurred, a juror may expect evidence that the sexual assault caused a physical injury to the alleged victim. However, under New Mexico statutes, unless it is an element of the offense, the prosecutor does not have to show that the alleged victim sustained a physical injury as a result of the sexual assault. The defined terms 'personal injury' and 'great bodily harm' are used in the elements of some types of criminal sexual penetration and criminal sexual contact, but not all. See §§30-9-10, 30-9-11, 30-9-12, and 30-1-12. The court (or the parties) may want to question the jurors about their views on the absence of injuries.

- **Consent -** Consent as a defense is discussed in greater detail in chapter 3 of this benchbook. In addition to considering consent as a defense, other issues are important when considering the possible views of jurors. Consent is determined from the alleged victim's subjective state of mind, not the defendant's reasonable belief that the victim consented. Consent does not have to be stated. It can also be given nonverbally by actions. The alleged victim may initially consent to sexual activity but later change his or her mind. He or she may also consent to some types of sexual activity but not to others. A court (or the parties) may want to ask a juror whether he or she will consider all the circumstances surrounding the event when determining whether consent was freely and willingly given and not forced or coerced.

- **Non-stranger Sexual Assault (Acquaintances, Intimate Partners, Spouses) -** Like some jurors in domestic violence cases, a juror in a sexual assault case may think that an alleged sexual assault between acquaintances, intimate partners, and spouses is a 'personal matter' and should not have been prosecuted. For purposes of charging a sexual assault crime, the relationship between the defendant and alleged victim is relevant only when it is a specific element of the offense, e.g., "position of authority" as in §30-9-11(E)(2). The New Mexico statutes on criminal sexual penetration contain no spousal exception. But see §30-9-11(G)(1). The court (or the parties) may want to question the jurors about their views on this issue.

- **Delay In Reporting Crime -** A juror may view a delay in reporting an alleged sexual assault as bearing on the question of whether it occurred or not. A court (or the parties) may want to question jurors on any reporting delays involved in the case, and to ask them whether they believe that there could be legitimate reasons to delay reporting a sexual assault, e.g., self-blame, embarrassment, humiliation, and fear of retaliation, or because the alleged victim was unconscious or under the influence of alcohol or controlled substances. A juror could be asked whether he or she understands that a delay in reporting an alleged sexual assault crime may depend on the circumstances of the crime and/or the personal coping skills of the alleged victim.

- **Personal Attributes -** A juror may have a preconceived notion of what a sex offender or a sexual assault victim should act or look like. As a result, a juror may base his or her decision in the case, in whole or in part, on this preconception. A court (or the parties) may want to question jurors on this issue to determine whether they are going to, in whole or in part, decide the case based their personal preconceptions of what a sex offender or sexual assault victim should look or act like, including the style and type of clothing, level of education, communication skills, etc.

- **Juror History of Sexual Assault -** A juror may have been a victim of a sexual assault, reported a sexual assault, or testified in a sexual assault case—or all of the above. A court (or the parties) may want to question potential jurors on this issue, and, if a panelist answers affirmatively, conduct a more detailed inquiry in the judge's chambers or in the courtroom in the absence of the jury pool/panel. The Use Note to UJI 14-120, *Voir Dire of Jurors by Court*, indicates that in "sexual matters, publicity or knowledge of parties might give reason for individual voir dire."

- **Consequences of Conviction and Sex Offender Registry -** A court should not instruct jurors regarding the potential consequences or penalties (punishment) that may arise after the verdict. UJI 14-6007 states: "you must not concern yourself with the consequences of your verdict" and the use note indicates that this is a proper instruction to give in every case. Although New Mexico has yet to decide the issue, other jurisdictions have applied this concept to questioning jurors regarding the potential of a defendant having to register under sex offender registration acts like New Mexico's Sex Offender Registration and Notification Act. See, e.g., *In re Spears*, 250 Mich. App. 349, 352-356 (2002) (applying this principal even though registration has been held not to be a form of 'punishment.')

For more information on the dynamics of sexual assault, refer to chapter 1 of this benchbook.

CHAPTER 6

GENERAL EVIDENCE

This chapter covers:

- Rape shield laws.
- Character evidence.
- Evidence of other crimes, wrongs or acts.
- Selected hearsay rules/exceptions.
- Witness competency.
- Corroboration of victim's testimony.
- Resistance to perpetrator.
- Privileges.

6.1 Introduction

This chapter addresses general evidentiary problems that are specific to criminal cases involving allegations of sexual assault. This chapter is by no means a comprehensive review of evidence in criminal cases. The *New Mexico Child Welfare Handbook*, Chapter 27, contains additional information about pertinent evidence issues.

6.2 New Mexico Rape Shield Law

New Mexico's Rape Shield Law comprises §30-9-16 and Rule 11-413. Together these two sections provide as follows:

- "As a matter of substantive right, in prosecutions pursuant to the provisions of Sections 30-9-11 through 30-9-15 NMSA 1978, evidence of the victim's past sexual conduct, opinion evidence of the victim's past sexual conduct or of reputation for past sexual conduct, shall not be admitted unless, and only to the extent that the court finds that, the evidence is material to the case and that its inflammatory or prejudicial nature does not outweigh its probative value." §30-9-16(A). See also Rule 11-413(A).

- "If the evidence referred to in Subsection A … of this section is proposed to be offered, the defendant shall file a written motion prior to trial. The court shall hear the pretrial motion prior to trial at an in camera hearing to determine whether the evidence is admissible pursuant to the provisions of Subsection A … of this section. If new information, which the defendant proposes to offer pursuant to the provisions of Subsection A … of this section, is discovered prior to or during the trial, the judge shall order an in camera hearing to determine whether the proposed evidence is admissible. If the proposed evidence is deemed admissible, the court shall issue a written order stating what evidence may be introduced by the defendant and stating the specific questions to be permitted." §30-9-16(C). See also Rule 11-413(B).

6.2.1 Context for the Development of Rape Shield Laws

A scholarly review of rape shield laws in general, and New Mexico's in particular, produced the following insights for consideration:

> "Prior to rape shield legislation, many courts considered a complainant's sexual history relevant to whether the victim consented on the occasion in question. The traditional rules were based on the faulty presumption that a woman with a character of unchastity or promiscuity was more likely to consent on any particular occasion. One commentator described this as the 'yes/yes inference.' That is, a woman who consented to nonmarital sex on some occasions was more likely to consent on all occasions. Courts also considered prior sexual conduct relevant to impeach a victim's credibility on the premise that an unchaste woman has a tendency to be untruthful.
>
> "Under these common law rules, defense lawyers 'were permitted great latitude in bringing out intimate details about a victim's life . . . even though that conduct may have at best a tenuous connection to the offense for which the defendant is being tried.' Such intrusions into a victim's private life, described by one commentator as 'nothing less than character-assassination in open court,' resulted in embarrassment and harassment of the rape victim. This hostility by the legal system had a significant impact on deterring reports of rape. Consequently, rape law reform has attempted to address the problems of underreporting and protecting the complainant from harassment by restricting the use of the complainant's sexual history.
>
> "Although rape shield laws differ from state to state, their primary purpose is to reverse the common law presumption discussed above, thereby denying the admission of evidence of prior sexual conduct aimed solely at the victim's unchaste character. Rape shield legislation generally falls into four categories based on the methods by which they restrict the admissibility of evidence of prior sexual conduct: (1) the Michigan approach; (2) the federal approach; (3) the New Mexico approach; and (4) the California approach. Each approach has been criticized as having inherent problems.

* * * * *

> "The approach taken by the New Mexico legislature is the least restrictive approach. Under this approach, judges are given broad discretion to determine the admissibility of prior sexual conduct evidence after an in camera pretrial hearing, in which the defendant offers proof of the relevance of the prior conduct evidence he is seeking to admit. Unlike the restrictive Michigan approach, there are no enumerated exceptions under the broad New Mexico approach. The determinative factor is whether the probative value of the evidence outweighs its prejudicial effect. This approach has been criticized as over-inclusive because it gives trial courts an 'unfettered exercise of discretion' without providing the courts with guidance in determining the probative value of prior sexual conduct evidence."

Graeber, H.A., *Evidence Law-Striking the Right Balance in New Mexico's Rape Shield Law-State v. Johnson*, 28 N.M.L. Rev. 611(1998)(*notes and citations omitted*). For additional history and contextual information, see *State v. Johnson*, 1997-NMSC-036.

6.2.2 The *State v. Johnson* Analysis of New Mexico's Rape Shield Law

In *State v. Johnson,* 1997-NMSC-036, a case involving convictions for aggravated assault, second degree criminal penetration, and false imprisonment where the victims were alleged prostitutes, the Supreme Court concluded "that, in this instance, our rape shield law and corresponding rule prevent the admission of prior sexual conduct by the victims, because Defendant failed to show (a) that the evidence was material and relevant, and (b) that its probative value equaled or outweighed its inflammatory or prejudicial nature." *Johnson* at ¶1. The court provided extensive contextual background on New Mexico's Rape Shield Law and laid out the case law prior to *Johnson*.

In discussing §30-9-16 and Rule 11-413, the *Johnson* court stated:

> "'The court has determined that the wording of the statute is not limited to sex by consent, rather, its unlimited wording applies to all sexual conduct.' *State v. Johnson, 102 N.M. 110, 117, 692 P.2d 35, 42 (Ct. App. 1984)* (citing *State v. Montoya, 91 N.M. 752, 580 P.2d 973 (Ct. App. 1978)).* Nothing in our statute or rule, however, limits the reasons a court might find evidence material and of sufficient probative value to justify admission. In particular, nothing in the statute or the rule precludes the introduction of relevant evidence of prostitution when the probative value of that evidence equals or outweighs its prejudicial effect."

Johnson at ¶19.

> "Our cases have held that trial courts should remove from the jury the temptation to pass judgment upon rape victims whenever possible. See *State v. Fish, 101 N.M. 329, 332-33, 681 P.2d 1106, 1109-10 (1984)* (upholding

> exclusion of prior sexual conduct evidence in the absence of substantial similarity between alleged prior rape and present case); *State v. Romero, 94 N.M. 22, 27, 606 P.2d 1116, 1121 (Ct. App. 1980)* (recognizing the rape shield statute reflects 'the strong public policy in this state to prevent unwarranted intrusions into the private affairs of victims of sex crimes'). We interpret such holdings as providing only general guidance to the trial court judge in applying the statute and rule. Such holdings emphasize the trial court's power to protect victim-witnesses through its discretion in determining materiality and balancing probative value against potential prejudice."

Johnson at ¶21. The *Johnson* court specifically negated the contention that New Mexico's rape shield laws provide trial courts 'nearly unfettered discretion.' *Id*.

6.2.3 Defendant's Right of Confrontation

Relying generally on *Davis v. Alaska*, 415 U.S. 308 (1974), the *Johnson* court found "that evidence of prior sexual conduct must be admitted if a defendant shows that evidence implicates his or her constitutional right of confrontation." *Johnson* at ¶22. "Application of the rape shield statute and rule often implicates the opposing principles of the protection of victims of sexual crimes on one hand, and the right of the criminal defendant to cross-examine the witnesses against him on the other. A defendant's right of confrontation -- with its protection of the right to cross-examine, test credibility, detect bias, and otherwise challenge an opposing version of facts -- is a critical limitation on the trial court's discretion to exclude evidence a defendant wishes to admit." *Johnson* at ¶23 (*citation and quotation omitted*). "If application of the rape shield law or rule would conflict with the accused's confrontation right, if it operates to preclude the defendant from presenting a full and fair defense, the statute and rule must yield. We conclude that *Federal Rule of Evidence 412*, which specifically provides that evidence is admissible if its exclusion would violate the constitutional rights of the defendant, states expressly what our rule must be construed to require implicitly." *Johnson* at ¶24.

6.2.4 New Mexico's Five Prong Balancing Test – A Framework for Trial Court Discretion

"The balance that must be achieved in implementing the statute and rule and protecting the rights of a defendant is delicate." *Johnson* at ¶25. The *Johnson* court saw the defendant's appeal as "an opportunity to describe the bounds of a trial court's discretion under our statute and rule." *Johnson* at ¶21. Thus, the Supreme Court adopted a five prong balancing test in *Johnson*. That five-part test was later applied and clearly articulated in *State v. Stephen F.*, 2007-NMCA-025, ¶12, *cert. granted*, as including the following factors:

- whether there is a clear showing that complainant committed the prior acts;
- whether the circumstances of the prior acts closely resemble those of the present case;
- whether the prior acts are clearly relevant to a material issue, such as identity, intent, or bias;
- whether the evidence is necessary to the defendant's case; and

- whether the probative value of the evidence outweighs its prejudicial effect.

In adopting the balancing test, the *Johnson* court concluded that a showing sufficient under the five-prong test "establishes a constitutional right to present evidence otherwise excluded by our statute. There may be other showings that are equally sufficient. We do not intend to limit the trial courts in the exercise of discretion under the rule and statute, but rather to suggest a possible framework for exercising that discretion." *Johnson* at ¶28.

6.2.5 Cases Addressing Exclusion/Inclusion of Victim's Prior Sexual Conduct Evidence

A. *State v. Payton*, 2007-NMCA-110, presented the issue of whether a defendant may introduce the fact that a victim has been previously sexually abused to show an alternate source of sexual knowledge. The court concluded that the defendant was not able to properly defend without the evidence. The court went on to say "[o]ur holding does not express an automatic right to introduce evidence of all sexual conduct or activity of a young victim. A defendant must always demonstrate relevancy. However, this case is one in which Defendant's right to present evidence in his defense trumps the unfortunate embarrassment to the victim." *Payton* at ¶¶14-15.

B. *State v. Stephen F.*, 2007-NMCA-025, *cert. granted*, involved a criminal sexual penetration conviction where both defendant and victim were minors. No disagreement existed that the sexual intercourse occurred between the two minors. Victim claimed she was raped, while defendant asserted consensual intercourse raising a defense that victim had 'motive to lie to avoid punishment.' In this case the Court of Appeals discussed its application of the five prong balancing test adopted in *Johnson*. The *Stephen F.* court concluded "that [Stephen F.] made the requisite showing under *State v. Johnson*, establishing a constitutional right to present evidence otherwise excluded by our rape shield statute." *Stephen F*. at ¶1. The court therefore held "that the trial court abused its discretion in excluding testimony that tended to prove the complaining witness's motive to lie…." *Id*. The court concluded that the defendant had articulated a plausible theory of relevance for the evidence of victim's prior sexual conduct. In contrast to *Johnson*, defendant "specifically argued that he intended the evidence to show that [the victim] had a motive to lie, and [defendant] provided the trial court with a legitimate theory of relevance." *Stephen F*. at ¶16. "A trial court *must* consider a defendant's confrontation rights in exercising its discretion to admit or exclude evidence of this nature. Because [defendant] established relevancy and necessity and because the trial court failed to consider this, we hold that the trial court abused its discretion in excluding the evidence." *Stephen F*. at ¶18.

C. *State v. Hueglin*, 2000-NMCA-106, a criminal sexual penetration case, presented a situation where "[d]efendant argued somewhat vaguely that evidence of the prior rape went to 'knowledge of the sexual awareness and especially if she'd gone through a traumatic experience like that on another occasion.' Defendant

did not enlarge on what he meant in referring to a 'traumatic experience like that on another occasion' nor did he tender any expert psychological testimony establishing the likelihood that Victim would have conflated the prior rape and her sexual encounter with Defendant. In the absence of expert testimony explaining how the prior incident would have affected Victim's recollection of her encounter with Defendant, Defendant would have been inviting the jury to engage in speculation based on lay psychology. Under these circumstances, the trial court did not abuse its discretion under Rules 11-403 and 11-413 … in prohibiting inquiry into the alleged prior rape." *Hueglin* at ¶26.

D. The court in *State v. Johnson*, 1997-NMSC-036, rejected the defendant's claim of relevancy because the "defendant never expressed his intention to use the prior sexual conduct evidence to expose the victims' motives to lie or as a basis for a theory of relevance other than propensity." *Johnson* at ¶37. The appellate court noted that even though evidence of a victim's prior sexual conduct may be admissible to show bias, motive to fabricate or for other purposes consistent with the constitutional right of confrontation, the trial court did not err in rejecting such evidence where defendant failed to show that it was material and relevant, and that its probative value equaled or outweighed its inherent prejudicial effect. *Johnson* at ¶40.

E. In *State v. Swafford*, 109 N.M. 132, 782 P.2d 385 (Ct. App. 1989), the court suppressed evidence of victim's prior sexual conduct as follows: "By way of an in camera hearing, defendant sought to introduce evidence of a past sexual encounter of victim and a third party during which victim allegedly affixed the ropes found on the bed to restrain the third party in the course of consensual sexual activity. The trial court ruled that any mention of the origin of the ropes would not be allowed, finding that such disclosure 'would advance no legitimate claim or defense available to the Defendant, unnecessarily confuse the jury, inject a false issue into the case, unreasonably humiliate and embarrass [victim], and run directly counter to the policies sought to be furthered by [§ 30-9-16 and Rule 11-413].' The trial court expressly concluded that the proffered evidence was not relevant to any material issue in this case: and, even if relevant, such relevance was marginal at best and any probative value it may have was outweighed by its prejudicial impact…. We hold that the trial court was within its discretion in its suppression of this evidence, since it was irrelevant to defendant's culpability for the crimes charged, advanced no legitimate defense, excuse, or justification for the crimes charged, and were likely to inject false issues and confuse the jury…. [W]e further hold that suppression of the evidence did not deprive defendant of due process, a fair trial, or an opportunity to confront witnesses against him; notably, defendant has not otherwise asserted that he was deprived of an opportunity to fully cross-examine victim and other witnesses during the trial." *Swafford* at 133-34, 386-87.

F. *State v. Gillette*, 102 N.M. 695, 702, 699 P.2d 626, 633 (Ct. App. 1985), held that a child victim's prior sexual conduct, whether with defendant or another, is

relevant and admissible insofar as it tends to show that defendant coerced the victim to submit to sex.

G. *State v. Fish*, 101 N.M. 329, 681 P.2d 1106 (1984) involved a prosecution for second-degree criminal sexual penetration where the defense theory included fabrication of the rape and consensual intercourse. Two aspects of the victim's prior sexual history were at issue, a prior rape and sexual intercourse with another man. The Supreme Court held that the "trial court properly excluded evidence of the victim's prior rape and other sexual history." *Fish* at 333, 1110.

H. *State v. Singleton*, 102 N.M. 66, 691 P.2d 67 (Ct. App. 1984), addressed the admissibility of evidence of a complainant's virginity. The defendant was convicted of kidnapping, attempted criminal sexual penetration, and criminal sexual penetration in the second degree. At issue was a statement allegedly made by the victim to the defendant during the sexual assault "pleading that she not be raped because she was still a virgin." *Singleton* at 69, 70. Defendant argued that evidence of the victim's virginity was barred under §30-9-16. The court concluded that the defendant had misused §30-9-16 "which is intended to protect victims from having their sexual history brought into evidence at trial when it is not relevant. Evidence of a victim's virginity is relevant in cases involving alleged forcible criminal sexual penetration where the consent of the victim is at issue." *Singleton* at 69, 70 (*citations omitted*). Although the defendant did not raise the defense of consent "because he denied any sexual contact with the victim, evidence that the victim had been forcibly raped was a fact necessary to be proven…. [E]vidence as to what the victim said to the defendant before being sexually assaulted was relevant and admissible to show that the sexual attack actually occurred and was carried out forcibly and violently. The victim's testimony tends to support her claim that she was sodomized and was relevant both to establish what in fact occurred during the incident and to rebut defendant's contentions that sexual penetration did not occur." *Id*. The court held that "[t]he fact that relevant evidence may tend to prejudice a defendant is not in and of itself grounds for the exclusion of the evidence. The trial court weighed the probative value of the evidence against its prejudicial effect to the defendant and properly admitted the testimony in its evidence." *Singleton* at 69-70, 70-71 (*citation omitted*).

I. *State v. Romero*, 94 N.M. 22, 606 P.2d 1116 (Ct. App. 1980) held that evidence that victim was a prostitute was not relevant to charge of rape, which victim said occurred at knifepoint, even though the defendant contended intercourse had been consensual. About *Romero*, the *Johnson* court stated that "[w]e are not certain that *Romero* is inconsistent with our holdings in this case…. However, to the extent *Romero* suggests that evidence of prostitution is relevant whenever a defendant contends that the intercourse with the defendant was itself an act of prostitution, it is overruled. The evidence offered should be relevant to a defense theory other than a theory based on propensity, because the fact-finder should

determine the defendant's guilt or innocence based on the particular encounter for which the defendant was charged." *Johnson* at ¶34.

J. *State v. Montoya*, 91 N.M. 752, 580 P.2d 973 (Ct. App. 1978) concluded that a prior codification of §30-9-16 was not limited to sex by consent. Rather, its unlimited wording applies to all forms of past sexual conduct, so that a prior rape is past sexual conduct within the meaning of this section. *Montoya* at 753, 974.

K. In *State v. Herrera*, 92 N.M. 7, 582 P.2d 384 (Ct. App 1978), the court concluded that a defendant claiming a rape victim's past sexual conduct as relevant to the issue of consent must make a preliminary showing which indicates relevancy, and the question of relevancy is not raised by merely asserting the issue. There must be a showing of a reasonable basis for believing that past sexual conduct is pertinent to the consent issue. *Herrera* at 16, 393.

6.3 Evidence of Character and Other Crimes, Wrongs or Acts

6.3.1 Admissibility Generally

Rule 11-404(A) provides as follows with respect to character evidence:

> "Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
>
> (1) Character of accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;
>
> (2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;
>
> (3) Character of witness. Evidence of the character of a witness, as provided in Rules 11-607, 11-608 and 11-609."

Additionally, Rule 11-404(B) provides as follows with respect to other crimes, wrongs or acts:

> "Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. The prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses

> pretrial notice on good cause shown, of any such evidence it intends to introduce at trial."

For cases interpreting this rule, see, e.g., *State v. Peters*, 1997-NMCA-084; *State v. Jones*, 120 N.M. 185, 899 P.2d 1139 (Ct. App. 1995).

In addition, the court must weigh the probative value of the evidence against the danger of unfair prejudice in deciding admissibility. See, e.g., Rule 11-403; *State v. Otto*, 2007-NMSC-012 (citing *State v. Woodward*, 121 N.M. 1, 908 P.2d 231 (1995) for the proposition that purpose of Rule 11-403 is not to guard against danger of any prejudice whatever, but only against danger of *unfair* prejudice and a statement is not unfairly prejudicial simply because it inculpates defendant); *Jones*.

6.3.2 Specific Instances of Use of Character Evidence in Sexual Assault and Related Cases

Defendant's truthfulness is not a pertinent trait of character in a prosecution for criminal sexual penetration of a minor or criminal sexual contact with a minor therefore the trial court did not abuse its discretion in excluding testimony about defendant's reputation for truth in the community where defendant had not testified. *State v. Ruiz*, 2007-NMCA-014, ¶¶45-47.

6.3.3 Specific Instances of Use of Other Crimes, Wrongs or Acts Evidence in Sexual Assault and Related Cases

For prior or subsequent bad acts toward the same victim, such evidence has been allowed, for example, as proof of defendant's:

- Mental element or intent: See, e.g., *State v. Kerby*, 2007-NMSC-014, ¶26 (evidence that defendant constructed a peephole to view victim's bathroom goes to the issue of sexual intent and is precisely the type of non-propensity evidence that Rule 11-404(B) allows); *State v. Otto*, 2007-NMSC-012, ¶¶9-13 (in a case involving the possibility that defendant unconsciously penetrated the victim, evidence of uncharged out of state acts was admissible to show intent and absence of mistake or accident); *State v. Ruiz*, 2007-NMCA-014, ¶¶31-33 (ex-wife's testimony about a specific incident that occurred when the minor victim of sexual abuse was spending the night as a guest, during which ex-wife observed defendant crouching beside the victim's bed, stroking her forehead and speaking softly to her, tended to establish that defendant behaved in an unusual manner displaying a peculiar form and degree of attention toward the victim and was relevant and admissible); *State v. Woodward*, 121 N.M. 1, 908 P.2d 231 (1995); *U.S. v. Joe*, 8 F.3d 1488 (10th Cir. 1993).

- Motive: See, e.g., *State v. Rojo*, 1999-NMSC-001, ¶¶ 46-48, *State v. Woodward*, 121 N.M. 1, 908 P.2d 231, ¶¶ 29-31 (1995).

- Mistake or accident: See, e.g., *State v. Otto*, 2007-NMSC-012.

- Lewd or lascivious disposition: The current state of this exception to Rule 11-404(B) has been called into question. As stated by the Court of Appeals in a case involving 'peephole' evidence: "Prior to the adoption of the Rules of Evidence, we upheld the admission of evidence of uncharged sexual conduct toward the prosecuting witness under the common-law 'lewd and lascivious disposition' exception to the rule against character evidence. *E.g.*, *State v. Minns*, 80 N.M. 269, 272, 454 P.2d 355, 358 (Ct. App. 1969). Subsequently, in *State v. Scott*, a case decided after the adoption of Rule 11-404(B), we relied upon *Minns* as support for the proposition that evidence of prior similar acts toward the victim, 'if not too remote, is admissible as showing a lewd and lascivious disposition . . . toward the prosecuting witness and as corroborating evidence.' 113 N.M. 525, 528, 828 P.2d 958, 961 (Ct. App. 1991) (quoting *Minns*, 80 N.M. at 272, 454 P.2d at 358). In *State v. Landers*, 115 N.M. 514, 519, 853 P.2d 1270, 1275 (Ct. App. 1992), this Court considered and rejected the argument that the exception for evidence of a lewd and lascivious disposition toward the prosecuting witness was inconsistent with Rule 11-404(B). We held that the trial court did not abuse its discretion in admitting evidence of incidents of uncharged sex misconduct that 'corroborated the victim's testimony and placed the charged acts in context.' *Id.* at 520, 853 P.2d at 1276." *State v. Kerby*, 2005-NMCA-106, ¶26 *modified by State v. Kerby*, 2007-NMSC-014.

  "We find it exceedingly difficult to reconcile the *Landers* exception for evidence of a lewd and lascivious disposition toward the prosecuting witness with Rule 11-404. In the related context of evidence of uncharged sexual misconduct with victims other than the prosecuting witness, we have acknowledged that 'the lewd disposition exception is nothing more than a euphemism for the character evidence which Federal Rule of Evidence 404(b) and its state counterparts are designed to exclude.' *State v. Lucero*, 114 N.M. 489, 492-93, 840 P.2d 1255, 1258-59 (Ct. App. 1992). Nothing in the express language of Rule 11-404 mandates the perpetuation of a common-law exception to the general proscription of propensity evidence; to the contrary, the lewd and lascivious disposition exception appears to flatly contradict the general proscription of propensity evidence found in Rule 11-404(A) and repeated in the first sentence of Rule 11-404(B). See *Lucero*, 114 N.M. at 492-93, 840 P.2d at 1258-59 (rejecting lewd-and-lascivious-disposition exception for evidence of uncharged conduct with other victims)." *Kerby*, 2005-NMCA-106, ¶28.

  "Logical consistency requires that we extend *Lucero* to the admission of evidence of uncharged misconduct with the prosecuting witness…. We hereby disavow *Landers* and its progeny's 'indefensible' distinction between evidence of a lewd and lascivious disposition toward the prosecuting witness and evidence of a lewd and lascivious disposition toward other victims." *Kerby*, 2005-NMCA-106, ¶29.

  But see *State v. Kerby*, 2007-NMSC-014, ¶26 (reversing the Court of Appeals ruling of inadmissibility of the peephole evidence stating without specifically referencing the lewd and lascivious exception that this is "precisely the type of non-propensity evidence that Rule 11-404(B) allows."); see also *State v. Gallegos*, 2007-NMSC-007, ¶26 (briefly discussing the lewd and lascivious doctrine).

- Other purposes: "…New Mexico is probably a state that considers SCRA 11-404(B) a rule of inclusion. That is, New Mexico allows use of other bad acts for many reasons, including those not specifically listed in SCRA 11-404(B). See *Williams*, 117 N.M. at 557, 874 P.2d at 18 (quoting *Landers*, 115 N.M. at 517, 853 P.2d at 1273). For example, in both *Ruiz*, 892 P.2d at 966-67, and *Jordan*, 116 N.M. at 80-81, 860 P.2d at 210-11, we approved the admission of other-bad-acts evidence to show the context of other admissible evidence, and in *Ruiz*, 892 P.2d at 965, we approved the admission of other-bad-acts evidence to show consciousness of guilt, neither of which purposes appears in the list of proper SCRA 11-404(B) purposes. Thus, the issue in New Mexico is whether there is a probative use of the evidence that is not based on the proposition that a bad person is more likely to commit a crime." *State v. Jones*, 120 N.M. 185, 187-88, 899 P.2d 1139, 1141-42 (Ct. App. 1995). See also *State v. Otto*, 2007-NMSC-012, ¶10 (noting that the list of purposes in Rule 11-404(B) is not exhaustive and evidence of other wrongs may be admissible on alternative relevant bases so long as it is not admitted to prove conformity with character).

Evidence of defendant's prior or subsequent bad acts toward a different victim has been admitted:

- To prove an element of the act or behavior pattern to show identity: See, e.g., *State v. Peters*, 1997-NMCA-084, ¶¶13-20 (evidence that two sexual assaults of two different victims shared a marked number of similarities material to the issue of identity particularly when coupled with corroborating DNA evidence); *State v. Allen*, 91 N.M. 759, 761, 581 P.2d 22, 24 (Ct. App. 1978) (testimony of sex offense victim B was sufficiently similar to prove identity of perpetrator of crime against victim A).

- To show abuse of authority: In a prosecution for criminal sexual contact of a minor who was a patient at the facility where defendant worked, defendant's son's testimony regarding his father's use of his position of domestic authority to influence him for sexual ends, was relevant as it went directly to the question of whether defendant had the plan, design, or intent to control the victim in same way for factually similar purposes. *State v. Lamure*, 115 N.M. 61, 66-67, 846 P.2d 1070, 1075-1076 (Ct. App. 1992).

Under other circumstances, similar evidence has been found inadmissible:

- For motive or identity: See, e.g., *State v. Williams*, 117 N.M. 551, 559, 874 P.2d 12, 20 (1994), (involving prosecution for murder and criminal sexual penetration where testimony by defendant's girlfriend regarding defendant's enjoyment of anal sex was inadmissible since evidence was not relevant to the defendant's identity because it was not so distinctive as to constitute a unique or distinct pattern easily attributable to one person); *State v. Beachum*, 96 N.M. 566, 568, 632 P.2d 1204, 1206 (Ct. App. 1981) ("In order for evidence to be admissible for this purpose, the similarity required must rise above the level of characteristics common to many incidents of the crime; it must demonstrate a unique or distinct pattern easily attributable to one person").

- For intent: See, e.g., *State v. Beachum*, 96 N.M. 566, 568, 632 P.2d 1204, 1206 (Ct. App. 1981) (where defendant claimed he did not commit the acts at all intent was not at issue; "[t]he rule in New Mexico and many other jurisdictions is that evidence is not admissible under Rule 404(b) to prove a material element of the crime charged unless that element is in issue").

- For lewd or lascivious disposition: See, e.g., *State v. Gallegos*, 2007-NMSC-007, ¶26 (evidence inadmissible where bad acts pertain to different victims as 'lewd and lascivious' doctrine can only be used to admit evidence of misconduct involving the same victim for which the defendant is on trial).

- For common scheme or plan: See, e.g., *State v. Gallegos*, 2007-NMSC-007, ¶29 (holding that the term 'plan' in Rule 11-404(B) cannot be used to introduce extrinsic-act evidence based solely on its similarity -- no matter how similar -- with the charged crime).

- For opportunity: See, e.g., *State v. Gallegos*, 2007-NMSC-007.

- For theory of 'grooming': See, e.g., *State v. Sena*, 2007-NMCA-115, *cert. granted* (court concluded evidence inadmissible in this case, however, opinion provides considerable background information on the theory of grooming).

- Evidence of other prior sexual conduct involving the defendant: Evidence of occasional rejection of defendant's request for oral sex by his girlfriend was not admissible to prove the defendant coerced the child victim into various sexual activities, including oral sex. *State v. Lucero*, 114 N.M. 489, 493, 840 P.2d 1255, 1259 (Ct. App. 1992).

Where evidence is of the crime charged, Rule 404(B) is inapplicable. "Rule 11-404(B) provides in relevant part: 'Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith.' The inclusion of the word 'other' connotes crimes, wrongs, or acts that are not the subject of the proceedings -- *viz* -- uncharged misconduct…. Defendant was charged with five offenses, which were essentially distinguishable by their general nature (contact versus penetration) and timing (annualized). [The] testimony provided evidentiary support for one incident of CSCM occurring in July 1997. Insofar as Defendant was charged with a single count of CSCM within that time frame, [the] testimony provided direct evidence in support of that charge. Thus, [the] testimony cannot properly be classified as evidence of uncharged misconduct, rendering Rule 11-404(B) inapplicable." *State v. Ruiz*, 2007-NMCA-014, ¶¶28-29.

6.4 Selected Hearsay Rules (and Exceptions) and Related Issues

Alleged victims of sexual assault may not always be available or willing to testify at trial. Consequently, prosecutors may attempt to prove their case by introducing other evidence of the defendant's alleged assault. This evidence often takes the form of out-of-court statements, either written or oral, made by the alleged victim, responding police officers, or other witnesses. These typically are called 'hearsay' statements.

Although the general rule is that hearsay is not admissible as evidence, this rule has numerous exceptions that allow hearsay statements to be admitted if they were made under circumstances that ensure their reliability. Hearsay is considered to be reliable if it falls into one of the 'firmly rooted' hearsay exceptions (which are contained in the rules of evidence) or if the evidence has 'particularized guarantees of trustworthiness.' In addition, not all out-of-court statements are even defined as hearsay. This section covers only those hearsay exceptions that are especially relevant to sexual assault, such as excited utterances, present sense impressions, and statements made for purposes of medical diagnosis or treatment. Additionally, this section addresses constitutional considerations as they relate to hearsay.

For more information related to child sexual abuse cases, see the *New Mexico Child Welfare Handbook*, Chapter 27.

6.4.1 General Hearsay Provisions

The hearsay rules are found in Rules 11-801 through 11-807 of the New Mexico Rules of Evidence. The rules use the term 'declarant' to mean the person who makes a statement that later is offered as evidence in a case. Rule 11-801(B).

Rule 11-801(C) defines "hearsay" as "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." A "statement" is "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." Rule 11-801(A).

Except as provided in the New Mexico Rules of Evidence, hearsay is not admissible. Rule 11-802. Under Rules 11-803 and 11-804, certain evidence that would otherwise be inadmissible under the hearsay rule is admissible. Statements which are not hearsay include admissions by party-opponents and prior statements by witness. Rule 11-801(D).

"A statement which is not offered to prove the truth of the matter asserted does not fall within the scope of the general prohibition. Accordingly, a statement offered merely to prove that it was made, and not to prove truth, is characterized as a 'verbal act' that is admissible irrespective of any limitations on hearsay testimony…. Insofar as Defendant made an issue of [victim's] failure to report, the fact that the statements ['Mom, I think I've had sex' and 'Mom, I think I've been raped'] were made had probative value independent of truth. This brings them within the verbal acts exception." *State v. Ruiz*, 2007-NMCA-014, ¶¶ 36-37. See also *State v. Otto*, 2007-NMSC-012, ¶5 and ¶¶17-18 (allowing victim statements that "he

comes in there just about every night mom" and "he sticks his finger inside me and wiggles it around and it hurts mom and I don't like it" to be admitted not for the truth of the statements but for the purpose of explaining why the victim's mother confronted defendant).

6.4.2 Constitutional Considerations

Under the Confrontation Clauses of the 6th Amendment to the United States Constitution (applied to states through the 14th Amendment) and Article II, §14 of the New Mexico Constitution, criminal defendants have a right to cross-examine witnesses against them. This right may be compromised when a hearsay statement is admitted into evidence without the declarant being available for cross-examination. Consequently, the United States Supreme Court has ruled that when hearsay evidence offered against a criminal defendant is testimonial and the declarant is unavailable to testify, the federal Confrontation Clause prohibits admission of the evidence unless the defendant had a prior opportunity to cross-examine the declarant. See *Crawford v. Washington*, 541 U.S. 36 (2004). New Mexico cases fall in line with this reasoning as shown, for example, in *State v. Henderson*, 2006-NMCA-059, which concludes "that the admission of a 'testimonial' statement given by a witness under oath in a preliminary hearing does not violate the Confrontation Clause under *Crawford* where: (1) the witness is unavailable; and (2) the defendant had a prior opportunity to cross-examine the statement that is now being offered into evidence against him." *Henderson* at ¶16.

The United States Supreme Court stated that the 'core class' of testimonial statements requiring the opportunity for cross-examination may include ex parte in-court testimony (or its functional equivalent) and extra-judicial statements contained in formalized testimonial materials. Examples may include:

- Affidavits.
- Depositions.
- Statements made while in police custody.
- Statements made in response to police interrogation.
- Confessions.
- Prior testimony at a preliminary hearing, before a grand jury or during a former trial that the defendant was unable to cross-examine.
- Similar pretrial statements that declarants would reasonably expect to be used in a prosecution.
- Statements made under circumstances that would lead an objective witness to reasonably believe that the statements would be available for use at a later trial.

Whether hearsay evidence constitutes a 'testimonial statement' barred from admission against a defendant where the defendant has not had an opportunity to cross-examine the declarant requires a court to conduct an objective examination of the circumstances under which the statement was obtained. *Davis v. Washington*, 547 US 813, 126 S. Ct. 2266 (2006). Although the United States Supreme Court did not "produce an exhaustive classification of all conceivable statements . . . as either testimonial or nontestimonial," the Court expressly stated:

> "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."

Davis at 822, 2273-2274 (*footnote omitted*).

Davis involved two separate cases (*Davis v. Washington* and *Hammon v. Indiana*) in which a defendant assaulted a victim, the victim answered questions posed by law enforcement personnel, the victim did not testify at trial, and the victim's statement was admitted as evidence against the defendant. In one of the cases, *Davis v. Washington*, the statements at issue arose from the victim's (McCottry) conversation with a 911 operator during the assault. After objectively considering the circumstances under which the 911 operator 'interrogated' McCottry, the Court concluded that the 911 tape on which the victim identified the defendant as her assailant and gave the operator additional information about the defendant was not testimonial evidence barred from admission by the Confrontation Clause. According to the Court:

> "[T]he circumstances of McCottry's interrogation objectively indicate its primary purpose was to enable police assistance to meet an ongoing emergency. She simply was not acting as a *witness*; she was not *testifying*."

Davis at 822, 2277 (*emphasis in original*).

In the other case, *Hammon v. Indiana*, the statement at issue arose from answers the victim (Amy) gave to one of the police officers who responded to a 'reported domestic disturbance' call at the victim's home. Amy summarized her responses in a written statement and swore to the truth of the statement. In this case, the Court concluded that the circumstances surrounding Amy's interrogation closely resembled the circumstances in *Crawford,* and that the 'battery affidavit' containing Amy's statement was testimonial evidence not admissible against the defendant absent the defendant's opportunity to cross-examine the victim. The Court summarized the similarities between the instant case and *Crawford*:

> "Both declarants were actively separated from the defendant— officers forcibly prevented [the defendant in Amy's assault] from participating in the interrogation. Both statements deliberately recounted, in response to police questioning, how potentially criminal past events began and progressed. And both took place some time after the events described were over. Such statements under official interrogation are an obvious substitute for live testimony, because they do precisely *what a witness does* on direct examination; they are inherently testimonial."

Davis at 830, 2278 (*emphasis in original*).

It is important to recognize that *Crawford* is not retroactive to cases that were final (appeals completed) prior to March 8, 2004. *Whorton v. Bockting*, 127 S. Ct. 1173 (2007).

Since *Crawford*, New Mexico's appellate courts have held hearsay evidence to be testimonial pursuant to the *Crawford* decision in a number of cases. See, e.g., *State v. Alvarez-Lopez*, 2004-NMSC-030; *State v. Johnson*, 2004-NMSC-029; *State v. Duarte*, 2004-NMCA-117. In all three of these cases, the court held that admission of an unavailable accomplice's statement violated the defendant's confrontation rights because the statements were made while in police custody. According to the appellate courts, statements made during a custodial interview fall "squarely within the class of 'testimonial' evidence" described by *Crawford*. *Johnson* at ¶7; *Alvarez-Lopez* at ¶24; *Duarte* at ¶13. Because the defendants in these three cases had no opportunity to cross-examine the accomplice, admission of the testimonial hearsay statement violated each defendant's right to confrontation, even though the statements otherwise fell into the statement-against-penal-interest exception to the hearsay rule. See also *State v. Lopez*, 2007-NMSC-037, ¶¶18-21; *State v. Lopez,* 2007-NMSC-049, ¶¶13-14; *State v. Walters*, 2007-NMSC-050, ¶¶20-24 (finding *Crawford* violations for admission of testimonial statements in cases all pertaining to a situation involving the death of a baby, including various charges of child abuse, criminal sexual penetration of a child under thirteen, and conspiracy).

In New Mexico, SANE (Sexual Assault Nurse Examiner) examinations can produce testimonial hearsay under some conditions. *State v. Romero*, 2007-NMSC-013, ¶¶17-18. It is important to note that in *Romero* the "examination occurred several weeks after the assault and with the assistance and encouragement of [a police officer], who made the appointment." *Romero* at ¶17. See also *State v. Ortega*, 2008-NMCA-001 (holding that child's statement given as part of the SANE examination was testimonial in nature, child's statement was not made for purposes of medical diagnosis or treatment, and given that child was not unavailable for trial, and that defendants had no opportunity to cross-examine her, the nurse's testimony regarding child's statement was properly excluded.)

Romero also addressed another Confrontation Clause issue, finding that "[b]ased on the Court of Appeals' analysis and the holdings of *Crawford* and *Davis*, the taped interview of the victim was 'testimonial' and should not have been played for the jury and admitted at trial…. [However,] [t]he officer's testimony regarding his observations of the victim during the taped interview was admissible under *Crawford* and *Davis*." *Romero* at ¶23.

In *Crawford*, the United States Supreme Court also identified types of evidence that are ordinarily admissible under exceptions to the hearsay rule that are not testimonial, and therefore admissible against defendants in criminal cases, including such things as business records. The New Mexico Supreme Court recently added blood alcohol reports to this list of nontestimonial hearsay evidence. In *State v. Dedman*, 2004-NMSC-037, the court determined that a blood alcohol report is not testimonial evidence because it is "generated by [State Laboratory Division] personnel, not law enforcement, and the report is not investigative or prosecutorial." *Dedman* at ¶30. The court further explained that even

though "the report is prepared for trial, the process is routine, non-adversarial, and made to ensure an accurate measurement." *Id.* By characterizing the blood alcohol report as nontestimonial, the *Crawford* requirement of prior cross-examination did not apply and the report could be admitted under the public record exception to the hearsay rule.

As another example, the New Mexico Court of Appeals, in a case involving multiple charges including criminal sexual penetration and criminal sexual contact of a minor, did not perceive a confrontation clause problem with materials such as an intake report and a prior assessment. The court stated that "[t]o determine whether a statement is testimonial, we consider the context in which it was made, focusing on whether the statement was made in a law enforcement context…. The record contains no indication that either the declarants or the facility had any relationship with law enforcement, or that the documents were prepared in a manner to suggest possible law enforcement or prosecutorial abuse in order to facilitate proof in an anticipated criminal proceeding. As a result, neither the intake report nor the prior assessment can be characterized as 'testimonial' in nature. We therefore conclude the Confrontation Clause is not implicated." *State v. Paiz*, 2006-NMCA-144, ¶30.

To summarize, before admitting hearsay evidence, New Mexico courts must now consider whether the hearsay in question is a "testimonial statement." If the hearsay is testimonial and the proponent has demonstrated that the witness is unavailable to testify, the court cannot admit the hearsay evidence unless the defendant had an opportunity to cross-examine the declarant before trial, even if the hearsay falls into one of the established hearsay exceptions.

6.4.3 Excited Utterances

An excited utterance is a statement relating to a startling event or condition made while under the stress and excitement of the event or condition. Rule 11-803(B). According to the Court of Appeals, for a statement to be admissible as an excited utterance,

> "[t]here must be some shock, startling enough to produce . . . nervous excitement and render the utterance spontaneous and unreflecting…. The utterance must have been before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance…. [And,] [t]he utterance must relate to the circumstances of the occurrence preceding it."

State v. Maestas, 92 N.M. 135, 141, 584 P.2d 182, 188 (Ct. App. 1978) (*internal quotations and citations omitted*). Under this approach, there is no fixed amount of time in which the statement must have been made. As a result, the *Maestas* trial court admitted statements the victim made to her mother shortly after a beating and while still under the stress of excitement from the beating, but did not admit statements the victim made later that evening and the next morning.

Similarly, the Court of Appeals:

> "decline[d] to adopt a bright-line rule that every statement made in response to a question, whether by police or others, is not an excited utterance. Rather, we follow our general approach to excited utterances, which requires the trial court to consider the particular circumstances of each case to determine whether the statement 'was the result of reflective thought' or whether it was rather a spontaneous reaction to the exciting event."

State v. Bonham, 1998-NMCA-178, ¶5 *abrogated on other grounds by State v. Traeger*, 2001-NMSC-022. The court in *Bonham* held that the victim's statements--made to police within moments of being attacked, while still bleeding, in pain, and in mild shock, and while the victim was still within the proximity of his attacker--were admissible as excited utterances, but that statements victim made hours later, while in the hospital, were not so admissible.

More recently, the Supreme Court stated in a murder case:

> "In deciding whether to admit an out-of-court statement under the excited utterance exception, the trial court should consider a variety of factors in order to assess the degree of reflection or spontaneity underlying the statement. These factors include, but are not limited to:
>
> - how much time passed between the startling event and the statement, and whether, in that time, the declarant had an opportunity for reflection and fabrication;
> - how much pain, confusion, nervousness, or emotional strife the declarant was experiencing at the time of the statement;
> - whether the statement was self-serving; and
> - whether the statement was made in response to an inquiry.
>
> The trial court has wide discretion in determining whether the utterance was spontaneous and made under the influence of an exciting or startling event."

State v. Balderama, 2004-NMSC-008, ¶51 (*internal quotations, citations and punctuation omitted*).

According to Rule 11-803, excited utterances are "not excluded by the hearsay rule, even though the declarant is available as a witness." However, in *State v. Lopez*, 1996-NMCA-101, ¶21, the Court of Appeals held that the Confrontation Clause of the New Mexico Constitution, which guarantees criminal defendants the right to confront the witnesses against them, requires the state to show that the declarant is unavailable before an excited utterance may be admitted into evidence if the declarant is not testifying at trial. According to the court, requiring a showing of unavailability "increases the apparent legitimacy of the trial process" and prevents prosecutors from "distort[ing] the search for the truth as a matter of tactical advantage, such as by substituting a high-performance witness to the declarant's statement for a low-performance declarant." *Lopez* at ¶19. (Although the court's ruling requiring a showing of unavailability applies only to excited utterances, its rationale may

apply to other hearsay exceptions, such as present sense impressions and statements made for purposes of medical diagnosis or treatment, which are discussed below.)

6.4.4 Present Sense Impression

A present sense impression is a "statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." Rule 11-803(A).

To be admissible as a present sense impression, "the statement must be made while the event or condition is being perceived by the declarant or immediately thereafter. The fact that the event occurred contemporaneously or shortly thereafter is a factor to be considered in determining the trustworthiness of the statement." *State v. Perry*, 95 N.M. 179, 180, 619 P.2d 855, 856 (Ct. App. 1980) (involving an appeal of a conviction for criminal sexual penetration in the third degree). "[T]he admissibility of the statement will depend upon the trial court's view of the type of case, the availability of other evidence, the verifying details of the statement and the setting in which the statement was made…. [In addition,] the statement must be one which describes or explains the event or condition. This requirement must not be viewed so narrowly as to exclude evidence which would aid the jury.... Relevancy and contemporaneousness are the keys of admissibility." *Perry* at 180, 856.

For example, the victim's words of greeting to the defendant, which were uttered just before the defendant shot the victim, were admissible under the present sense impression exception in order to identify defendant as the shooter. *State v. Salgado*, 1999-NMSC-008. In another case, *State v. Peters*, 1997-NMCA-084, ¶32, the Court of Appeals summarily concluded that the testimony of a police officer concerning a victim's statement made on the night she was beaten, raped and robbed, while she was crying and bleeding, was admissible as a present sense impression. On the other hand, a child's statement made four or more hours after an incident were not admissible as a present sense impression. *State v. Massengill*, 2003-NMCA-024, ¶¶9-10. See also *State v. Maestas*, 92 N.M. 135, 139-41, 584 P.2d 182, 186-88 (Ct. App. 1978) (holding statements inadmissible when made at least three hours after the declarant had been beaten).

According to Rule 11-803, present sense impressions "are not excluded by the hearsay rule, even though the declarant is available as a witness." But see, §6.4.3 above for a discussion of *State v. Lopez*, 1996-NMCA-101, ¶21, which held that the Confrontation Clause requires proof of unavailability before an excited utterance may be admitted into evidence.

6.4.5 Statements Made for the Purpose of Medical Diagnosis or Treatment

Statements made for purposes of medical diagnosis or treatment are admissible if they describe "medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." Rule 11-803(D). Admissibility of this type of statement does not depend on the availability or unavailability of the declarant. Rule 11-803. But see, §6.4.3 above for a discussion of *State v. Lopez*, 1996-NMCA-101, ¶21, which held that the

Confrontation Clause requires proof of unavailability before an excited utterance may be admitted into evidence.

In *State v. Woodward*, 121 N.M. 1, 908 P.2d 231 (1995), a psychologist was permitted to testify as to the victim's identification of her spouse as the perpetrator of domestic abuse because "disclosure of the perpetrator is essential to diagnosis and treatment of situational depression" in cases involving domestic abuse. Moreover, the victim's statements to the psychologist were admissible because she "made the statements for the purpose of obtaining medical treatment, and because [the psychologist] reasonably relied on these statements in diagnosing and treating" the victim. *Woodward* at ¶36.

In *State v. Altgilbers*, 109 N.M. 453, 786 P.2d 680 (Ct. App. 1989), the defendant was charged with sexually abusing two of his daughters. Relying on this exception to the hearsay rule, the court confirmed the appropriateness of testimony of a pediatrician and a psychologist about the two children's identification of defendant as their abuser, noting that "in dealing with child sexual abuse … disclosure of the perpetrator may be essential to diagnosis and treatment." *Altgilbers* at 459, 686.

Also relevant are the following children's court cases, *State v. Frank G.*, 2005-NMCA-026, ¶¶28-32 (concluding that the court did not abuse its discretion in admitting child's statements to program therapist where licensed program therapist testified to importance of the identity of the perpetrator, and stated that the purpose of her therapy sessions with child was for diagnosis and treatment and that, in order to properly treat a child abuse victim, it was essential to know the identity of the abuser, and child's statements about the sexual abuse were of the type upon which medical personnel reasonably rely in treatment or diagnosis and meet the standards for admission in Rule 803(D)); *State ex rel. Children, Youth & Families Dep't v. Esperanza M.*, 1998-NMCA-039 (concluding that the state established that the identity of perpetrator was 'reasonably pertinent' to a pediatrician for purposes of medical diagnosis or treatment and pediatrician's testimony was, therefore, admissible under Rule 803(D) but that the state failed to establish such a foundation for admission of hearsay testimony by a psychologist and a social worker).

It is important to note that "[b]oth *Woodward* and *Altgilbers* were criminal cases in which the admissibility of hearsay must also meet the constitutional limits of the Confrontation Clause, a stricter threshold than Rule 11-803. There is no similar obstacle to admissibility in a civil children's court action. Thus, if the State establishes a foundation that the identity of the perpetrator was 'reasonably pertinent' for medical diagnosis or treatment, the children's court may admit hearsay testimony identifying a perpetrator under Rule 11-803(D)." *In re Esperanza* at ¶16.

In re Esperanza articulates a very important distinction as follows:

> "Parents argue that admission of [the pediatrician's] hearsay testimony under Rule 11-803(D) was improper under *State v. Alberico*, 116 N.M. 156, 861 P.2d 192 (1993), and *State v. Lucero*, 116 N.M. 450, 863 P.2d 1071 (1993). Both *Alberico* and *Lucero* involved the admission of scientific testimony,

specifically posttraumatic stress disorder (PTSD) evidence, in criminal sexual abuse cases. Our Supreme Court concluded in *Alberico* that PTSD testimony was admissible to show symptoms consistent with sexual abuse, but inadmissible to identify the alleged perpetrator of the crime. *Alberico*, 116 N.M. at 172, 175, 861 P.2d at 208, 211. Following *Alberico*, the Court in *Lucero* concluded that although the State may introduce PTSD testimony to show that the presence of certain symptoms is consistent with sexual abuse, the expert could not name the abuser because it bolstered the complainant's credibility and encroached upon the jury's fact-finding function. *Lucero*, 116 N.M. at 454, 863 P.2d at 1075.

“Parents' reliance upon *Alberico* and *Lucero* is misplaced, and ignores holdings of this Court in *State v. Altgilbers*, 109 N.M. 453, 786 P.2d 680 (Ct. App. 1989) and our Supreme Court in *State v. Woodward*, 121 N.M. 1, 908 P.2d 231 (1995), applying *Altgilbers*. Both *Woodward* and *Altgilbers* involved the admission of hearsay testimony under Rule 11-803(D), rather than PTSD testimony.

“In *Altgilbers*, this Court considered the medical diagnosis or treatment exception to the hearsay rule in a criminal sexual abuse case in which the defendant was charged with sexually abusing his daughters. 109 N.M. at 455, 786 P.2d at 682. We upheld the district court's admission of a daughter's statement to her psychologist and pediatrician identifying the defendant as the perpetrator because the disclosure of the perpetrator was important to diagnosis and treatment. *Id.* at 457-60, 786 P.2d at 684-87. This Court adopted Justice Powell's approach to Federal Rule of Evidence 803(4) that the exception applies 'so long as the statements made by an individual were relied on by the physician in formulating his opinion.' *Id.* at 458-59, 786 P.2d at 685-86 (quoting Justice Powell's separate opinion when sitting with a panel on the Fourth Circuit of Appeals in *Morgan v. Foretich*, 846 F.2d 941, 950-53 (4th Cir. 1988)).

“In applying Justice Powell's ‘pertinence’ approach, this Court and our Supreme Court have relied on the foundation established by the party seeking to admit the hearsay testimony that testimony is admissible if it is ‘reasonably pertinent’ for medical diagnosis or treatment. *See Woodward*, 121 N.M. at 8, 908 P.2d at 238; *Altgilbers*, 109 N.M. at 459-60, 786 P.2d at 686-87. In *Altgilbers*, both the psychologist and the pediatrician testified that the identity of the perpetrator was important to their diagnoses and evaluations. *Id.* at 459, 786 P.2d at 686. Similarly in *Woodward*, our Supreme Court upheld the district court's admission of the victim's statement to her psychologist that the defendant, her husband, had abused and threatened to kill her. *Id.* at 8, 908 P.2d at 238. In *Woodward*, the psychologist testified that ‘disclosure of the perpetrator is essential to diagnosis and treatment of situational depression’ in cases involving spousal abuse. *Id.*”

In re Esperanza at ¶¶12-15. For more information about expert scientific evidence regarding post traumatic stress disorder, see Chapter 7 of this benchbook.

6.5 Competency of Witnesses

"Every person is competent to be a witness except as otherwise provided in these rules." Rule 11-601. This general rule regarding competence of witnesses applies in sexual assault cases as it would in any other case. However, some additional legal principles apply to sexual assault cases and some particular situations may be more likely to arise in sexual assault cases.

6.5.1 Competency of Minor Witnesses

The following statute applies specifically in the sexual assault context where a minor victim may testify:

> "In any prosecution for criminal sexual penetration or criminal sexual contact of a minor, if the alleged victim is under thirteen years of age, the court may hold an evidentiary hearing to determine whether to order a psychological evaluation of the alleged victim on the issue of competency as a witness. If the court determines that the issue of competency is in sufficient doubt that the court requires expert assistance, then the court may order a psychological evaluation of the alleged victim, provided however, that if a psychological evaluation is ordered it shall be conducted by only one psychologist or psychiatrist selected by the court who may be utilized by either or both parties; further provided that if the alleged victim has been evaluated on the issue of competency during the course of investigation by a psychologist or psychiatrist selected in whole or in part by law enforcement officials, the psychological evaluation, if any, shall be conducted by a psychologist or psychiatrist selected by the court upon the recommendation of the defense."

§30-9-18. The Court of Appeals held in a sexual assault case that whether or not young persons (in this case age 10 and 11) "were competent to testify was a matter to be resolved by the trial court in the exercise of its discretion. Their capacity to testify was not to be determined solely on the basis of their age." *State v. Barnes*, 83 N.M. 566, 494 P.2d 979 (Ct. App. 1972). The Court of Appeals has also found that "the trial court must determine competency from inquiries into the child's capacities of observation, recollection, and communication, as well as the child's appreciation or consciousness of the duty to speak the truth." *State v. Orosco*, 113 N.M. 789, 798, 833 P.2d 1155, 1164 (Ct. App. 1991). The *Orosco* court made it clear that where the trial court met this test it may rule contrary to expert testimony stating that a child is not competent to testify, stating that "expert testimony is opinion, not fact" and that the "trial court, like the jury, can ignore the expert testimony." *Orosco* at 798, 1164.

Recently, the Court of Appeals again faced an issue relating to the admissibility of a young person's testimony in a case involving criminal sexual penetration of a minor and criminal

sexual contact of a minor convictions; however, this time the issue related to defendant's motion "seeking to exclude [the young person's] testimony on the theory that suggestive and/or coercive interview techniques had so severely undermined the reliability of her memories that she should be prohibited from testifying." *State v. Ruiz*, 2007-NMCA-014, ¶21. "Although New Mexico's courts have recognized the dangers associated with suggestive interviewing techniques in cases of this nature neither this Court, nor the New Mexico Supreme Court, has adopted the novel *Michaels* approach, which places a heavy burden on the proponent of child victim testimony to establish its reliability. Like many other states, New Mexico rejects *Michaels* in favor of our well-established competency jurisprudence." *Ruiz* at ¶22 (*citation omitted*). Relying upon Rule 11-601, the *Ruiz* court confirmed that "[i]n New Mexico, we apply a general presumption that all persons are competent to appear as witnesses. When an individual's competency to testify is challenged, the district courts are merely required to conduct an inquiry in order to ensure that he or she meets a minimum standard, such that a reasonable person could 'put any credence in their testimony.' This methodology stems from a core principle of modern civil and criminal procedure, whereby questions of credibility are consigned to juries, rather than judges." *Ruiz* at ¶23 (*citations omitted*).

For more information on the competency of minors to testify, see *New Mexico Child Welfare Handbook*, Chapter 27.

6.5.2 Competency of Witnesses with Mental Disabilities

A state statute specifically addresses the competency of "witnesses with mental retardation" in any case, not just sexual assault cases. §38-6-8. For more information on this statutory section see Chapter 5, §5.6.

In a case involving convictions for criminal sexual penetration in the second, third and fourth degrees where the victim has Down's Syndrome, the Court of Appeals held that the trial court did not abuse its discretion in admitting the testimony of the victim who, because of Down's Syndrome, had a mental age equivalent to that of a person slightly below six years of age. *State v. Hueglin*, 2000-NMCA-106, ¶24. The Court of Appeals found the following principles persuasive in considering Rule 11-601: "a witness wholly without capacity is difficult to imagine. The question is one particularly suited to the jury as one of weight and credibility. . . . [T]he trial court's role is to insure that witnesses . . . meet a minimum standard regarding the matters on which they will testify, the minimum necessary to permit any reasonable person to put any credence in their testimony." *Hueglin* at ¶22 (*citations omitted*). The *Hueglin* court held that "[t]o be competent, a witness is required to have a basic understanding of the difference between telling the truth and lying, coupled with an awareness that lying is wrong and may result in 'some sort of punishment.'" *Hueglin* at ¶24 (*citations omitted*).

6.6 Corroboration of Victim's Testimony in Sexual Assault Cases

"The testimony of a victim need not be corroborated in prosecutions under [§§30-9-11 to 30-9-14] and such testimony shall be entitled to the same weight as the testimony of victims of

other crimes under the Criminal Code." §30-9-15. See also *State v. Hunter*, 101 N.M. 5, 677 P.2d 618 (1984) and *State v. Nichols*, 2006-NMCA-017.

6.7 Resistance to Perpetrator in Sexual Assault Cases

Within the crimes of criminal sexual penetration and criminal sexual contact, the defined term "force and coercion' is used numerous times to delineate the various forms of the crimes. See §§30-9-10 to 30-9-13. The definition of 'force and coercion' specifically states that "[p]hysical or verbal resistance of the victim is not an element of force or coercion." §30-9-10.

While a victim's resistance to the perpetrator is generally not an element in any criminal offense, it was expressly made a statutory non-requirement for sexual offenses based upon the defined term 'force and coercion.' This provision reflects the idea that a victim's lack of resistance to a perpetrator's actions should not negate the crime itself. It also reflects the idea that there are legitimate reasons for a victim's nonresistance. For instance, a victim may have the capability to resist but voluntarily choose not to, such as when the victim believes that resistance will cause even greater harm or death. Indeed, a victim may be so frightened and panicked at the thought of being seriously harmed or killed that he or she becomes physically immobilized by the fear or does not know what to do to thwart the sexual assault. A victim may also be physically unable to resist a perpetrator's actions because of restraints, intoxication, unconsciousness, mental incapacity, or physical helplessness.

6.8 Privileges

In New Mexico, "except as otherwise required by constitution, and except as provided in these rules or in other rules adopted by the supreme court, no person has a privilege to:

- refuse to be a witness; or
- refuse to disclose any matter; or
- refuse to produce any object or writing; or
- prevent another from being a witness or disclosing any matter or producing any object or writing."

Rule 11-501. As recently as 2006, the Supreme Court stated that "given the clear directive of Rule 11-501, we remain compelled to decline to recognize common law privileges." *Estate of Romero v. City of Santa Fe*, 2006-NMSC-028, ¶11.

Several specific privileges are provided for by rule, and those most relevant to or with unique attributes for sexual assault crimes are discussed in more detail below. It is important to note that with respect to any of the privileges, a "person upon whom these rules confer a privilege against disclosure of the confidential matter or communication waives the privilege if the person or person's predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter or communication. This rule does not apply if the disclosure is itself a privileged communication." Rule 11-511. However, "[e]vidence of a statement or other disclosure of privileged matter is not admissible against

the holder of the privilege if the disclosure was compelled erroneously or made without opportunity to claim the privilege." Rule 11-512.

Several points included in Rule 11-513 are critical from the court's perspective:

- "The claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by the court or counsel. No inference may be drawn therefrom.
- "In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury.
- "Upon request, any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom." Rule 11-513.

Finally, "[t]he rules with respect to privileges apply at all stages of all actions, cases and proceedings." Rule 11-1101(C).

6.8.1 Privileges Arising from Marital Relationships

Two spousal privileges exist in New Mexico:

- No husband shall be compelled to disclose any communication made by his wife during the marriage, and no wife shall be compelled to disclose any communication made to her by her husband during the marriage. §38-6-6(A).
- A person has a privilege in any proceeding to refuse to disclose and to prevent another from disclosing a confidential communication by the person to that person's spouse while they were husband and wife. Rule 11-505(B).

Generally, marital privileges are inapplicable to situations where the defendant/spouse has allegedly committed a crime against the victim/spouse.

"This statute [§38-6-6] extends a spousal testimonial privilege to *any* communication. Rule 505, however, provides that one spouse may prevent another from disclosing a *confidential* communication, made during the marriage. Thus, the statute is far more comprehensive and seeks to grant a greater privilege than does the rule. The New Mexico Supreme Court has held that any conflict between the rules of evidence and statutes attempting to create evidentiary privileges must be resolved in favor of the rules. Thus, Section 38-6-6(A), which mirrors the older common law rule that neither spouse could be compelled to disclose a communication made during the marriage, does not govern…." *State v. Teel*, 103 N.M. 684, 685, 712 P.2d 792, 793 (Ct. App. 1985) (*citations omitted*). The court noted that for a communication to have been privileged under the rule, it had to have been a communication and it had to have been intended private. The court further concluded that such things as wife's observation of the diamond and identification of spouse's signature were not communications and were not subject to the privilege. *Teel* at 687, 795.

6.8.2 Privileged Communications with Care Providers

A. Victim/Counselor Privilege

A victim's communications with a victim counselor are generally not subject to discovery or subpoena without permission of the victim. Under the Victim Counselor Confidentiality Act, §31-25-1 et seq., neither a victim nor a victim counselor can be compelled to:

- Provide testimony or produce records concerning confidential communications for any purpose in any criminal action or other judicial, legislative or administrative proceeding.
- Provide testimony in any civil or criminal proceeding that would identify the name, address, location or telephone number of a safe house, abuse shelter or other facility that provided temporary emergency shelter to the victim of the offense or occurrence that is the subject of a judicial, legislative or administrative proceeding unless the facility is a party to the proceeding.

§31-25-3.

The Act's definitions section, §31-25-2, includes the following:

- "Confidential communication" means any information exchanged between a victim and a victim counselor in private or in the presence of a third party that is necessary to facilitate communication or further the counseling process, which is disclosed in the course of the counselor's treatment of the victim for any emotional or psychological condition resulting from a sexual assault or family violence.
- "Victim" means a person who consults a victim counselor for assistance in overcoming adverse emotional or psychological effects of a sexual assault or family violence.
- "Victim counseling" means assessment, diagnosis and treatment to alleviate the adverse emotional or psychological impact of a sexual assault or family violence on the victim. Victim counseling includes crisis intervention.
- "Victim counselor" means any employee or supervised volunteer of a victim counseling center or other agency, business or organization that provides counseling to victims who is not affiliated with a law enforcement agency or the office of a district attorney, has successfully completed forty hours of academic or other formal victim counseling training or has had a minimum of one year of experience in providing victim counseling and whose duties include victim counseling.

A victim does not waive the Act's protections by testifying in court about the crime. If the victim partially discloses the contents of a confidential communication while testifying, either party may request the court to rule that justice requires waiver of the privilege. Any waiver must apply only to the extent necessary to require a witness to respond to questions

concerning the confidential communication that are relevant to the facts and circumstances of the case. §31-25-4(A). A victim counselor does not have authority to waive the privilege. §31-25-4(B).

The Victim Counselor Confidentiality Act is consistent with the psychotherapist-patient privilege in Rule 11-504 and it is to be given effect. *Albuquerque Rape Crisis Center v. Blackmer*, 2005-NMSC-032, ¶1.

B. Physician-patient and Psychotherapist-patient privilege

The privilege is stated as follows:

> "A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications, made for the purposes of diagnosis or treatment of the patient's physical, mental or emotional condition, including drug addiction, among the patient, the patient's physician or psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the physician or psychotherapist, including members of the patient's family."

Rule 11-504(B).

This privilege may be claimed by:

- The patient;
- The patient's guardian or conservator;
- The personal representative of a deceased patient; and
- The person who was the physician or psychotherapist, but only on behalf of the patient.

The authority to claim the privilege is presumed in the absence of contrary evidence. Rule 11-504(C).

Exceptions, further detailed in Rule 11-504(D), exist to this privilege for:

- Proceedings for hospitalization;
- Examinations by order of the court;
- Condition as an element of the claim or defense; and
- Required report.

The following terms are defined for purposes of this privilege:

- Confidential communication;
- Patient;

- Physician; and
- Psychotherapist.

Rule 11-504(A).

In a prosecution for criminal sexual penetration the Court of Appeals recognized that, “when a litigant voluntarily agrees to disclose medical or psychotherapy records, which otherwise would be protected by a privilege, a waiver occurs. [Thus,] when a medical patient voluntarily signs a release allowing the disclosure of information which would otherwise be privileged, the privilege must be considered waived.” *State v. Gonzales*, 1996-NMCA-026, ¶20. However, “waiver of the psychotherapist-patient privilege as set forth in Rule 11-504(D)(3) does not automatically make all the records discoverable. Privacy concerns are still fundamental. To protect a child's privacy, we require that there ‘be a threshold showing by defendant that the records may reasonably be expected to provide information material to the defense.’” *State v. Ruiz,* 2001-NMCA-097, ¶32 (quoting *Gonzales*).

In a case involving convictions for twenty counts of criminal sexual penetration in the second degree, nine counts of criminal sexual contact, one count of aggravated battery, two counts of aggravated battery, three counts of kidnapping, and one count of attempted criminal sexual penetration, the Court of Appeals found the physician patient privilege inapplicable. *State v. Ryan*, 2006-NMCA-044. “Defendant contends that the district court erred in admitting evidence of certain out-of-court statements that he made to a physician…. To invoke the [physician patient] privilege, a claimant must establish that he or she was a patient at the time the statement was made, that the communication at issue was confidential, and that the statement was made for the purpose of diagnosing or treating the patient. See Rule 11-504(B); *State v. Roper*, 1996 NMCA 73, ¶7…. The statements at issue were not made for the purpose of diagnosing or treating Defendant, but rather, for the purpose of diagnosing or treating the Victim. Consequently, the statements are outside the scope of the privilege….” *Ryan* at ¶41.

6.8.3 Other Privileges

The Court of Appeals has recently held “that, in New Mexico, a parent has a privilege to use moderate or reasonable physical force, without criminal liability, when engaged in the discipline of his or her child. Discipline involves controlling behavior and correcting misbehavior for the betterment and welfare of the child. The physical force cannot be cruel or excessive if it is to be justified. The parent's conduct is to be measured under an objective standard.” *State v. Lefvre*, 2005-NMCA-101, ¶16.

CHAPTER 7

SCIENTIFIC EVIDENCE

This chapter covers:

- Expert testimony in sexual assault cases, including PTSD testimony, hypnotic testimony, medical testimony and effects of battering.
- DNA testing and admissibility.
- Sexual Assault Nurse Examiner (SANE) programs.
- Drug facilitated sexual assault.

7.1 Introduction

This chapter explores various scientific evidentiary issues that commonly arise in cases involving sexual assault. It provides a general introduction to various scientific methods or topics, including DNA testing, drug facilitators, post traumatic stress disorder (PTSD), hypnosis and expert testimony. It also includes New Mexico case law governing the admissibility of testimony and techniques.

7.2 Expert Testimony in Sexual Assault Cases

This section discusses issues commonly arising regarding the admission of expert testimony in cases involving allegations of sexual assault:

- General requirements for admissibility of expert testimony.
- Expert testimony on post traumatic stress disorder (PTSD) and rape trauma syndrome (RTS).
- Hypnotic testimony.
- Expert testimony by physicians and medical personnel.
- Expert testimony on the emotional and psychological effects of battering.

7.2.1 General Requirements for Admissibility of Expert Testimony

The consolidated Supreme Court decision in *State v. Alberico* and *State v. Marquez*, both involving criminal sexual penetration convictions, constitutes a pivotal decision on expert testimony. *Alberico*, 116 N.M. 156, 861 P.2d 192 (1993). While it is not the intent of this chapter to comprehensively address all issues relating to expert testimony, some general

information is included here to set the stage for discussion of expert testimony issues specific to sexual assault cases.

"Rules 702, 703, 704, and 705 govern the admissibility of expert opinion testimony. These rules do not characterize expert opinion testimony as a lesser or greater form of evidence, but rather accord the trier of fact the discretion to evaluate such evidence just like any other admissible evidence. 'This Court has consistently held that the jury are [sic] the judges of the weight and credibility of evidence.' Thus, expert opinion testimony is given no more credence or weight, at least in theory, than ordinary lay witness testimony." *Alberico* at 163, 199 (*citations omitted*). "It is the duty of our courts, therefore, to determine initially whether expert testimony is competent under Rule 702, not whether the jury will defer to it." *Alberico* at 164, 200.

Rule 11-702 provides: "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise." The *Alberico* court confirmed three prerequisites in Rule 11-702 for the admission of expert testimony:

1) that the expert be qualified;
2) that the evidence will assist the trier of fact; and
3) that an expert may testify only as to scientific, technical or other specialized knowledge.

Alberico at 166, 202. The *Alberico* court further acknowledged that New Mexico's Rule 11-702 is identical to the federal rule 702, and abandoned the *Frye v. United States,* 293 F. 1013 (DC. Cir. 1923) test as the United States Supreme Court had also done in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). *Alberico* at 167, 203. More recently *State v. Fry*, 2006-NMSC-001, (involving among other convictions attempted criminal sexual penetration) reiterated the rejection of the *Frye* test "that had required general acceptance in the field in order for opinion testimony to be considered scientific knowledge that will assist the trier of fact in favor of a more flexible test that focuses on the validity and the soundness of the scientific method used to generate the evidence." *Fry* at ¶54 (*quotations and citations omitted*).

Case law has specified several factors that can be considered by trial courts in assessing the validity of a particular technique to determine if it is scientific knowledge under Rule 11-702. The factors include, without limitation, the following:

1) whether a theory or technique can be (and has been) tested;
2) whether the theory or technique has been subjected to peer review and publication;
3) the known potential rate of error in using a particular scientific technique and the existence and maintenance of standards controlling the technique's operation;

4) whether the theory or technique has been generally accepted in the particular scientific field; and
5) whether the scientific technique is based upon well-recognized scientific principle and whether it is capable of supporting opinions based upon reasonable probability rather than conjecture.

Fry at ¶54 (citing *Daubert*, *Alberico* and *State v. Anderson*, 118 N.M. 284, 881 P.2d 29 (1994)).

“Even if the expert testimony passes muster under Rule 702, it must still be material to the particular case to be admissible under Rule 401, and even if relevant (that is, material and probative), the scientific evidence may be excluded if its prejudicial effect substantially outweighs its probative value under Rule 403. Expert testimony might be material under Rule 401 and still not be valid or probative under Rule 702. Furthermore, an expert's testimony might be valid and probative, and thus would assist the trier of fact in that it is accurate and consistent, but it might not be so accurate or consistent as to outweigh its prejudicial effect under a Rule 403 balancing test.” *Alberico* at 168-169, 204 (*citation omitted*). The Supreme Court has stated that "[g]iven the capabilities of jurors and the liberal thrust of the rules of evidence, we believe any doubt regarding the admissibility of scientific evidence should be resolved in favor of admission, rather than exclusion." *Fry* at ¶55 (citing *Lee v. Martinez*, 2004-NMSC-027, ¶16).

A recent Court of Appeals case, *State v. Downey*, 2007-NMCA-046, *cert. granted*, stated that “[i]n summary, our Supreme Court's cases in this area can be distilled into several guiding principles. First, a trial court's gatekeeping function is confined to an assessment of the reliability of the scientific technique underlying an expert's opinion, not the validity of the conclusions drawn by an expert employing that technique. Second, any deficiencies or infirmities in the actual performance of a scientific test go to the weight of the evidence, not to its admissibility. Third, doubt regarding the admissibility of scientific evidence should be resolved in favor of admissibility.” *Downey* at ¶20.

In the context of a case involving multiple convictions of criminal sexual penetration of a minor and criminal sexual contact of a minor, the Court of Appeals was asked to decide the question of reliability of a physician’s testimony under *Daubert*. The court confirmed that “[t]he admission of expert testimony or other scientific evidence is peculiarly within the sound discretion of the trial court and will not be reversed absent a showing of abuse of that discretion….” and that “it is error to admit expert testimony involving scientific knowledge unless the party offering such testimony first establishes the evidentiary reliability of the scientific knowledge.” *State v. Lente*, 2005-NMCA-111, ¶3. Defendant argued “that [under *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 143 L. Ed. 2d 238, 119 S. Ct. 1167 (1999)] all expert testimony, not just scientific testimony, should be subject to the *Daubert-Alberico* test.” *Lente* at ¶4. The *Lente* court noted that the New Mexico Supreme Court has not yet adopted the holding of *Kumho* and that after *Kumho*, New Mexico applies *Daubert* somewhat differently than it is applied in federal court. “Currently, therefore, New Mexico law requires only that the trial court establish the reliability of scientific knowledge, and does not apply the *Daubert-Alberico* standard to all expert testimony.” *Lente* at ¶4.

As an important practical note, *Daubert-Alberico* hearings comprise a time consuming specialized type of hearing generally including presentation of evidence by both the prosecution and defense. Securing the attendance of specialized expert witnesses will often require more advance notice than for other types of hearings.

7.2.2 Expert Testimony on Post Traumatic Stress Disorder (PTSD) and Rape Trauma Syndrome (RTS)

The *Alberico* decision articulated several points of law regarding PTSD and RTS evidence as follows:

- "[B]ecause PTSD evidence is both valid and probative and because it is not unduly prejudicial, it is admissible for establishing whether the alleged victim exhibits symptoms of PTSD that are consistent with rape or sexual abuse." *Alberico* at 175, 210. Stated another way, "[a] properly qualified mental health professional may testify that in the expert's opinion an alleged victim of sexual abuse suffers from PTSD. In addition, the expert may testify that the complainant's symptoms are consistent with those suffered by someone who has been sexually abused." *Alberico* at 178, 213-214.

- "While PTSD testimony may be offered to show that the victim suffers from symptoms that are consistent with sexual abuse, it may not be offered to establish that the alleged victim is telling the truth; that is for the jury to decide." *Alberico* at 175, 210. "[W]e expressly prohibit direct testimony regarding the credibility or truthfulness of the alleged victim of sexual abuse." *Alberico* at 175, 211.

- Likewise, "the expert may not testify as to the identity of the alleged perpetrator of the crime." *Alberico* at 175, 211.

- The *Alberico* court held "that expert testimony concerning RTS is inadmissible mainly because it is not part of the specialized manual DSM III-R like PTSD is, even though there is evidence in the record that RTS is generally accepted by psychologists just like PTSD is." *Alberico* at 176, 212.

- "[T]he expert will not be allowed to state an opinion in terms of causality; in other words, the expert may not testify that the victim's PTSD symptoms were in fact caused by sexual abuse." *Alberico* at 176, 212.

Additional cases addressing PTSD include *State v. Lucero,* 116 N.M. 450, 863 P.2d 1071 (1993) and *State v. Paiz*, 2006-NMCA-144.

7.2.3 Expert Testimony by Physicians and Medical Personnel

In several cases, New Mexico appellate courts appear to apply the *Alberico* ruling not only to PTSD testimony, but also to testimony of examining physicians. *State v. Salazar*, 2006-

NMCA-066, upheld a physician's testimony about what the victim told her at the time of a physical examination, acknowledging *Alberico's* prohibition against the "expert testifying to the identity of the alleged perpetrator of the crime as a result of an examination of the victim." *Salazar* at ¶12. Additionally, *Salazar* confirmed that the expert must "not improperly comment on the victim's credibility or testify as to her belief that the defendant was the perpetrator." *Salazar* at ¶12. However, it is important to note that "[w]here the expert does not use his or her expertise in testifying about the identity of the perpetrator, and instead is just repeating what the alleged victim related, we analyze the issue under hearsay rules, and not the rules governing the admission of expert testimony." *Salazar* at ¶12.

For another case involving physician testimony, see *State v. Paiz*, 2006-NMCA-144. *Paiz* is notable in that it distinguishes *Lucero* as a case limited to PTSD testimony from a psychologist rather than non-PTSD physician testimony, and also that it addresses the hearsay issue concluding that the physician's testimony was not offered for the truth of the matter asserted, but rather to explain the scope of the physical exam thus invoking the non-hearsay provisions of Rule 11-803(D). *Paiz* at ¶¶38-40. For additional information on hearsay issues, see Chapter 6.

A recent case, *State v. Romero*, 2007-NMSC-013, involves a SANE nurse being qualified as an expert by the trial court. Although with respect to the SANE nurse's testimony the issues are predominantly about whether or not the testimony is testimonial in nature under *Crawford*, the court also determines that "portions of the victim's narrative specifically accusing Defendant of sexual assault and other charges should have been excluded" from the SANE nurse's reading of the victim's narrative. *Romero* at ¶¶14-18. See also *State v. Romero*, 2006-NMCA-045. For additional information on *Crawford* issues, see Chapter 6.

Sometimes evidence is offered not regarding specific aspects of the particular case, but rather to provide general information or knowledge. For example, "[i]n a case where the victim recanted her accusation during her trial testimony, [the Court of Appeals] affirmed the admission of testimony from an expert about 'general knowledge about recantation, and about the general characteristics of abused children' when the trial court determined that such testimony assists the trier of fact because the jury would need some assistance in determining why children recant testimony. *State v. Neswood*, 2002 NMCA 81, ¶15, 132 N.M. 505, 51 P.3d 1159 (internal quotation marks omitted). New Mexico has decided many cases in which the State has been allowed to present such evidence. *See, e.g.*, *State v. Casaus*, 1996 NMCA 31, ¶32, 121 N.M. 481, 913 P.2d 669 (allowing expert to explain how a child remembers an event); *State v. Newman*, 109 N.M. 263, 266, 784 P.2d 1006, 1009 (Ct. App. 1989) (holding that testimony regarding characteristics of child sexual abuse victims is admissible). New Mexico courts have universally upheld admission of this sort of testimony when offered by the State to counter defense assertions of recent fabrication or delayed reporting. *See Alberico,* 116 N.M. at 164-65, 861 P.2d at 200." *State v. Campbell*, 2007-NMCA-051, ¶12.

In *Campbell*, the trial courted erred in excluding testimony by an expert psychologist about general characteristics of children in reporting sexual abuse because the issues surrounding the expert testimony were critical to the defense. "The question here is not the extent to which [the psychologist's] testimony would tell us anything directly about the child, but the

extent to which her testimony would provide an otherwise important framework in which the jury might regard issues present in the case concerning the context in which the child made various statements. To the extent that the defense hinged its case on the assertion that the child was coerced into making statements by his mother, we hold that due process required the district court to allow the defense to make its case, with [the psychologist's] testimony as a part." *Campbell* at ¶17.

7.2.4 Hypnotic Testimony

In a case of first impression for New Mexico, *State v. Beachum*, 97 N.M. 682, 643 P.2d 246 (Ct. App. 1981), set out a framework for considering hypnotic testimony. After recounting a great deal of background information on hypnosis and considering opinions from many other jurisdictions, the *Beachum* court articulated the following rule regarding hypnotic testimony:

> "A rule of per se inadmissibility, we conclude, is unnecessarily broad and may result in the exclusion of evidence that may be valuable and accurate. The better rule is that testimony of pre-hypnotic recollections is admissible in the sound discretion of the trial court, but post-hypnotic recollections, revived by the hypnosis procedure, are only admissible in a trial where a proper foundation has also first established the expertise of the hypnotist and that the techniques employed were correctly performed, free from bias or improper suggestibility."

Beachum at 688, 252.

The *Beachum* court went on to adopt a six pronged test for admissibility of hypnotically induced testimony of a witness. *Beachum* at 689, 253. More recently, *State v. Varela*, 112 N.M. 538, 817 P.2d 731 (Ct. App. 1991), reaffirmed the holding of *Beachum* and reiterated the prerequisite six safeguards prior to admissibility of hypnotic testimony as follows:

1) a psychiatrist or psychologist experienced in the use of hypnosis must conduct the session;
2) the professional conducting the hypnotic session should be independent of and not regularly employed by the prosecutor, investigator or defense;
3) any information given to the hypnotist by law enforcement personnel or the defense prior to the hypnotic session must be recorded;
4) before inducing hypnosis the hypnotist should obtain from the subject a detailed description of the facts as the subject remembers them;
5) all contacts between the hypnotist and the subject must be recorded; and
6) only the hypnotist and the subject should be present during any phase of the hypnotic session, including the pre-hypnotic testing and the post-hypnotic interview.

Varela at 541, 734. The Supreme Court recognized that *Beachum* set out an "explicit procedure to follow in administering a hypnotic session in order to introduce hypnotically refreshed testimony." *State v. Hutchinson*, 99 N.M. 616, 621, 661 P.2d 1315, 1320 (1983).

The *Hutchinson* court also restated the *Beachum* rule regarding hypnotic testimony, thus giving the stamp of approval of the highest state court. *Hutchinson* at 621, 1320.

In cases involving hypnotic testimony, the specific facts of each case have proven critical to the outcome and applicability of the *Beachum* ruling. The following summaries provide examples of specific factual situations and the applicability of the law to those facts:

- *Beachum* involved charges of criminal sexual penetration, armed robbery and aggravated burglary. In a line-up, the victim was able to identify the voice of the defendant as the assailant, but was unable to make a positive visual identification. During and after hypnosis the victim identified the defendant as her assailant from photographs. The trial court held an evidentiary hearing at which several experts and other witnesses testified. The trial court then suppressed some, but not all, of the victim's testimony.

  > "[T]he trial court determined upon the evidence before it that the use of hypnosis to enhance the memory of the prosecutrix was unduly suggestible. The trial court did not preclude the complaining witness from testifying as to her voice identification of defendant or any of the events concerning the attack upon her on July 8, 1980. N.M. Evidence Rule 403 invests the court with discretion to exclude the admission of evidence where the danger of prejudice is deemed to outweigh any probative value."

  Beachum at 690-691, 254-255.

- *Hutchinson* involved murder, kidnapping and armed robbery convictions. A witness, Hart, participated in a recorded interview with his attorney prior to being hypnotized four times for the purpose of tracing Hart's movements the night of the incident in an effort to locate the victim's body. None of the sessions aided Hart in recalling where the body had been left. The *Beachum* procedures were not followed in this case. Acknowledging that *Beachum* distinguished between pre-hypnotic and post-hypnotic testimony, the court held that "because the testimony at trial was essentially the same as the statements made to Hart's attorney before hypnosis, we find that there was no error in the trial court's ruling to allow Hart to testify." *Hutchinson* at 621, 1320.

- In a case where defendant was convicted of first degree criminal sexual penetration and kidnapping, the Court of Appeals held that the *Beachum* standards were not applicable meaning that the trial court properly admitted the victim's testimony. *State v. Clark*, 104 N.M. 434, 439, 722 P.2d 685, 690 (Ct. App. 1986), *overruled on other grounds* in *State v. Henderson*,109 N.M. 655, 789 P.2d 603 (1990) and *State v. Sanchez*, 1996-NMCA-089. *Clark* involved a 6 year old victim witness who recalled various details of the incident. In an effort to assist the child in recalling additional details or information, two attempts were made to hypnotize the child. The child was frightened, agitated, uncooperative and resisted hypnosis. In the hypnosis attempts the child was told she would remember more and more, but no suggestions were made to her or photographs shown. Two days after the last unsuccessful hypnotic

episode the child identified the defendant from photographs and subsequently made an in-court identification. In contrast to *Hutchinson* where there was no question that the witness was hypnotized, here the trial court found the child's testimony was not a 'post-hypnotic recollection revived' based on overwhelming evidence that the hypnotic procedure was inept and ineffective and that no information was conveyed to or elicited from the child during the attempts at hypnosis. *Clark* at 439, 690. The *Clark* court went on to emphatically state:

> "Our ruling on this issue should not be taken as an indication of approval for the procedures utilized during the hypnotic sessions in question. To the contrary, we express deep concern about law enforcement's use of nonprofessional hypnotists and condemn the failure to adhere to basic safeguards, whether or not required for evidentiary purposes. Our concern is not only for possible evidentiary taint, but also for the physical and mental well-being of the hypnotized subject."

Clark at 439, 690.

- In *Varela* a child was referred for therapy due to nightmares, inappropriate anger, depression and other symptoms. In taking a case history sexual abuse was not revealed. Prior to the child victim's allegation of the sexual abuse she had not told anyone of the abuse or that defendant had done anything to her. When the therapist performed relaxation therapy on the child the allegations were made. The relaxation therapy used was identified as Ericksonian hypnosis. *Varela* at 540, 733. Defendant argued that the child's memory had been hypnotically enhanced without appropriate safeguards adopted by the trial court. The Court of Appeals reversed the order suppressing the testimony of the child and therapist and remanded the case to the district court. The appellate court stated that Ericksonian hypnosis did not create the same reliability problems as classical hypnosis. However, they also determined that the record was inadequate to state definitively that the safeguards adopted by the court for hypnosis in *Beachum* were unnecessary when the Ericksonian hypnosis was used. The appellate court further distinguished *Beachum* in that *Varela* was not a case of hypnosis conducted for forensic purposes and the disclosure was completely unanticipated by the hypnotist. *Varela* at 541, 734. The appellate court concluded that while the six *Beachum* factors were not totally relevant in this case, they still had value to help the district court decide the admissibility of the testimony. The district court on remand must give due weight to the features of the hypnosis session. The appellate court felt the district court could find that the testimony was admissible. *Varela* at 542, 735.

7.2.5 Expert Testimony on the Experience of Battering

Because sexual assault may be related to domestic violence in some situations, this section provides brief information on expert testimony regarding the experience of battering.

Trial attorneys may sometimes offer testimony concerning the experience of battered women for the purpose of establishing one of the following:

- The specific effects of abuse on battered women;
- That a particular victim is indeed a battered woman, or
- That a particular victim suffers from the collection of specific effects of abuse on battered women collectively known as the 'battered women's syndrome.'

For further discussion see Douglas, M.A., *The Battered Woman Syndrome*, in Sonkin, D., ed., Domestic Violence On Trial, Springer, New York, 1987; see also 18 ALR 4th 1153 *Admissibility of Expert or Opinion Testimony on Battered Wife or Battered Woman Syndrome* and 58 A.L.R.5th 749 *Admissibility of Expert or Opinion Evidence of Battered-Woman Syndrome on Issue of Self-defense*.

While such testimony may focus on the victim's behavior, e.g. recanting testimony, minimizing and denying, etc., it is also important for the court and trier of fact to understand the context in which the violence has occurred.

The court should examine the perpetrator's patterns of violence and control of the victim, the perpetrator's belief systems that support the violence, the impact of the violence and abuse on the victim, how the victim has attempted to protect herself and the children from the violence in the past, the reasons the victim stayed in the relationship or returned to it, and the reasonableness of the victim's belief or apprehension that the perpetrator is going to inflict serious bodily harm or death. It is important that the court view the victim's behavior within the context of the impact of the violence on the victim.

For admissibility of expert testimony on battering and its effects in cases where the alleged battered woman is the victim/defendant:

- When offered by the prosecution, see, e.g., *State v. Ciskie*, 751 P.2d. 1165 (Wa. 1988);
- When offered by the defense, see, e.g., *State v. Vigil*, 110 N.M. 254, 794 P.2d 728 (1990); *State v. Swavola*, 114 N.M. 472, 840 P.2d 1238 (Ct. App. 1992); *State v. Gallegos*, 104 N.M. 247, 719 P.2d 1268 (Ct. App. 1986).

For more information, refer to the *New Mexico Domestic Violence Benchbook*.

7.3 DNA Testing and Admissibility

This section addresses DNA (deoxyribonucleic acid) testing and its potential application in sexual assault cases. To gain an understanding of DNA evidence, this section begins by providing general background of DNA biology and DNA testing techniques, and then moves on to discuss the legal requirements to admit DNA testing and statistical interpretation evidence.

7.3.1 Understanding DNA

Complex scientific information underlies the DNA analysis and information that may be used in court proceedings, including proceedings in sexual assault cases. To assist judges and other non-scientists in understanding issues involving DNA, *Forensic DNA Analysis for Non-Scientists,* prepared by Albuquerque Police Department Crime Lab (2007) is attached as Appendix D. This document explains DNA, DNA analysis and the statistical evaluation of DNA profiles in simplified language.

7.3.2 New Mexico Case Law on DNA Evidence and Statistical Interpretation

Several New Mexico Supreme Court cases, involving charges of criminal sexual penetration among other charges, have addressed the admissibility of DNA evidence to inculpate the accused. The cases summarized in this section were all decided post-*Alberico*.

First, in *State v. Anderson*, 118 N.M. 284, 881 P.2d 29 (1994), the Supreme Court held that DNA typing evidence and accompanying statistical calculations are admissible in New Mexico courts. "Any controversy over the results of the testing and the statistical calculations goes to the weight of the evidence and is properly left to the trier of fact." *Anderson* at 302-303, 47-48. In a footnote the *Anderson* court was careful to state that,

> "This does not mean that DNA typing evidence should always be admitted into evidence. The admissibility of any such evidence remains subject to attack. Issues pertaining to relevancy or prejudice may be raised. In addition, traditional challenges to the admissibility of evidence such as improper procedures, contamination of the sample, or chain of custody questions may be presented. The evidence, in the above instances, may be found to be so tainted that it is totally unreliable and, therefore, must be excluded."

Anderson at 303, 48, footnote 7.

Next, in *State v. Duran*, 118 N.M. 303, 881 P.2d 48 (1994), the Supreme Court built upon the holding of *Anderson*. The *Duran* court held specifically that "the evidence involving DNA typing and the statistical probabilities based on both the fixed-bin method used by the FBI (discussed at length in *Anderson (citation omitted)*) and the 'modified ceiling principle' method recommended in the report entitled *DNA Technology in Forensic Science* ('the NRC report'), jointly prepared by the Committee on DNA Technology in Forensic Science, the Board on Biology, the Commission on Life Sciences, and the National Research Council (also discussed in *Anderson)* were admissible at trial." *Duran* at 304, 49. "Any debate over the resulting probabilities that the 'match' is random goes to the weight of the evidence and is properly left for the jury to determine." *Duran* at 307, 52.

Finally, in *State v. Stills,* 1998-NMSC-009, the Supreme Court held that "PCR [Polymerase Chain Reaction] evidence is admissible in New Mexico courts." *Stills* at ¶33. The prior

Anderson and *Duran* cases had involved RFLP (Restriction Fragment Length Polymorphism) analysis rather than the PCR technique.

The Supreme Court felt it was important "to clarify that neither our opinion in *Anderson* nor that in [*Duran*] in any way affects the use of DNA evidence to exculpate a person accused of a crime." *Duran* at 307, 52.

For more background information about DNA evidence, all three opinions, *Anderson*, *Duran*, and *Stills*, contain lengthy discussions about various DNA issues. However, it is important to note that the opinions were written over 10 years ago so that considerable developments have likely taken place in scientific knowledge regarding DNA since that time.

7.4 Other Types of Test Results

7.4.1 Penile Plethysmograph

In *State v. Ruiz*, 2001-NMCA-097, the Court of Appeals assumed "without deciding, that the results of the penile plethysmograph test are not reliable enough to be considered admissible." *Ruiz* at ¶45. In *Ruiz*, however, the appellate court ruled that defendant might be allowed to testify regarding the test results to rebut an inference resulting from questioning of a witness by the prosecution insinuating that he refused to take the test. The Court of Appeals agreed with defendant "that he was entitled to present evidence that he had taken and passed the test, once the prosecution opened the door by questioning [a witness] about it." *Ruiz* at ¶46.

7.4.2 Polygraph

Generally polygraph examinations are treated similarly in sexual assault cases and other types of criminal cases, with several exceptions:

- Sex offenders: A district court may order a sex offender placed on probation to abide by reasonable terms and conditions of probation, including being subject to polygraph examinations (in addition to alcohol and drug testing) to determine if the sex offender is in compliance with the terms and conditions of probation. §31-20-5.2(C)(5).

- Victims: See below for the restriction in new legislation enacted during the 2008 legislative session.

Recent legislation with a *July 1, 2008 effective date* (HB 337, 2008 General Session) adds a new statutory section as follows:

"VICTIMS--POLYGRAPH EXAMINATIONS--PROHIBITED ACTIONS.—A law enforcement officer, prosecuting attorney or other government official shall not ask or require an adult, youth or child victim of a sexual offense provided in Sections 30-9-11 through 30-9-13 NMSA 1978 to submit to a polygraph examination or other truth-telling device as a condition for proceeding with the investigation, charging or prosecution of the offense. The victim's refusal to submit to a polygraph examination or other truth-telling device shall not prevent the investigation, charging or prosecution of the offense."

7.4.3 Blood Spatter, Hair Analysis, Blood Typing from Bodily Fluids, Bite Mark, Etc.

Many other types of evidence may be offered in sexual assault cases. Some types of evidence, such as bite marks or semen, may be more common in sexual assault cases than other criminal cases. Still the treatment of these types of evidence in sexual assault cases would be similar to any other criminal case. Since the intent of this benchbook is to address issues unique to sexual assault cases and not to cover criminal law more generally, these types of evidence will not be further addressed here. Additionally, DNA testing has generally replaced certain other scientific techniques such as blood typing and hair analysis.

7.5 Sexual Assault Nurse Examiner (SANE) Programs

For information about New Mexico SANE programs refer to Appendix E - *New Mexico SANE Programs* – December 2007, Appendix F - *General Information about New Mexico Sexual Assault Nurse Examiner (SANE) Programs* -- December 2007, Appendix G - *Qualifications for Being a New Mexico SANE – Adult/Adolescent* – Revised September 2007, and Appendix H - *Core Components of a SANE Medical Record* – November 2005.

For additional information regarding sexual assault evidence collection kits and suspected offender kits refer to §1.6.1 of this benchbook and the appendices referenced in that section, namely Appendix A - *Sexual Assault Evidence Kit (SAEK) Instructions* – Exam and treatment protocol and directions for evidence collection from sexual assault patients – Revised December 2006 and Appendix B - *Sexual Assault History Form – New Mexico Sexual Assault Evidence Kit (SAEK)* – June 2005.

To obtain the most current version of any of the documents contained in the appendices mentioned in this section, contact the New Mexico Coalition of Sexual Assault Programs at 505-883-8020 in Albuquerque or 1-888-883-8020 toll free outside of Albuquerque.

7.6 Drug-Facilitated Sexual Assault

Along with force, coercion, fraud, disguise, position of authority, and the exploitation of a victim's age or mental incapacity, perpetrators of sexual assault may also use alcohol and drugs to incapacitate their victims and to facilitate sexual assaults. Alcohol is still the most frequently used substance to facilitate a sexual assault. See Michigan Sexual Assault Systems Response Task Force, *The Response to Sexual Assault: Removing Barriers to Services and Justice*, p. 46 (www.mcadsv.org/products/sa/TASKFORCE.pdf, last visited March 2008). However, other substances like GHB and Rohypnol are also frequently used for their more extreme pharmacological effects, such as amnesia, reduction of sexual inhibitions, impairment of judgment, and loss of consciousness, to name but a few. See Fitzgerald, N. and K. Jack Riley, *Drug-Facilitated Rape: Looking for the Missing Pieces*, National Institute of Justice Journal, April 2000.

7.6.1 New Mexico's Delivery of a 'Drug-Facilitator' Crime

"It is unlawful for a person to distribute gamma hydroxybutyric acid [GHB] or flunitrazepam [Rohypnol] to another person without that person's knowledge and with intent to commit a crime against that person, including criminal sexual penetration. 'Without that person's knowledge' means the person is unaware that a substance with the ability to alter that person's ability to appraise conduct or to decline participation in or communicate unwillingness to participate in conduct is being distributed to that person." §30-31-22(B).

However, even though this statute requires delivery of a drug facilitator without the person's knowledge, it is important to note that a victim who consents to the delivery of a drug facilitator—voluntarily ingests the drug facilitator—is not necessarily consenting to a subsequent sexual act. In *The Response to Sexual Assault: Removing Barriers to Services and Justice*, p. 46, the Michigan Sexual Assault Systems Response Task Force stated that "[a]lthough [victims] also consume alcohol and drugs voluntarily, in these circumstances alcohol and drugs can be used as a weapon by perpetrators who use [the victim's] intoxication and diminished ability to assault [him or] her."

7.6.2 Forensic Evidence Collection Issues

The following observations were made regarding the difficulty of performing law enforcement investigations in drug-facilitated sexual assault cases:

> "Investigations of suspected drug-facilitated [sexual] assaults often turn out to be inconclusive because many victims do not seek assistance until hours or days later, in part because the drugs have impaired recall and in part because victims may not recognize the signs of sexual assault. By the time they do report a suspected assault, conclusive forensic evidence may have been lost. Even when victims do suspect a drug-facilitated rape and seek help immediately, law enforcement agencies may not know how to collect evidence appropriately or how to test urine using the sensitive method

> required." Fitzgerald & Riley, *Drug-Facilitated Rape: Looking for the Missing Pieces*, pp. 10-11.

In cases of suspected drug-facilitated sexual assault, it is recommended that urine samples be collected from the alleged victim as soon as possible to detect the presence of drugs that might not be detectable with blood samples. One forensic examiner/toxicologist, noting that many sexual assault evidence kits do not provide containers for urine, explained the need for such urine containers and samples, comparing the forensic need for urine versus blood samples:

> "Given the fact that there is usually a substantial delay between the drugging and the reporting of the crime, the urine allows for a longer window of detection of drugs commonly used in these crimes. The sooner the urine specimen is obtained after the alleged event, the greater the chance of detecting drugs that are quickly eliminated from the body. A urine specimen is probably of little value if it is obtained after four days of the suspected drugging of the victim. For an extensive analysis to be performed, it is recommended that a minimum of 30 mL [milliliters] of urine be collected; however, 100 mL is preferred.
>
> "Because drugs are generally detectable in blood specimens a much shorter period than in urine, blood specimens are usually useful only when the collection has occurred within 24 hours of the drugging. The blood (approximately 30 mL) should be collected in a container with preservatives (such as gray-top tubes containing sodium fluoride and potassium oxalate) and refrigerated. This blood specimen should be collected in addition to blood specimens needed for other forensic testing (i.e., serology or DNA)." LeBeau, *Toxicological Investigations of Drug-Facilitated Sexual Assaults*, 1 Forensic Science Communications (April 1999).

Additionally, because drug facilitators are often stored in innocuous-looking containers, such as water bottles, eye droppers, window cleaning bottles, etc., law enforcement personnel should specifically request to search such containers in affidavits that accompany search warrants. For further information on toxicological investigations, see *The Prosecution of Rohypnol and GHB Related Sexual Assaults* (American Prosecutors Research Institute, 1999), Chapter 2.

For information on New Mexico's sexual assault evidence collection methods, see §1.6.1 and Appendix A - *Sexual Assault Evidence Kit (SAEK) Instructions* – Exam and treatment protocol and directions for evidence collection from sexual assault patients – Revised December 2006, Appendix B - *Sexual Assault History Form – New Mexico Sexual Assault Evidence Kit (SAEK)* – June 2005, and Appendix I - *SANE Drug-Facilitated Sexual Assault Form* – June 2005.

7.6.3 Types and Characteristics of Common Drug Facilitators

This subsection discusses various drug facilitators commonly used to facilitate sexual assaults. Each listed drug facilitator is identified by common title and chemical name, and includes, when appropriate, the applicable New Mexico controlled substance schedules. Also listed are each drug facilitator's common pharmacological effects.

- **Ecstasy**
  - Chemical name: 3, 4-methylenedioxy amphetamine.
  - New Mexico's controlled substance schedule: Schedule I, §30-31-6(C).
  - Pharmacological effects: hallucinations, memory loss, cognitive impairment, psychosis, long-term neurochemical and brain cell damage, and hypothermia.

- **GHB/GBL**
  - Chemical name: gamma hydroxybutyric acid, gamma butyrolactone, 1-4 butane diol.
  - New Mexico's controlled substance schedule: Schedule I, §16.19.20.65 NMAC, and Schedule III, §16.19.20.67 NMAC.
  - Pharmacological effects: dizziness, nausea, memory loss (amnesia), hallucinations, hypotension, severe respiratory depression, unconsciousness, and coma.

- **Rohypnol**
  - Chemical name: flunitrazepam.
  - New Mexico's controlled substance schedule: Schedule I, §16.19.20.65 NMAC.
  - Pharmacological effects: sedation, muscle relaxation, partial amnesia, anxiety reduction.

- **Amphetamines/Methamphetamines**
  - Chemical name: amphetamine, methamphetamine.
  - New Mexico's controlled substance schedule: Schedule II, §30-31-7.
  - Pharmacological effects: psychosis, schizophrenia, paranoia, auditory and visual hallucinations, violent and erratic behavior.

- **LSD (Lysergic Acid Diethlyamide)**
  - Chemical name: lysergic acid diethylamide.
  - New Mexico's controlled substance schedule: Schedule I, §30-31-6(C).
  - Pharmacological effects: hallucination, impaired and distorted depth and time perception, impaired judgment, acute anxiety, acute depression, flashbacks.

Much of the foregoing information on drug facilitators was obtained through the U.S. Drug Enforcement Administration's website at www.usdoj.gov/dea/concern/concern.htm (last visited March 2008). For specific information on GHB and its analogue GBL, see Poratta, *GHB—Forever Changing the Fabric of Sexual Assault Investigations*, 3 Sexual Assault Report 3 (January/February 2000), pp. 33, 47-48.

CHAPTER 8

POST-CONVICTION AND SENTENCING MATTERS

This chapter covers:

- Post-conviction bail.
- Testing and counseling for HIV and sexually transmitted diseases.
- Imposition of a sentence for sexual assault crimes.
- Post conviction petition for DNA testing.
- Parole.

8.1 Introduction

This chapter explores issues that a court may have to consider after a sex offender has been convicted, including:

- The potential revocation of the sex offender's bail.
- The rights and duties associated with sentencing.
- The sentencing alternatives available, such as probation, imprisonment, sex offender treatment programs, sex offender registration, and restitution.
- A defendant's post-sentencing rights and duties, such as DNA testing and HIV testing and counseling.

Generally, this chapter addresses only those post-conviction and sentencing matters unique to sexual assault and is not intended to be a comprehensive treatment of the subject for all crimes.

8.2 Post-Conviction Bail

Before conviction, defendant has a right, with certain exceptions, to reasonable bail. N.M. Const. Art. II, §13. For a discussion of the applicable laws governing bail determinations before conviction, see chapter 4 of this benchbook.

Section 31-11-1 regarding release pending appeal provides:

- "All appeals and writs of error in criminal cases have the effect of a stay of execution of the sentence of the district court until the decision of the supreme court or court of appeals." §31-11-1(A).
- "If a defendant is convicted of a capital or violent offense and is sentenced to death or a term of imprisonment not suspended in whole, he shall not be entitled to release pending appeal." §31-11-1(B).
- "If a defendant is convicted of a noncapital offense other than a violent offense and is sentenced to a term of imprisonment not suspended in whole, he shall not be entitled to release pending appeal unless the court finds:
  - o by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released; and
  - o that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in reversal or an order for a new trial." §31-11-1(C).
- "In all parole and probation revocation proceedings, where the alleged violation by the parolee or probationer of the conditions of release poses a threat to himself or others, the defendant shall not be entitled to be released on bail pending the decision on revocation. In those instances where the state has failed to conduct a preliminary parole revocation hearing on a parolee held for parole violations within sixty days of arrest, the parolee shall be eligible for bail. In all cases, the final parole revocation hearing shall be scheduled for hearing within sixty days of the parolee's return to the penitentiary. In the case of probation violation, if the final probation revocation hearing is not brought before the court within sixty days, then the probationer shall be eligible for bail." §31-11-1(E).

For purposes of §31-11-1, 'violent offense' includes, among other things:

- Kidnapping; and
- Criminal sexual penetration in the first or second degree. §31-11-1(D).

Regarding changes in the law on post-conviction bail, in *State v. House*, 1996-NMCA-052, the Court of Appeals stated:

> "In 1988, New Mexico voters removed entirely any constitutional right to post-conviction bail through a constitutional amendment which provides that 'all persons shall, **before conviction** be bailable by sufficient sureties, except for capital offenses.' N.M. Const. Art. II, §13 (*emphasis added*). That same year the legislature enacted Section 31-11-1 in its present form, denying the right to bail pending appeal for those convicted of certain offenses and granting a limited and conditional right to bail for those convicted of other offenses…. Section 31-11-1(C) is not inconsistent with Article II, Section 13. In fact, the legislative creation of that limited and conditional right to bail appears to be a new right, not provided under the New Mexico Constitution. Thus, the statute appears substantive in nature. It is not the province of New Mexico courts to invalidate substantive policy choices made by the legislature."

House at ¶6 (*citations omitted*). The *House* court also determined that §31-11-1(C) is constitutional. *House* at ¶10. Additionally, the court noted that 'substantial question' under §31-11-1(C)(2) is a question that is "more than not frivolous." *House* at ¶14. Finally, bail pending appeal is appropriate if, assuming that the 'substantial question' is determined favorably to defendant on appeal, that 'substantial question' decision is likely to result in reversal or an order for a new trial on all counts on which imprisonment has been imposed. *House* at ¶15.

8.2.1 Release During Trial and Revocation of Release

"A person released pending trial under Rule 5-401 shall continue on release under the same terms and conditions as previously imposed, unless the court determines that other terms and conditions or termination of release are necessary to assure his presence during the trial or to assure that his conduct will not obstruct the orderly administration of justice." Rule 5-402(A).

8.2.2 Release Before Sentencing

"A person released pending or during trial may continue on release pending the imposition of sentence under the same terms and conditions as previously imposed, unless the surety has been released or the court has determined that other terms and conditions or termination of release are necessary to assure:

- that such person will not flee the jurisdiction of the court;
- that his conduct will not obstruct the orderly administration of justice; or
- that the person does not pose a danger to any other person or to the community."

Rule 5-402(B). "By its terms, the rule recognizes that a surety may be released upon a finding of guilt. Further, a defendant is not automatically entitled to release under the same terms and conditions that were previously imposed pending or during trial after he has been adjudicated guilty but not yet sentenced. This is because the risk he will not appear has materially increased with the determination that he is guilty…. An increase in the amount of the bond after conviction is within the discretion of the trial court." *State v. Valles*, 2004-NMCA-118, ¶13 (*citations omitted*).

8.2.3 Release After Sentencing and Pending Appeal

"After imposition of a judgment and sentence, the court, upon motion of the defendant, may establish conditions of release pending appeal or a motion for new trial. The court may utilize the criteria listed in Paragraph B of Rule 5-401, and may also consider the fact of defendant's conviction and the length of sentence imposed. The defendant shall be detained unless the district court after a hearing determines that the defendant is not likely to flee and does not pose a danger to the safety of any other person or the community if released. In the event the court requires a bail bond in the same amount as that established for release pending trial, the bond previously furnished shall continue pending appeal or disposition of a motion for a new trial, unless the surety has been discharged by order of the court. Nothing

in this rule shall be construed as prohibiting the judge from increasing the amount of bond on appeal." Rule 5-402(C). See also §31-11-1 (discussed above).

8.2.4 Revocation of Bail or Modification of Conditions of Release Pending Appeal

"The taking of an appeal does not deprive the district court of jurisdiction under Rule 5-403, and the state may file a motion in the district court for revocation of bail or modification of conditions of release on appeal." Rule 5-402(D). Rule 5-403 provides: "The court on its own motion or upon motion of the district attorney may at any time have the defendant arrested to review conditions of release. Upon review the court may:

- impose any of the conditions authorized under Rule 5-401(A) or (C); or
- after a hearing and upon a showing that the defendant has been indicted or bound over for trial on a charge constituting a serious crime allegedly committed while released pending adjudication of a prior charge, revoke the bail or release."

See also §31-11-1 (discussed above).

8.3 Testing and Counseling for HIV and Sexually Transmitted Diseases

This section discusses a court's authority to order testing and counseling for HIV and other sexually transmitted diseases after a defendant has been *convicted* of certain criminal offenses. For discussion of this issue after a defendant has been *formally charged* with certain criminal offenses, see chapter 5 of this benchbook.

8.3.1 Testing

"A test designed to identify the human immunodeficiency virus or its antigen or antibody may be performed, without his consent, on an offender convicted pursuant to state law of any criminal offense:

- involving contact between the penis and vulva;
- involving contact between the penis and anus;
- involving contact between the mouth and penis;
- involving contact between the mouth and vulva;
- involving contact between the mouth and anus; or
- when the court determines from the facts of the case that there was a transmission or likelihood of transmission of blood, semen or vaginal secretions from the offender to the victim.

§24-2B-5.1(A). For an analogous provision relating to sexually transmitted diseases, see §24-1-9.1(A).

"When consent to perform a test on an offender cannot be obtained pursuant to the provisions of §§24-2B-2 or 24-2B-3, the victim of a criminal offense described in §24-2B-5.1(A) may petition the court to order that a test be performed on the offender. The petition and all proceedings in connection therewith shall be under seal. When the victim of the criminal offense is a minor or incompetent, the parent or legal guardian of the victim may petition the court to order that a test be performed on the offender. The court shall order and the test shall be administered to the offender within ten days after the petition is filed by the victim, his parent or guardian." §24-2B-5.1(B). For an analogous provision relating to sexually transmitted diseases, see §24-1-9.1(B).

8.3.2 Counseling

"When the offender has a positive test result, both the offender and victim shall be provided with counseling, as described in §24-2B-4." §24-2B-5.1(B). "No positive test result shall be revealed to the person upon whom the test was performed without the person performing the test or the health facility at which the test was performed providing or referring that person for individual counseling about:

- the meaning of the test results;
- the possible need for additional testing;
- the availability of appropriate health care services, including mental health care, social and support services; and
- the benefits of locating and counseling any individual by whom the infected person may have been exposed to the human immunodeficiency virus and any individual whom the infected person may have exposed to the human immunodeficiency virus."

§24-2B-4. For an analogous provision relating to sexually transmitted diseases, see §24-1-9.3.

8.3.3 Disclosure of Test Results

"The results of the test shall be disclosed only to the offender and to the victim or the victim's parent or legal guardian." §24-2B-5.1(B). For an analogous provision relating to sexually transmitted diseases, see §24-1-9.1(B). "No person to whom the results of a test have been disclosed may disclose the test results to another person except as authorized by the HIV Test Act." §24-2B-7. For an analogous provision relating to sexually transmitted diseases, see §24-1-9.5. "Nothing in the HIV Test Act shall be construed to prevent a person who has been tested from disclosing in any way to any other person his own test results." §24-2B-8. In addition, the HIV Act provides that the test results must not be disclosed with any identifiable information except to the listed persons or entities as provided in the Act. §24-2B-6. For an analogous provision relating to sexually transmitted diseases, see §24-1-9.4.

8.3.4 Administration, Payment for, and Lawful Distribution of Test Results

The court's order shall direct responsibility for the administration, payment for and lawful distribution of test results as follows:

- The Department of Health is responsible when the offender is sentenced to imprisonment in a state corrections facility, §24-2B-5.1(C);
- The Department of Health is responsible when the offender is convicted of a misdemeanor or petty misdemeanor offense or is convicted of a felony offense that is suspended or deferred, §24-2B-5.1(D);
- The Department of Health is responsible when the offender is a minor adjudicated as a delinquent child pursuant to the provisions of the Children's Code and the court does not transfer legal custody of the minor to the Children, Youth and Families Department, §24-2B-5.1(F); and
- The Children, Youth and Families Department is responsible when the offender is a minor adjudicated as a delinquent child pursuant to the provisions of the Children's Code [§32A-1-1] and the court transfers legal custody of the minor to the Children, Youth and Families Department, §24-2B-5.1(E).

8.4 Imposition of Sentence for Sexual Assault Crimes

Generally, sexual assault crimes are punishable in accordance with the sentencing authority for non-capitol felonies in §31-18-13 and §31-18-15 and for misdemeanors in §31-19-1. It is important to note that §31-18-15 contains provisions specifically for greater imprisonment and fines for sexual offenses against a child and aggravated criminal sexual penetration. A comprehensive discussion of sentencing is beyond the scope of this benchbook; only sentencing considerations specific to sexual assault will be discussed.

8.4.1 Sentencing for Two Violent Sex Offense Convictions

"When a defendant is convicted of a second violent sexual offense, and each violent sexual offense conviction is part of a separate transaction or occurrence, and at least the second violent sexual offense conviction is in New Mexico, the defendant shall, in addition to the punishment imposed for the second violent sexual offense conviction, be punished by a sentence of life imprisonment. The life imprisonment sentence shall be subject to parole pursuant to the provisions of §31-21-10." §31-18-25(A). "Notwithstanding [§31-18-25(A)], when a defendant is convicted of a second violent sexual offense, and each violent sexual offense conviction is part of a separate transaction or occurrence, and the victim of each violent sexual offense was less than thirteen years of age at the time of the offense, and at least the second violent sexual offense conviction is in New Mexico, the defendant shall be punished by a sentence of life imprisonment without the possibility of parole." §31-18-25(B). "The sentence of life imprisonment shall be imposed after a sentencing hearing,

separate from the trial or guilty plea proceeding resulting in the second violent sexual offense conviction, pursuant to §31-18-26." §31-18-25(C).

As used in this context, §31-18-25(F) provides that "violent sexual offense" means:

- criminal sexual penetration in the first degree, as provided in §30-9-11(C), or
- criminal sexual penetration in the second degree, as provided in §30-9-11(D).

Additionally, when a defendant has a felony conviction from another state, the felony conviction shall be considered a violent sexual offense for the purposes of the Criminal Sentencing Act [Chapter 31, Article 18] if the crime would be considered a violent sexual offense in New Mexico. §31-18-25(E). However, for the purposes §31-18-25 a violent sexual offense conviction incurred by a defendant before he reaches the age of eighteen shall not count as a violent sexual offense conviction. §31-18-25(D).

The New Mexico Supreme Court held that §31-18-25 authorizes the imposition of multiple enhancements for multiple current convictions. *State v. McClendon*, 2001-NMSC-023, ¶19. In *McClendon* the defendant was convicted of two counts of second degree criminal sexual penetration, among other convictions. Defendant also admitted that he had been convicted of two prior felonies, one of which was a prior violent sexual offense. Based on his prior conviction for a violent sexual offense, defendant was sentenced to two mandatory terms of life imprisonment in addition to the basic sentence of nine years on each count of criminal sexual penetration. The Supreme Court affirmed the defendant's conviction and sentence. *Id.*

The sentencing hearing required in §31-18-25, is conducted in accordance with the procedures in §31-18-26. "The court shall conduct a separate sentencing proceeding to determine any controverted question of fact regarding whether the defendant has been convicted of two violent sexual offenses. Either party to the sentencing proceeding may demand a jury sentencing proceeding." §31-18-26(A). "A jury sentencing proceeding shall be conducted as soon as practicable by the original trial judge before the original trial jury. A nonjury sentencing proceeding shall be conducted as soon as practicable by the original trial judge. In the case of a plea of guilty, the sentencing proceeding shall be conducted as soon as practicable by the original trial judge or by the original trial jury, upon demand of the defendant." §31-18-26(B). "In a jury sentencing proceeding, the judge shall give appropriate instructions and allow arguments. In a nonjury sentencing proceeding, or upon a plea of guilty when the defendant has not demanded a jury, the judge shall allow arguments and determine the verdict." §31-18-26(C).

The New Mexico Court of Appeals concluded that although the statutory language 'as soon as practicable' in §31-18-26(B) means that the life enhancement proceeding must be conducted without undue delay, the legislature did not intend to impose a specific time limitation on the commencement of life enhancement proceedings. *State v. Massengill*, 2003-NMCA-024, ¶60. In a case involving criminal sexual penetration and abuse of a child by endangerment, defendant's argument that the trial court erred by granting a continuance of a life enhancement sentencing proceeding was rejected on appeal, where defendant failed to

demonstrate that he suffered actual prejudice in connection with the continuance of the life enhancement proceeding or that the delay violated his rights to due process or a speedy trial. *Massengill*, at ¶¶61-63.

8.4.2 Sentencing for Third Violent Felony

In accordance with §31-18-23, mandatory life imprisonment shall be imposed, under specified circumstances, after conviction of a third violent felony. Violent felony is defined to include first degree criminal sexual penetration and some forms of second degree criminal sexual penetration. §31-18-23(E)(2)(d). Note that effective July 1, 2007, §30-9-11 was amended to add the new crime of aggravated criminal sexual penetration, which changed the paragraph numbering within that statutory section. Thus, the cross references in §31-18-23 are not accurate at the time of writing this benchbook (November 2007).

8.4.3 Other Sentencing Enhancements

Other general enhancement provisions, not specifically mentioning sexual offenses, can be found in §31-18-16 (use of firearms) and §31-18-17 (habitual offenders).

- It is not improper to enhance a sentence under the general habitual offender statute if it has already been enhanced under the firearm enhancement statute. *State v. Reaves*, 99 N.M. 73, 653 P.2d 904 (Ct. App. 1982).
- §31-18-16 provides a separate and distinct basis (use of a firearm) for further altering a basic sentence in addition to the alteration for aggravating circumstances permitted by §31-18-15.1; the language and requirements of each statute were totally independent of the other. *State v. Hall*, 107 N.M. 17, 25, 751 P.2d 701, 709 (Ct. App. 1987).

8.4.4 Aggravating and Mitigating Circumstances

A. New Mexico’s statute which allows for alterations of sentences based on the judge’s consideration of mitigating and aggravating circumstances, §31-18-15.1, has recently been held facially unconstitutional. *State v. Frawley*, 2007-NMSC-057. The issue addressed in *Frawley* was “whether alteration of a defendant's basic sentence upon a finding by the judge of aggravating circumstances surrounding the offense or concerning the offender, §31-18-15.1(A), violates the federal constitutional right to a jury trial under the Sixth and Fourteenth Amendments to the United States Constitution.” *Frawley* at ¶1.

In *Frawley* the New Mexico Supreme Court relies on a line of recent United States Supreme Court cases including *Cunningham v. California*, 127 S. Ct. 856 (2007), *United States v. Booker*, 543 U.S. 220 (2005), *Blakely v. Washington*, 542 U.S. 296 (2004) and *Apprendi v. New Jersey*, 530 U.S. 466 (2000). These cases support the *Frawley* holding that a jury not a trial judge must find aggravating circumstances beyond a reasonable doubt. Under §31-18-15.1, not only were judges allowed to make such findings, but the statute specifically required a judge to find the aggravating circumstances. Furthermore, the one type of fact -- prior convictions -- that is ‘*Blakely*-exempt,” §31-18-15.1 specifically precludes from being

used as an aggravating circumstance. Thus, the *Frawley* court concluded that §31-18-15.1 can never be constitutionally applied. *Frawley* at ¶¶ 28-29.

The *Frawley* court declined to attempt to temporarily remedy the constitutional deficiency stating that "the question of how to ultimately fix the constitutional problem lies with the Legislature." *Frawley* at ¶33. The court did, however, conclude that the holding "is only to be given prospective application." *Frawley* at ¶44. The *Frawley* decision was filed on October 25, 2007 and released for publication on November 27, 2007.

Prior to *Frawley* several recent cases involving aggravated sentences were remanded to trial courts for resentencing consistent with the holding in *Cunningham*. See, e.g., *State v. King*, 2007-NMCA-130, *State v. Bounds*, 2007-NMCA-062, *State v. Kincaid,* 2007 N.M. App. Unpub. LEXIS 9, *cert. granted*.

B. Long before the *Frawley* decision several New Mexico cases addressed the alteration of sentences specifically in criminal sexual penetration cases. Brief summaries of these cases are included here for historical reference as the *Frawley* decision does not apply retroactively.

- A judge's consideration of the physical injury (an element of criminal sexual penetration) suffered by the victim in increasing the basic sentence did not expose the defendant to double jeopardy. *State v. Bernal*, 106 N.M. 117, 739 P.2d 986 (Ct. App. 1987).
- Another case was remanded for a new sentencing hearing on defendant's convictions for kidnapping, criminal sexual penetration, and robbery, where the trial court found the existence of aggravating circumstances, but did not specify what those circumstances were. *State v. McGuire*, 110 N.M. 304, 795 P.2d 996 (1990).
- On the other hand, while the victim's blood relationship to defendant arguably was a circumstance surrounding the offense of criminal sexual penetration, it was impermissible for the court to consider such relationship as an aggravating factor at sentencing on a criminal sexual penetration count after defendant had also been convicted of incest. *Swafford v. State*, 112 N.M. 3, 810 P.2d 1223 (1991).

Additionally, one case addressed the alteration of sentences specifically in criminal sexual contact cases. Where the defendant was charged with rape of a child, criminal sexual contact of a minor, and contributing to the delinquency of a minor, the court properly considered the minority of the victims as an aggravating circumstance even though it was an essential element of each crime. *State v. Cawley*, 110 N.M. 705, 799 P.2d 574 (1990) (distinguished in *Swafford*).

C. On a related matter, the only underlying felonies for felony murder that can serve as an aggravating circumstance for capital sentencing are kidnapping, criminal sexual contact of a minor, and criminal sexual penetration. §31-20A-5(B). For the use of each of these three felonies as an aggravating circumstance, the legislature imposed the additional requirement of demonstrating beyond a reasonable doubt that the defendant had an intent to kill. *State v. Fry*, 2006-NMSC-001. However, the jury is not required to find that the aggravating

circumstances outweigh the mitigating circumstances beyond a reasonable doubt in order to specify a sentence of death. *Fry*. §31-20A-5, which provides a role for the jury, was not addressed in *Frawley*.

8.5 Additional Considerations in Imposing Sentence for Sexual Assault Crimes

8.5.1 Probation for Sex Offenders

"When a district court defers imposition of a sentence for a sex offender, or suspends all or any portion of a sentence for a sex offender, the district court shall include a provision in the judgment and sentence that specifically requires the sex offender to serve an indeterminate period of supervised probation for a period of not less than five years and not in excess of twenty years. A sex offender's period of supervised probation may be for a period of less than twenty years if, at a review hearing provided for in [§31-20-5.2(B)], the state is unable to prove that the sex offender should remain on probation. Prior to placing a sex offender on probation, the district court shall conduct a hearing to determine the terms and conditions of supervised probation for the sex offender. The district court may consider any relevant factors, including:

- the nature and circumstances of the offense for which the sex offender was convicted or adjudicated;
- the nature and circumstances of a prior sex offense committed by the sex offender;
- rehabilitation efforts engaged in by the sex offender, including participation in treatment programs while incarcerated or elsewhere;
- the danger to the community posed by the sex offender; and
- a risk and needs assessment regarding the sex offender, developed by the sex offender management board of the New Mexico sentencing commission or another appropriate entity, to be used by appropriate district court personnel." §31-20-5.2(A).

For purposes of §31-20-5.2 'sex offender' means a person who is convicted of, pleads guilty to or pleads nolo contendere to any of the listed offenses which include among others:

- kidnapping, as provided in §30-4-1, when committed with intent to inflict a sexual offense upon the victim; and
- criminal sexual penetration in the first, second or third degree, as provided in §30-9-11. §31-20-5.2(F).

The other listed crimes involve child victims and thus are not addressed in this benchbook. Section 31-20-5, the general statute on probation, applies to those sexual assault crimes, such as criminal sexual contact, not specifically covered by §31-20-5.2.

"The district court may order a sex offender placed on probation to abide by reasonable terms and conditions of probation, including:

- being subject to intensive supervision by a probation officer of the corrections department;
- participating in an outpatient or inpatient sex offender treatment program;
- a probationary agreement by the sex offender not to use alcohol or drugs;
- a probationary agreement by the sex offender not to have contact with certain persons or classes of persons; and
- being subject to alcohol testing, drug testing or polygraph examinations used to determine if the sex offender is in compliance with the terms and conditions of his probation. §31-20-5.2(C).

"A district court shall review the terms and conditions of a sex offender's supervised probation at two and one-half year intervals. When a sex offender has served the initial five years of supervised probation, the district court shall also review the duration of the sex offender's supervised probation at two and one-half year intervals. When a sex offender has served the initial five years of supervised probation, at each review hearing the state shall bear the burden of proving to a reasonable certainty that the sex offender should remain on probation." §31-20-5.2(B). "If the district court finds that a sex offender has violated the terms and conditions of his probation, the district court may revoke his probation or may order additional terms and conditions of probation." §31-20-5.2(E).

"The district court shall notify the sex offender's counsel of record of an upcoming probation hearing for a sex offender, and the sex offender's counsel of record shall represent the sex offender at the probation hearing. When a sex offender's counsel of record provides the court with good cause that the counsel of record should not represent the sex offender at the probation hearing and the sex offender is subsequently unable to obtain counsel, the district court shall notify the chief public defender of the upcoming probation hearing and the chief public defender shall make representation available to the sex offender at that hearing." §31-20-5.2(D).

8.5.2 Restitution

Section 31-17-1 pertains to victim restitution for all crimes, including sexual offenses. "It is the policy of this state that restitution be made by each violator of the Criminal Code [§30-1-1] to the victims of his criminal activities to the extent that the defendant is reasonably able to do so." §31-17-1(A). See also N.M. Const. Art. II, §24 (providing the right to restitution from the person convicted of the criminal conduct that caused the victim's loss or injury for victims of various crimes including kidnapping and criminal sexual penetration). The Court of Appeals has determined that an order requiring a defendant convicted of criminal sexual penetration, incest, and contributing to the delinquency of a minor to pay a portion of the cost of the victim's counseling was reasonably related to the defendant's rehabilitation and valid under §31-17-1. *State v. Palmer*, 1998-NMCA-052, ¶17.

8.5.3 Inmate Release Programs

Section 33-2-43 allows for the establishment of 'inmate-release programs' which permit penitentiary inmates to attend school or to be employed in private business. However, the

inmate can only participate on various conditions including that he or she has "not been convicted of a crime involving assaultive sexual conduct nor violence to a child…." §33-2-44.

8.5.4 Sex Offender Treatment Programs

In determining conditions of probation or parole, the district court judge may consider efforts already made by the defendant to participate in treatment programs. Additionally, the judge may order participation in inpatient or outpatient sex offender treatment programs as a condition of probation or parole. §31-20-5.2 and §31-21-10.1. For more information on sex offender treatment, see chapter 1, §1.8, of this benchbook.

8.5.5 Sex Offender Notification and Registration

For information on sex offender notification and registration, see chapter 9 of this benchbook.

8.5.6 Victim's Right to Make Statement

Victims of various crimes, including kidnapping and criminal sexual penetration, have constitutional rights related to sentencing as follows:

- the right to make a statement to the court at sentencing and at any post-sentencing hearings for the accused; and
- the right to information about the conviction, sentencing, imprisonment, escape or release of the accused. N.M. Const. Art. II, §24. See also §31-26-4.

"At any scheduled court proceeding, the court shall inquire on the record whether a victim is present for the purpose of making an oral statement or submitting a written statement respecting the victim's rights enumerated in §31-26-4. If the victim is not present, the court shall inquire on the record whether an attempt has been made to notify the victim of the proceeding. If the district attorney cannot verify that an attempt has been made, the court shall:

- reschedule the hearing; or
- continue with the hearing but reserve ruling until the victim has been notified and given an opportunity to make a statement; and
- order the district attorney to notify the victim of the rescheduled hearing." §31-26-10.1(A).

For more information on the Victims of Crime Act, §31-26-1, et. seq., see chapter 5 of this benchbook.

8.5.7 Defendant's Right to Make Statement

As in all other non-capital felonies, in sexual assault cases the trial judge must give the defendant an opportunity to speak before pronouncing sentence. Failure to do so renders the sentence invalid. *Tomlinson v. State*, 98 N.M. 213, 215, 647 P.2d 415, 417 (1982).

8.6 Post Conviction Petition for DNA Testing

"A person convicted of a felony, who claims that DNA evidence will establish his innocence, may petition the district court of the judicial district in which he was convicted to order the disclosure, preservation, production and testing of evidence that can be subjected to DNA testing. A copy of the petition shall be served on the district attorney for the judicial district in which the district court is located." §31-1A-2(A). As used in this section, "DNA" means deoxyribonucleic acid. §31-1A-2(N). §31-1A-2 does not limit "other circumstances under which a person may obtain DNA testing or post-conviction relief a petitioner may seek pursuant to other provisions of law." §31-1A-2(J).

8.6.1 Requirements for Petition

"As a condition to the district court's acceptance of his petition, the petitioner shall:

- submit to DNA testing ordered by the district court; and
- authorize the district attorney's use of the DNA test results to investigate all aspects of the case that the petitioner is seeking to reopen." §31-1A-2(B).

"The petitioner shall show, by a preponderance of the evidence, that:

- he was convicted of a felony;
- evidence exists that can be subjected to DNA testing;
- the evidence to be subjected to DNA testing:
  - has not previously been subjected to DNA testing;
  - has not previously been subjected to the type of DNA testing that is now being requested; or
  - was previously subjected to DNA testing, but was tested incorrectly or interpreted incorrectly;
- the DNA testing he is requesting will be likely to produce admissible evidence; and
- identity was an issue in his case or that if the DNA testing he is requesting had been performed prior to his conviction and the results had been exculpatory, there is a reasonable probability that the petitioner would not have pled guilty or been found guilty." §31-1A-2(C).

8.6.2 District Court's Authority and Responsibilities

The district court has the following responsibilities with respect to post-conviction consideration of DNA evidence:

- If the petitioner satisfies the requirements of §31-1A-2(C), the district court shall appoint counsel for the petitioner, unless the petitioner waives counsel or retains his own counsel. §31-1A-2(D).
- After reviewing a petition, the district court may
  - dismiss the petition,
  - order a response by the district attorney, or
  - issue an order for DNA testing. §31-1A-2(E).
- The district court shall order all evidence secured that is related to the petitioner's case and that could be subjected to DNA testing. The evidence shall be preserved during the pendency of the proceeding. The district court may impose appropriate sanctions, including dismissal of the petitioner's conviction or criminal contempt, if the court determines that evidence was intentionally destroyed after issuance of the court's order to secure evidence. §31-1A-2(F).
- The district court shall order DNA testing if the petitioner satisfies the requirements set forth in §31-1A-2(B) and (C). §31-1A-2(G). See §8.6.1 of this benchbook.
- If the results of the DNA testing are exculpatory, the district court may:
  - set aside the petitioner's judgment and sentence,
  - dismiss the charges against the petitioner with prejudice,
  - grant the petitioner a new trial, or
  - order other appropriate relief. §31-1A-2(H).

8.6.3 Preservation of Evidence

"The state shall preserve all evidence that is secured in relation to an investigation or prosecution of a crime and that could be subjected to DNA testing, for not less than the period of time that a person remains subject to incarceration or supervision in connection with the investigation or prosecution." §31-1A-2(L). The state may dispose of evidence before the expiration of the time period in the following circumstances:

- no other law, regulation or court order requires that the evidence be preserved;
- the evidence must be returned to its rightful owner;
- preservation of the evidence is impractical due to the size, bulk or physical characteristics of the evidence; and
- the state takes reasonable measures to remove and preserve portions of the evidence sufficient to permit future DNA testing. §31-1A-2(M).

8.6.4 Costs of DNA Testing

"The cost of DNA testing ordered pursuant to this section shall be borne by the state or the petitioner, as the district court may order in the interest of justice. Provided, that a petitioner shall not be denied DNA testing because of his inability to pay for the cost of DNA testing. Testing under this provision shall only be performed by a laboratory that meets the minimum standards of the national DNA index system." §31-1A-2(I).

8.6.5 Rights of Appeal

The following rights of appeal are provided in §31-1A-2(K):

- The petitioner shall have the right to appeal a district court's denial of the requested DNA testing, a district court's final order on a petition or a district court's decision regarding relief for the petitioner.
- The state shall have the right to appeal any final order issued by the district court.
- An appeal shall be filed by a party within thirty days to the court of appeals.

8.7 Parole

Under §31-21-10.1(A), if the district court sentences a sex offender to a term of incarceration in a facility designated by the Department of Corrections, the district court shall include a provision in the judgment and sentence that specifically requires the sex offender to serve an indeterminate period of supervised parole for a period of:

- **Effective prior to July 1, 2007:**
  - not less than five years and not in excess of twenty years.
- **Effective date of July 1, 2007:**
  - not less than five years and not in excess of twenty years for the offense of kidnapping when committed with intent to inflict a sexual offense upon the victim, criminal sexual penetration in the third degree, [and other sexual offenses against children]; or
  - not less than five years and up to the natural life of the sex offender for the offense of aggravated criminal sexual penetration, criminal sexual penetration in the first or second degree, [and other sexual offenses against children].

A sex offender's period of supervised parole may be for a period of less than the maximum if, at a review hearing provided for in §31-21-10.1(C), the state is unable to prove that the sex offender should remain on parole. §31-21-10.1(A).

In the context of parole, 'sex offender' means a person who is convicted of, pleads guilty to or pleads nolo contendere to any of the listed offenses, which include kidnapping when committed with intent to inflict a sexual offense upon the victim, aggravated criminal sexual penetration, or criminal sexual penetration in the first, second or third degree, as well as

several other sexual offenses against children. §31-21-10.1(I). Section 31-21-10.1 shall apply to all sex offenders, except geriatric, permanently incapacitated and terminally ill inmates eligible for the medical and geriatric parole program as provided by the Parole Board Act [§31-21-22]. §31-21-10.1(H).

"Prior to placing a sex offender on parole, the parole board shall conduct a hearing to determine the terms and conditions of supervised parole for the sex offender. The board may consider any relevant factors, including:

- the nature and circumstances of the offense for which the sex offender was incarcerated;
- the nature and circumstances of a prior sex offense committed by the sex offender;
- rehabilitation efforts engaged in by the sex offender, including participation in treatment programs while incarcerated or elsewhere;
- the danger to the community posed by the sex offender; and
- a risk and needs assessment regarding the sex offender, developed by the sex offender management board of the New Mexico sentencing commission or another appropriate entity, to be used by appropriate parole board personnel." §31-21-10.1(B).

"The board may order a sex offender released on parole to abide by reasonable terms and conditions of parole, including:

- being subject to intensive supervision by a parole officer of the corrections department;
- participating in an outpatient or inpatient sex offender treatment program;
- a parole agreement by the sex offender not to use alcohol or drugs;
- a parole agreement by the sex offender not to have contact with certain persons or classes of persons; and
- being subject to alcohol testing, drug testing or polygraph examinations used to determine if the sex offender is in compliance with the terms and conditions of the sex offender's parole." §31-21-10.1(D).

With an **effective date of July 1, 2007**, the following statutory language regarding electronic real-time monitoring was added to §31-21-10.1:

> "The [parole] board shall require electronic real-time monitoring of every sex offender released on parole for the entire time the sex offender is on parole. The electronic monitoring shall use global positioning system monitoring technology or any successor technology that would give continuous information on the sex offender's whereabouts and enable law enforcement and the corrections department to determine the real-time position of a sex offender to a high level of accuracy." §31-21-10.1(E)

"When a sex offender has served the initial five years of supervised parole, and at two and one-half year intervals thereafter, the board shall review the duration of the sex offender's supervised parole. At each review hearing, the attorney general shall bear the burden of

proving by clear and convincing evidence that the sex offender should remain on parole." §31-21-10.1(C). Note that the burden of proof at review hearings was clarified during the 2007 legislative session ((SJC/SB 528 and 439, 2007 General Session) to be 'clear and convincing' with an **effective date of July 1, 2007**. The board shall notify the chief public defender of an upcoming parole hearing for a sex offender pursuant to §31-21-10.1(C), and the chief public defender shall make representation available to the sex offender at the parole hearing. §31-21-10.1(F). If the board finds that a sex offender has violated the terms and conditions of parole, the board may revoke the sex offender's parole or may modify the terms and conditions of parole. §31-21-10.1(G).

CHAPTER 9

SEXUAL OFFENDER IDENTIFICATION SYSTEMS

This chapter covers:

- Identification of criminals.
- Sex offender registration and notification.
- DNA identification.

9.1 Introduction

This chapter discusses various procedures and systems that are used within New Mexico and nationally to collect, store, and disseminate personal information concerning sex offenders. The procedures and systems discussed in this chapter are as follows:

- Identification of Criminals. Chapter 29, Article 3.
- Sex Offender Registration and Notification Act (SORNA). §§29-11A-1 through 29-11A-10.
- Combined DNA Index System (CODIS). 42 USC §14132.
- DNA Identification Act. §§29-16-1 through 29-16-13, §29-3-10 and §30-9-19.

9.2 Law Enforcement's Identification of Criminals

9.2.1 General Information

"It is the duty of the New Mexico state police to install and maintain complete systems for the identification of criminals, including:

- the fingerprint system, and
- the modus operandi system.

The New Mexico state police shall obtain, from whatever source procurable, and shall file and preserve for record:

- plates,
- photographs,

- outline pictures,
- fingerprints,
- measurements,
- descriptions,
- modus operandi statements and
- such other information about, concerning and relating to any and all persons who have been or who shall be convicted of a felony or who shall attempt to commit a felony within this state or who are well-known and habitual criminals…."

§29-3-1(A). "The New Mexico state police may also obtain like information concerning persons who have been convicted of violating any of the military, naval or criminal laws of the United States or who have been convicted of a crime in any other state, country, district or province, which, if committed within this state, would be a felony." §29-3-1(B).

"The New Mexico state police shall make a complete and systematic record and index of all information obtained for the purpose of providing a convenient and expeditious method of consultation and comparison." §29-3-1(C).

Effective January 1, 2007, "a person eighteen years of age or over who is arrested for the commission of a felony … shall provide a DNA sample to jail or detention facility personnel upon booking. A sample is not required if it is determined that a sample has previously been taken, is in the possession of the administrative center, has not been expunged pursuant to the DNA Identification Act and is sufficient for DNA identification testing." §29-3-10(A). For purposes of this statute, "felony" means: "a sex offense as defined in the provisions of §29-11A-3 that is a felony" or "any other felony offense that involves death, great bodily harm, aggravated assault, kidnapping, burglary, larceny, robbery, aggravated stalking, use of a firearm or an explosive or a violation pursuant to the Antiterrorism Act." §29-3-10(D)(3). For a complete list of the qualifying arrestee offenses, see §10.14.200.7 NMAC, which has been recently updated to include, effective July 1, 2007, the offenses of aggravated criminal sexual penetration and attempted aggravated criminal sexual penetration. For more information on DNA Identification, see §§9.4 and 9.5 below.

9.2.2 Fingerprints and Photographs

An arresting officer or the jail must obtain duplicate sets of fingerprints prior to release and take a photograph each time a person is arrested in the following instances potentially relevant to sexual assault:

- From a person arrested for the commission of a criminal offense amounting to a felony under New Mexico law or laws of any other jurisdiction;
- From a person arrested for the commission of a criminal offense not amounting to a felony but punishable by imprisonment for more than six months under New Mexico law or laws of any political subdivision.

"At the time of fingerprinting, a state tracking number shall be assigned to the fingerprint records and the booking sheet." §29-3-8 (A) and (B). Both copies of the fingerprints and a

photograph of the person arrested shall be forwarded to the New Mexico Department of Public Safety within five days following the date of arrest. The department shall forward one copy to the Federal Bureau of Investigation in Washington, D.C. §29-3-8(D). Fingerprints and photographs must also be obtained from an inmate who is charged with a felony or misdemeanor offense while incarcerated. §29-3-8(E).

9.2.3 Arrest Records – Correction or Expungement

"A person who believes that arrest record information concerning him is inaccurate or incomplete is, upon satisfactory verification of his identity, entitled to review the information and obtain a copy of it for the purpose of challenge or correction. In the event a law enforcement agency refuses to correct challenged information to the satisfaction of the person to whom the inaccurate or incorrect information relates, the person is entitled to appeal to the district court to correct the information pursuant to the provisions of §39-3-1.1." §29-10-8.

"A person may petition the department [of public safety] to expunge arrest information on the person's state record or federal bureau of investigation record if the arrest was for a misdemeanor or petty misdemeanor offense and the arrest was not for a crime of moral turpitude. If the department cannot locate a final disposition after contacting the arresting law enforcement agency, the administrative office of the courts and the administrative office of the district attorneys, the department shall expunge the arrest information." §29-3-8.1.

In a case dealing with a petition to expunge adult arrest records the Court of Appeals ruled as follows: "We know of no statute in New Mexico granting our courts authority to seal or expunge adult criminal records." *Toth v. Albuquerque Police Dep't*, 1997-NMCA-079, ¶4. The *Toth* court assumed, without directly deciding, that the trial court did have an inherent judicial authority to expunge criminal records, but noted that "this power--arising, as does all inherent judicial authority, from necessity--should be sparingly used." *Toth* at ¶9. The Court of Appeals affirmed the district court's decision, "holding that Petitioner has failed to present compelling circumstances to justify expungement," *Toth* at ¶7, and "that Petitioner did not present sufficient extraordinary circumstances to justify exercise of the district court's discretion." *Toth* at ¶11.

9.3 Sex Offender Registration and Notification Act (SORNA)

9.3.1 History and Future of SORNA

"In 1995 the Legislature passed the Sex Offender Registration Act (SORA). This Act--New Mexico's version of 'Megan's law'--was passed in response to the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program, pursuant to which states that enact registration programs for sex offenders can obtain federal funding. The Act was amended … and was then called the Sex Offender Registration and Notification Act (SORNA)." *State v. Brothers*, 2002-NMCA-110, ¶6 (*citations omitted*).

Recent SORNA-related Legislation with a July 1, 2007 effective date (SJC/SB 528 and 439, 2007 General Session):

- Clarifies "sex offender" definition. §29-11A-3(D).
- Amends "sex offense" definition to include new crime of aggravated criminal sexual penetration. §29-11A-3(E)(1).
- Provides that §29-11A-3 is applicable to:
  - A person convicted of a sex offense on or after July 1, 1995; and
  - A person convicted of a sex offense prior to July 1, 1995 and who, on July 1, 1995, was still incarcerated, on probation or on parole for commission of that sex offense.
- Provides that retention of registration information for aggravated criminal sexual penetration is for the sex offender's natural life. §29-11A-5(D)(1).

SORNA has been amended numerous times since 1995, including most recently in 2007 as noted above. Additional amendments are likely to occur in the future for a variety of reasons, including federal mandate. For example, the federal Adam Walsh Child Protection and Safety Act, Public Law (P.L.) 109-248, was signed into law on July 27, 2006, and became effective on October 1, 2006. This law will impact sex offender registration in the future, as states must implement this federal law before the later of 3 years after the date of the enactment of the Act, and 1 year after the date on which software for uniform sex offender registries required to be developed by the US Attorney General is available. The US Attorney General may authorize up to two 1-year extensions of the deadline. 42 USC §16924.

9.3.2 SORNA Purposes

The purposes underlying New Mexico's SORNA are to assist law enforcement agencies' efforts to protect their communities by:

- requiring sex offenders who are residents of New Mexico to register with the county sheriff of the county in which the sex offender resides;
- requiring sex offenders who are residents in other states, but who are employed in New Mexico or who attend school in New Mexico, to register with the county sheriff of the county in which the sex offender works or attends school;
- requiring the establishment of a central registry for sex offenders; and
- providing public access to information regarding certain registered sex offenders.

§29-11A-2.

9.3.3 Select Definitions under SORNA

A. Conviction/Conditional Discharge

Under SORNA, 'conviction' means "a conviction in any court of competent jurisdiction and includes a deferred sentence, but ***does not include a conditional discharge***." §29-11A-3(A) (*emphasis added*). A person granted a conditional discharge under §31-20-13 is not required to register as a sex offender. *State v. Herbstman*, 1999-NMCA-014, ¶20. Notice requiring defendant to register as a sex offender pursuant to SORNA did not need to be placed in a conditional discharge order. *Herbstman* at ¶21.

B. Sex Offender

As clarified by the 2007 SORNA amendments to §29-11A-3(D), 'sex offender' means a person who:

- is a resident of New Mexico who is convicted of a sex offense pursuant to state, federal, tribal or military law;
- changes residence to New Mexico, when that person has been convicted of a sex offense pursuant to state, federal, tribal or military law;
- does not have an established residence in New Mexico, but lives in a shelter, halfway house or transitional living facility or stays in multiple locations in New Mexico and who has been convicted of a sex offense pursuant to state, federal, tribal or military law; or
- is a resident of another state and who has been convicted of a sex offense pursuant to state, federal, tribal or military law, but who is:
  - employed full time or part time in New Mexico for a period of time exceeding fourteen days or for an aggregate period of time exceeding thirty days during any calendar year, including any employment or vocation, whether financially compensated, volunteered or for the purpose of government or educational benefit; or
  - enrolled on a full-time or part-time basis in a private or public school or an institution of higher education in New Mexico.

C. Sex Offense

Among numerous other offenses, under SORNA 'sex offense' includes several of the offenses (or their equivalents in any other jurisdiction, as added by a 2007 amendment) which provide the focus of Chapter 2 of this benchbook:

- Aggravated criminal sexual penetration, as provided in §30-9-11;
- Criminal sexual penetration in the first, second, third or fourth degree, as provided in §30-9-11;
- Criminal sexual contact in the fourth degree, as provided in §30-9-12; or
- Attempt to commit any of the specified sex offenses, as provided in §30-28-1.

§29-11A-3(E). Many of the other included offenses pertain to victims who are minors and thus are not directly addressed in this benchbook.

9.3.4 Mandatory Notification to Sex Offenders under SORNA

A. Judicial Notification to Sex Offenders

Of particular importance to courts is the mandatory notification to sex offenders of the duty to register required by §29-11A-7. This statutory section provides that:

> "A court shall provide a sex offender convicted in that court with written notice of his duty to register pursuant to the provisions of [SORNA]. The written notice shall be included in judgment and sentence forms provided to the sex offender." §29-11A-7(A).

This mandated notice must inform the sex offender that he or she is required, as mandated by SORNA, to:

- register with the county sheriff for the county in which the sex offender will reside or, if the sex offender will not have an established residence, with the county sheriff for each county in which the sex offender will live or be temporarily located;
- report subsequent changes of address;
- notify the county sheriff of the county he resides in if the sex offender intends to move to another state and that the sex offender is required to register in the other state;
- disclose his status as a sex offender in writing when he begins employment, begins a vocation or enrolls as a student at an institution of higher education in New Mexico to the county sheriff for the county in which the institution of higher education is located and to the law enforcement entity and registrar for the institution of higher education;
- provide written notice of any change regarding his employment, vocation or enrollment status at an institution of higher education to the county sheriff, the law enforcement entity and the registrar;
- disclose his status as a sex offender in writing when he enrolls as a student at a private or public school in New Mexico, to the county sheriff for the county in which the school is located and to the principal of the school;
- provide written notice of any change regarding his enrollment status at a public or private school in New Mexico to the county sheriff and the principal of the school;
- disclose his status as a sex offender in writing to his employer, supervisor or other person similarly situated, when he begins employment, begins a vocation or volunteers his services, regardless of whether the sex offender receives payment or other compensation;
- read and sign a form that indicates that the sex offender has received the written notice and that a responsible court official, designated by the chief judge for that judicial district, has explained the written notice to the sex offender.

§29-11A-7(A).

A sample SORNA notice used by the Second Judicial District is contained in Appendix J. Note that this sample may not be applicable to all situations. For example, it provides for annual renewal of registration, however, under certain circumstances renewal is required every 90 days. The notice must be carefully tailored to meet the statutory requirements for the circumstances of each case.

B. Case Law Relevant to Notification to Sex Offenders

An important distinction lies between the court's statutory mandate to provide notice to sex offenders as contrasted with a lack of authority to order compliance with the SORNA registration requirements. In *State v. Brothers*, 2002-NMCA-110, the Court of Appeals held that "because the statute contains a legislative mandate that sex offenders register, the court was not authorized to order Defendant to comply with the registration requirement." *Brothers* at ¶24. However, a district court has jurisdiction to determine whether a defendant is a 'sex offender' and to give the defendant written notice of the registration requirements under SORNA. The Court of Appeals went on to say that "[i]f Defendant refuses to register, the State may bring criminal charges against him for willful failure to register" under §29-11A-4. *Brothers* at ¶24.

Notice requiring a defendant to register as a sex offender does not need to be placed in a conditional discharge order, because a person granted a conditional discharge is not required to register as a sex offender. *State v. Herbstman*, 1999-NMCA-014, ¶¶20-21. However, when a deferred sentence expires and charges are dismissed, a conviction is not eradicated under SORNA, thus the defendant is still subject to SORNA registration requirements. *Brothers* at ¶15.

Where a defendant was charged with crimes that require, on conviction, registration under SORNA and where defendant pled no contest to crimes that do not require registration, the district court did not have the authority: 1) to include, as a condition of defendant's probation, that defendant provide the sheriff information required under SORNA; and 2) to give the sheriff the discretion to process the information under SORNA. *State v. Williams*, 2006-NMCA-092, ¶13.

C. Other Notification Relevant to Sex Offenders

In addition to the court required notification:

- jails, detention centers and corrections must provide written notice of the duty to register at the time of release of a sex offender, §29-11A-7(B); and
- the Department of Public Safety, when notified by another state that a sex offender will become a resident of New Mexico, must provide written notice to the sex offender of the duty to register, §29-11A-7(D).

"A court, the corrections department, a municipal or county jail or a detention center shall also provide written notification regarding a sex offender's release to the sheriff of the county in which the sex offender is released and to the department of public safety." §29-11A-7(C).

9.3.5 Registration Requirements under SORNA

Section 29-11A-4 provides the circumstances under which a sex offender must register with the county sheriff, the type of information the sex offender must provide, deadlines for when that information must be provided, the frequency of registration renewal, and the penalties for knowing or willful violations.

For each registration under §29-11A-4, the county sheriff must obtain:

- a photograph of the sex offender and a complete set of the sex offender's fingerprints;
- a description of any tattoos, scars or other distinguishing features on the sex offender's body that would assist in identifying the sex offender;
- a sample of his or her DNA for inclusion in the sex offender DNA identification system pursuant to the provisions of the DNA Identification Act, §29-16-1. (For more information on the DNA Identification Act, see §9.5 below.)

9.3.6 Time Periods for Which Registration is Required

A. Registration Required for 10 Years

The following offenses, among others, require the sex offender to remain registered for 10 years:

- Criminal sexual penetration in the fourth degree, as provided in §30-9-11;
- Attempt to commit the offense listed above, as provided in §30-28-1.

§29-11A-5(E).

B. Registration Required for Natural Life

The following offenses, among others, require the sex offender to remain registered for his or her natural life:

- Aggravated criminal sexual penetration, as provided in §30-9-11;
- Criminal sexual penetration in the first, second or third degree, as provided in §30-9-11;
- Criminal sexual contact in the fourth degree, as provided in §30-9-12;
- Attempt to commit any of the sex offenses listed above, as provided in §30-28-1.

§29-11A-5(D).

Notwithstanding the provisions of §29-11A-5(E), if a sex offender is convicted a second or subsequent time for a sex offense set forth in that subsection, the Department of Public Safety shall retain information regarding the sex offender for the entirety of the sex offender's natural life. §29-11A-5(F).

9.3.7 Local, Central and National Registry

The following registries shall be maintained or participated in, pursuant to §29-11A-5:

- A county sheriff shall maintain a local registry of sex offenders in his or her jurisdiction required to register pursuant to the provisions of SORNA.
- The Department of Public safety shall maintain a central registry of sex offenders required to register pursuant to the provisions of SORNA.
- The Department of Public Safety shall participate in the national sex offender registry administered by the United States Department of Justice. The Department of Public Safety shall send conviction information and fingerprints for all sex offenders registered in New Mexico to the national sex offender registry administered by the United States Department of Justice and to the Federal Bureau of Investigation.

9.3.8 Notification Requirements under SORNA

The public access to information, active notification, and internet website provisions are sometimes referred to as the ‘notification provisions’ of SORNA.

A. Sheriff’s Obligations to Forward Information

For a sex offender convicted of one of the listed offenses, the county sheriff shall forward registration information obtained from the sex offender:

- to the district attorney for the judicial district in which the sex offender resides, and
- if the sex offender is a resident of a municipality, the chief law enforcement officer for the municipality in which the sex offender resides.

§29-11A-5.1(A). The list of offenses includes, among others, the following:

- Aggravated criminal sexual penetration, as provided in §30-9-11;
- Criminal sexual penetration in the first, second or third degree, as provided in §30-9-11; or
- Attempt to commit any of the sex offenses listed above, as provided in §30-28-1.

§29-11A-5.1(A).

“Within seven days of receiving registration information from a sex offender described in [§29-11A-5.1(A)] the county sheriff shall contact every licensed daycare center, elementary school, middle school and high school within a one-mile radius of the sex offender's

residence and provide them with the sex offender's registration information, with the exception of the sex offender's social security number and DNA information." §29-11A-5.1(D).

B. Public Right to Access to Information

A person who wants to obtain registration information regarding sex offenders may request that information from the following officials:

- Sheriff for the county in which the sex offenders reside;
- Chief law enforcement officer for municipality in which the sex offenders reside;
- District attorney for the judicial district in which the sex offenders reside; or
- Secretary of public safety.

§29-11A-5.1(B). "Upon receiving a request for registration information regarding sex offenders, the county sheriff, chief municipal law enforcement officer, district attorney or secretary of public safety shall provide that registration information, with the exception of a sex offender's social security number and DNA information, within a reasonable period of time, and no later than seven days after receiving the request." §29-11A-5.1(C).

C. Information on Internet Web Site

The Department of Public Safety shall establish and manage an internet web site that provides the public with registration information regarding sex offenders described in §29-11A-5.1(A), except that the Department of Public Safety shall not provide registration information on the internet web site regarding a sex offender who was less than eighteen years of age when he or she committed the sex offense for which he or she was convicted as a youthful offender, unless at the time of sentencing, the court made a finding that the sex offender is not amenable to treatment and is a danger to the community. The registration information provided to the public shall not include a sex offender's social security number or DNA information or a sex offender's place of employment, unless the sex offender's employment requires him or her to have direct contact with children. §29-11A-5.1(E). As of March 2008, New Mexico's web site address was www.nmsexoffender.dps.state.nm.us.

Effective July 1, 2007, the Children's Code provides that a governmental entity "shall not disclose on a public access web site maintained by it" various types of information regarding children including: "an adult sentence imposed on a child, *except information required to be disclosed pursuant to the Sex Offender Registration and Notification Act*." §32A-2-32.1 (*emphasis added*).

9.3.9 Case Law Interpreting SORNA

A. Constitutional Considerations

- SORNA does **not** violate the following constitutional provisions:

  - Either the federal or state ex post facto clause (SORNA is a civil, remedial, regulatory, nonpunitive law);
  - Either the federal or state due process clause;
  - Article IV, §34 of the New Mexico Constitution, which states that "no act of the legislature shall affect the right or remedy of either party, or change the rules of evidence or procedure, in any pending case."

State v. Druktenis, 2004-NMCA-032.

- A court's failure to advise defendant, at the time of his or her plea, of sex offender registration consequences under SORNA does not violate due process of law.
- Sex offender registration law consequences are collateral (not direct) consequences of a plea and therefore are not consequences of which a court, under the due process clause, must advise a defendant.
- Although the notification and registration provisions under SORNA are immediate and automatic, they do not constitute punishment for a crime. SORNA is primarily remedial in purpose and effect. The court does not impose SORNA provisions or have discretion to modify them in accepting a plea.

State v. Moore, 2004-NMCA-035, ¶¶24-25.

In contrast, defense counsel has "an affirmative duty to advise a defendant charged with a sex offense that a plea of guilty or no contest will almost certainly subject the defendant to the registration requirements of SORNA. Proper advice will also include a discussion regarding what SORNA registration will mean, both in terms of the specific registration and notification provisions …, as well as the likely social consequences of being a registered sex offender. This is the minimum advice a defendant needs before deciding to waive his or her constitutional rights by entering into a plea agreement. Failure to so advise the defendant amounts to deficient performance…." *State v. Edwards*, 2007-NMCA-043, ¶31.

Subsequent to issuance of the Court of Appeals opinions in *Moore* and *Edwards*, the Supreme Court significantly amended the Rules of Criminal Procedure and associated forms as they pertain to the court's role in advising criminal defendants on various matters including SORNA registration requirements. Supreme Court Orders No. 07-8300-29 and No. 07-8300-30, October 19, 2007. The district court rules contain the following new provision:

> "The court shall not accept a plea of guilty, no contest or guilty but mentally ill without first, by addressing the defendant personally in open court, informing the defendant of and determining that the defendant understands the following: …. (7) that, if the defendant pleads guilty or no contest to a crime for which registration as a sex offender is or may be required, and if the defendant is represented by counsel, the court shall determine that the defendant has been advised by counsel of the registration requirement under the Sex Offender Registration and Notification Act."

Rule 5-303(F)(7). Related district court Forms 9-406, 9-408 and 9-408C are also amended to conform to the new provision in Rule 5-303(F)(7). These amended district court rules and

forms are effective on and after December 10, 2007. The rules and forms for courts of limited jurisdiction are also similarly amended. See Rules 6-501(A)(11), 6-502(B)(7), 7-501(A)(11), 7-502(B)(7), 8-501(A)(9), 8-502(B)(7) and Forms 9-405A, 9-406A, and 9-408A. These amended rules and forms for courts of limited jurisdiction are effective for cases *filed* on or after December 15, 2007.

The provision of the Albuquerque Sex Offender Registration and Notification Act (ASORNA) ordinance that requires sex offenders to submit to compulsory DNA testing and dental imprinting is an unreasonable governmental invasion into the individual's personal security or privacy and violates the Fourth Amendment guarantee against unreasonable searches and seizures. This ordinance differs from the DNA Identification Act in that it would have been able to be applied retroactively and to persons who are no longer in custody or subject to some type of supervisory release. *ACLU v. City of Albuquerque*, 2006-NMCA-078, ¶¶38-45, (noting in a footnote that the court did not analyze and expressed no opinion about the constitutionality of §29-3-10, which provides for DNA collection from certain felony arrestees on or after January 1, 2007.)

B. State Preemption

The state preempts the field of sex offender notification and registration. If local governments had ordinances in effect on January 18, 2005, those ordinances remain in effect until repealed only as to sex offenders required to register under the ordinance, but not under SORNA. All other sex offenders must register in accordance with the provisions of SORNA. §29-11A-9.

The ASORNA ordinance did not conflict with state law even though the ordinance was more restrictive than state law because the ordinance required a broader class of sex offenders to register than did state law. Sex offenders who are required to register under state law are not required to register under the ordinance, and the ordinance required sex offenders to provide more detailed information than did state law. By the enactment of a state sex offender law, and other related laws, the legislature did not express a clear intent to occupy the entire field of sex offender registration and notification, thereby preempting ASORNA. On the contrary, the legislature declared an express intent to not preempt the city ordinance. The language of the preemption and savings clause provides that an ordinance in effect on January 18, 2005 shall continue in force and effect until repealed. ASORNA is such an ordinance. *ACLU v. City of Albuquerque*, 2006-NMCA-078, ¶¶14-15 (holding various provisions of the Albuquerque ordinance unconstitutional, while upholding other provisions).

9.4 Combined DNA Index System (CODIS)

The Combined DNA Index System (CODIS), established under the DNA Identification Act of 1994, 42 USC §14132, et seq., and operated by the Federal Bureau of Investigation (FBI), is a software and distributive database system that indexes actual DNA profiles gathered from crime scene evidence and from selected state and federal criminal offenders nationwide. The primary purpose of CODIS is to facilitate the investigation and apprehension of criminal

offenders by linking together state databases and allowing law enforcement personnel to access DNA profile information nationwide. CODIS is comprised of three tiers or levels:

- **National DNA Index System (NDIS):** A national repository for DNA profiles collected from the states and federal government. NDIS permits states to exchange DNA profiles and to perform interstate searches. NDIS is operated by the FBI.

- **State DNA Index System (SDIS):** A state repository for DNA profiles collected from that particular state. SDIS allows the state's crime laboratories to exchange DNA profiles. SDIS serves as the communications link between the local DNA index systems and the NDIS. In New Mexico, this level is called the New Mexico DNA Identification System (NMDIS).

- **Local DNA Index System (LDIS):** A local repository for DNA profiles, located at crime laboratories, which can be accessed by the state's law enforcement agencies. DNA profiles originate at this level and flow to state and national levels.

All 50 states have legislation authorizing the collection of DNA samples from categories of convicted offenders for inclusion into a DNA database. Moreover, federal legislation now authorizes the collection of DNA samples and indexing of DNA analyses from individuals convicted of a "qualifying federal offense" (42 USC §14135a), a "qualifying military offense" (10 USC §1565), and a "qualifying District of Columbia" offense (42 USC §14135b). More information on CODIS is available on the FBI's website, located at www.fbi.gov/hq/lab/html/codis1.htm (last visited March 2008).

By statute, in New Mexico the county sheriff maintains a local registry of sex offenders (§29-11A-5(A)) and forwards local information including DNA samples to the central registry maintained by the Department of Public Safety (§29-11A-5(B)). Additionally, jail or detention facility personnel who collect samples pursuant §29-3-10 forward the samples to the Department of Public Safety. §29-3-10(B). The Department of Public Safety participates in the national sex offender registry administered by the United States Department of Justice. The Department of Public Safety sends conviction information and fingerprints for all sex offenders registered in New Mexico to the national sex offender registry administered by the United States Department of Justice and to the FBI. §29-11A-5(C). The Department of Public Safety serves as the liaison with the FBI for purposes of CODIS. §29-16-4(B)(5).

"Procedures used for DNA testing shall be compatible with the procedures the federal bureau of investigation has specified, including comparable test procedures, laboratory equipment, supplies and computer software. Procedures used shall meet or exceed the provisions of the federal DNA Identification Act of 1994 regarding minimum standards for state participation in CODIS, including minimum standards for the acceptance, security and dissemination of DNA records." §29-16-4(B)(1).

Additionally, "samples from biological material collected pursuant to a medical examination of a sexual assault victim shall be submitted by the investigating law enforcement agency to that agency's servicing laboratory for DNA testing. Records derived from DNA testing that

qualify for insertion into CODIS shall be submitted by the servicing laboratory to the administrative center." §30-9-19(A).

9.5 DNA Identification Act

9.5.1 Purposes

The purposes of the DNA Identification Act, §29-16-2, particularly relevant to sexual assault, are to:

- establish a DNA identification system for covered offenders and persons required to provide a DNA sample pursuant to the provisions of §29-3-10; and
- facilitate the use of DNA records by local, state and federal law enforcement agencies in the:
  - identification, detection or exclusion of persons in connection with criminal investigations; and
  - registration of sex offenders required to register pursuant to the provisions of SORNA.

Additional purposes relate to missing and unidentified persons or human remains.

9.5.2 Basic Statutory Framework

A. General

The DNA identification system shall provide for:

- collection,
- storage,
- DNA testing,
- maintenance and comparison of samples and DNA records for forensic and humanitarian purposes, including generation of investigative leads, statistical analysis of DNA profiles and identification of missing persons and unidentified human remains.

§29-16-4(B)(1).

The Department of Public Safety manages the DNA Identification System in conjunction with the DNA oversight committee. §29-16-5. The secretary of public safety has authority to designate the administrative center which administers and operates the DNA identification system. §29-16-4(C). At present the administrative center is physically located in the Metropolitan Forensic Science Center in Albuquerque. For additional definitions, see §29-16-3.

B. Who Must Provide Samples

A covered offender shall provide one or more samples to the administrative center, as follows:

- A covered offender convicted on or after July 1, 1997 shall provide a sample immediately upon request to the Department of Corrections as long as the request is made before release from any correctional facility or, if the covered offender is not sentenced to incarceration, before the end of any period of probation or other supervised release;
- A covered offender incarcerated on or after July 1, 1997 shall provide a sample immediately upon request to the Department of Corrections as long as the request is made before release from any correctional facility;
- A covered offender on probation or other supervised release on or after July 1, 1997 shall provide a sample immediately upon request to the Department of Corrections as long as the request is made before the end of any period of probation or other supervised release; and
- A covered offender required to register or renew his or her registration pursuant to the provisions of the SORNA shall provide a sample immediately upon request to the county sheriff located in any county in which the sex offender is required to register, unless the sex offender provided a sample while in the custody of the Department of Corrections or to the county sheriff of another county in New Mexico in which the sex offender is registered.

§29-16-6(A). A 'covered offender' means any person convicted of a felony offense as an adult under the Criminal Code §30-1-1, et. seq., the Motor Vehicle Code §66-1-1, et. seq., or the New Mexico Constitution or convicted as an adult pursuant to youthful offender or serious youthful offender proceedings under the Children's Code §32A-1-1, et. seq., or a sex offender required to register pursuant to the provisions of SORNA. §29-16-3(D).

Additionally, a person eighteen years of age or over who is arrested on or after January 1, 2007 for the commission of a felony, as provided in §29-3-10, shall provide a sample immediately upon request to jail or detention facility personnel, unless:

- the person has previously provided a sample sufficient for DNA testing pursuant to the provisions of this section;
- the sample is in the possession of the administrative center; and
- the sample has not been expunged.

§29-16-6(B).

C. When DNA Samples are Collected from Sex Offenders

- Effective January 1, 2007, “a person eighteen years of age or over who is arrested for the commission of a felony … shall provide a DNA sample to jail or detention facility personnel upon booking.” §29-3-10(A). Felony means:
    - “a sex offense as defined in the provisions of §29-11A-3 that is a felony” or
    - “any other felony offense that involves death, great bodily harm, aggravated assault, kidnapping, burglary, larceny, robbery, aggravated stalking, use of a firearm or an explosive or a violation pursuant to the Antiterrorism Act.”

  §29-3-10(D)(3).

- When a sex offender registers with a county sheriff, the sheriff shall obtain, among other things, “a sample of his DNA for inclusion in the sex offender DNA identification system pursuant to the provisions of the DNA Identification Act.” §29-11A-4(E)(3).

D. Confidentiality

Generally, DNA records and samples are confidential and shall not be disclosed except as otherwise provided in the DNA Identification Act and rules promulgated thereunder. §29-16-8.

E. Enforcement

Under §29-16-9, the Attorney General or a district attorney may petition a district court for an order requiring a covered offender or a person required to provide a DNA sample pursuant to 29-3-10 to:

- provide a sample; or
- provide a sample by alternative means if the covered offender or person will not cooperate.

Nothing in §29-16-9 shall prevent the collection of samples by order of a court of competent jurisdiction or the collection of samples of covered offenders. §29-16-9.

F. Expungement

A person may request expungement of his or her sample and DNA records from the DNA identification system on the following grounds:

- the conviction that led to the inclusion of the sample has been reversed; or
- the arrest that led to the inclusion of the sample has:
    - resulted in a felony charge that has been resolved by a dismissal, nolle prosequi, successful completion of a pre-prosecution diversion program or a conditional discharge, misdemeanor conviction or acquittal; or

- o not resulted in a felony charge within one year of arrest.

The administrative center shall not expunge a person's sample and DNA records from the DNA identification system if the person has a prior felony conviction or a pending felony charge for which collection of a sample is authorized pursuant to the provisions of the DNA Identification Act. §29-16-10.

9.5.3 Implementation of DNA Identification Act

The Department of Public Safety has promulgated rules to implement the provisions of §29-3-10, the DNA Identification Act at §§29-16-1 through 29-16-13, and SORNA at §§29-11A-1 through 29-11A-10. These administrative rules address, among other things, the following topics:

- Definitions, including who is an 'arrestee' for purposes of §29-10-3, §10.14.200.7 NMAC
- Collection and transfer of samples, and fees, §10.14.200.8 NMAC
- Handling and security of samples, §10.14.200.9 NMAC
- Sample processing and analysis, §10.14.200.10 NMAC
- Access to DNA sample information, records and samples, §10.14.200.11 NMAC
- Expungement of information, §10.14.200.12 NMAC

APPENDIX A

Sexual Assault Evidence Kit (SAEK) Instructions

Exam and treatment protocol and directions for evidence collection from sexual assault patients – Revised December 2006 (For most current version contact New Mexico Coalition of Sexual Assault Programs at 505-883-8020 in Albuquerque or 1-888-883-8020 toll free outside of Albuquerque.)

SEXUAL ASSAULT EVIDENCE KIT (SAEK) INSTRUCTIONS

Exam and treatment protocol and directions for evidence collection from sexual assault patients

Revised December 2006

READ DIRECTIONS COMPLETELY PRIOR TO PERFORMING EXAM!

AT NO TIME SHOULD A MEDICAL FACILITY SUBMIT AN INVOICE FOR THE SEXUAL ASSAULT EVIDENCE KIT WHERE A PHYSICIAN SIGNS OFF ON A SEXUAL ASSAULT MEDICAL OR FORENSIC EXAM FOR WHICH A NURSE PERFORMS.

IDEALLY, SEXUAL ASSAULT PATIENTS SHOULD BE EXAMINED BY EXPERIENCED NEW MEXICO SEXUAL ASSAULT NURSE EXAMINERS (SANE). A LIST OF NEW MEXICO SANE PROGRAMS WITH CONTACT INFORMATION IS ON PAGE 9.

IF YOU ARE RESPONDING TO CHILD SEXUAL ABUSE, READ PAGE 9 FIRST!

IF PATIENT NEEDS TO URINATE & DRUG FACILIATED RAPE IS SUPECTED, READ PAGE 4.

PRE-EXAM CONSIDERATIONS

Priority

Priority should be given to examine the sexual assault patient. Initially, triage the patient for medical needs, safety, and comfort before proceeding with the forensic exam. Medical stability is the priority; the sexual assault exam is secondary to any necessary medical response. Please note that medical stability is an on-going process during the sexual assault exam.

Advocate

Call your local advocacy program to provide the patient with a support person to be present during the forensic interview and exam. The advocate's role is essential during this procedure. The trained advocate can help with referrals, case management, long-term recovery and psychological healing of the patient. If you are responding to a patient who came from a facility, do not use an employee of the facility as an advocate.

Consent

After reading these instructions, explain the forensic examination to the patient and obtain consent for the following specific procedures allowing the patient to decide what procedures he/she will allow:

- ❑ Full (evidence collection *and* medical treatment) or limited (medical treatment) exam
- ❑ Documentation of injury, which may include photography and colposcope
- ❑ Pregnancy testing, STD Prophylaxis, and Emergency Contraception
- ❑ Urine collection for Drug Facilitated Sexual Assault
- ❑ Release of evidence and/or reporting to law enforcement
- ❑ Referral to child safe house and/or appropriate pediatric medical agency for age appropriate patients

The patient is under no obligation to report the assault to the police or to undergo the sexual assault exam. Counsel the patient that collection of evidence is recommended even if they do not think that they want to press charges at this time. Ensure that the patient realizes that preservation of evidence is time sensitive and that now is the optimal time to collect.

In the event the patient wants evidence collected, but at the time of the exam does not wish to have the case investigated by law enforcement, it is important to inform the patient that any collected evidence will be stored by the appropriate crime lab. For the crime labs to accept evidence, an information report must be filed with the appropriate law enforcement agency which is responsible for transferring the evidence. The information report will include, at minimum, the patient's name, date of birth, and most likely a reference to sexual assault. Like all police reports, the information report is public record. The patient is under no obligation to speak to law enforcement at the time of the exam or participate in an investigation. The information report does not automatically result in an active investigation, but rather facilitates the transfer and storage of evidence. If the patient decides to pursue an active investigation, he or she must contact the appropriate law enforcement agency to initiate the investigation. The advocate may be able to help the patient with initiating the investigation.

If the patient decides against evidence collection, a limited exam can be offered. A limited exam includes medications for STD prophylaxis and Emergency Contraception and you would not need the SAEK. With patient consent, pregnancy testing with subsequent emergency contraception and STD prophylaxis may be provided. The patient still has the option to return within 5 days post assault for a full sexual assault evidence exam.

If the patient wants to file a police report, notify law enforcement. The advocate should remain with the patient during the investigative interview with police.

Exam Payment

Inform the patient that the evidence collection portion of the exam will be paid in full by the State of New Mexico and up to $150.00 of the medical treatment is covered by the State fund. At no time should your facility submit an invoice for the Sexual Assault Evidence Kit where a physician signs off on a sexual assault medical or forensic exam for which a nurse performs. The hospital or clinic (not the patient) should submit billing to:

NMCSAP/SCPTP
3909 Juan Tabo NE, Suite 6
Albuquerque, NM 87111

If a billing packet or more information is required, call the NMCSAP toll free number at 888-883-8020. If additional medical treatment charges are incurred, inform the patient that he/she may be held responsible for the medical portion of the charges (injury repair, prescriptions, etc). The patient may apply for additional funding to cover the medical treatment from Crime Victims Reparation Commission (841-9432) if a police report is filed. (The number for the Commission is also in the enclosed "From Victim to Survivor" brochure.)

CHAIN OF CUSTODY **READ! IMPORTANT!!**

Chain of custody refers to the examiner's ability to testify under oath that the evidence could not have been tampered or compromised in any way during its collection, packaging, storage, or transfer. Chain of Custody must be maintained at all times once the Sexual Assault Evidence Kit is opened. This means the examiner must stay with the evidence collected during the exam until all evidence has been properly sealed and secured. Chain of Custody includes an Integrity Seal, which is the assurance that the examiner is responsible for collecting and packaging the evidence. The Integrity Seal is the examiner's initials and the date of collection written over the taped seal of the SAEK small and large White Envelopes and large Brown Bag. Once sealed, evidence should be signed over to law enforcement. If this is not possible, evidence may be signed over to the next shift at your medical facility. The next individual must take full responsibility for the evidence until law enforcement is able to retrieve the SAEK White Envelope and Brown Bag. Every individual who assumes responsibility for any evidence must document the handling and transfer of that evidence. It is acceptable to keep the kit in an area that is locked securely. Ideally, law enforcement should obtain the completed kit as soon as possible following the exam.

SEXUAL ASSAULT EVIDENCE KIT (SAEK) EXAM

- ❑ Obtain a Sexual Assault Evidence Kit (SAEK). It is critical that the integrity of the SAEK is intact.
- ❑ Read these Sexual Assault Instructions completely prior to starting the sexual assault exam.
- ❑ Use Personal Protection Equipment (gloves) while collecting evidence to prevent cross-contamination and change gloves frequently during the sexual assault exam.
- ❑ The patient's history is critical in directing the examiner's collection of evidence. Specimens are collected from orifices or sites the patient indicates were involved in the sexual assault. Exceptions would be pediatrics, drug-facilitated assault, patients with no memory or ability to verbalize the alleged assault, and/or if the examiner observes injuries or findings. For these exceptions where the evidence is collected by the examiner but not reported by the patient, write on the outside of that envelope "Collected Not Reported."

Sexual Assault History Form

- ❑ Obtain history of assault and relevant data as directed by the enclosed Sexual Assault History Form.
- ❑ Complete as much information as possible on the History Form. Print clearly and legibly.
- ❑ When asking the patient to give a description of the assault, DO NOT ASK LEADING QUESTIONS that lead to yes or no answers such as, "Were you raped?" Instead, ask the patient "What happened?" or "Can you describe the incident to me?" Let the patient use his/her own words and use those words in your charting. Documentation of the patient's account of the assault must be the patient's verbatim statement. Use quotations to indicate patient's actual statements. It is critical that no re-phrasing occur.
- ❑ Let the patient know that for evidence collection you need to ask specific questions about which of the suspect's body parts touched the patient's body parts.
- ❑ History is for diagnosis and treatment of the patient and to direct the collection of evidence. LAW ENFORCEMENT WILL DO THE INVESTIGATIVE INTERVIEW.
- ❑ The examiner should avoid using the word "rape" in discussing any conclusions. Use the words "sexual assault" or "assault."

Exam Room Preparation/Supplies

- ❑ Prepare room by gathering equipment and supplies so that the exam may be conducted uninterrupted. Supplies include speculum, sterile water, extra sets of gloves, blood drawing supplies, vital sign supplies, ruler for measuring injuries, black marker/Sharpie, a stable stand for holding/air-drying the swabs, and clothing for the patient to wear post exam. An easy makeshift stand for holding and air-drying the swabs is to turn a Styrofoam cup upside down and pierce four holes per cup to hold the 4 swabs collected; make and label a cup for each orifice (oral, anal, vaginal, penile, etc) that the patient reports penetrated. Equipment specific for a sexual assault exam includes a Colposcope, Toluidine Blue Dye, an Alternative Light Source/Woods Lamp, and a camera for photography. If these are not readily available in your hospital facility, proceed with the SAEK collection using the supplies that you have.
- ❑ Open the kit, lay out envelopes that you will use (based on patient narrative), and label each envelope completely and legibly. Label envelopes and bags *before* placing evidence inside: this minimizes the destruction of evidence and prevents the mix-up of evidence samples. Complete the information on the front of the SAEK White Envelope and Brown Bag.
- ❑ Once you have opened the SAEK, you must maintain "Chain of Custody." The examiner is responsible for the evidence. The examiner must stay with the evidence collected during the exam until all evidence has been properly sealed and secured. Evidence is *never* to be left alone with the patient, family, friend, legal guardian, or advocate. (Refer to Chain of Custody on page 2.)
- ❑ Show the patient the room and supplies, and answer any additional patient questions.
- ❑ Allow the patient to have a person of their choice in the exam room to support them during the process. This may be the trained advocate or a friend/family member.

Clothing/Patient Disrobing

- ❑ The patient is under no obligation to forfeit his/her clothing for evidence. This is entirely the patient's decision. Advise the patient that he/she may not receive clothing back and if it is returned, it will likely be damaged from lab tests. Explain to the patient that body fluids, hair, and/or trace fibers found on the clothing may contain critical information.
- ❑ Even if the patient has changed clothing, it may be useful to collect the underwear worn to the exam, as the underwear may contain drainage from post-assault.
- ❑ Inspect clothing for any tears, stains, and debris and document condition of clothing on the History Form. Be careful not to lose any trace fibers from the clothing. Photographs of torn or bloodied clothing can support documentation. Wet clothing may need to be temporarily laid out for drying and packaging at a later time; this must occur in a secured area. Document this in your charting.
- ❑ Place two large sheets of paper on the floor, one on top of the other (the bottom sheet keeps the top sheet clean; the bottom sheet will be thrown away while the top sheet and any debris/trace fibers will be saved in the pre-labeled Floor Sheet bag). *Do not use* chux or any plastic sheeting.
- ❑ Have the patient remove their shoes prior to having them disrobe. While standing barefoot on the Floor Sheet, the patient can disrobe and drop clothes gently in the middle of the Floor Sheet. These will be the clothes collected for evidence. If the patient declines submitting his/her clothes for evidence, have patient lightly shake clothes over the Floor Sheet for any potential trace fibers and lay the clothes aside. Allow patient to determine what pieces of clothing will be left for evidence.
- ❑ Give patient a hospital gown to wear during the subsequent exam.

Patient Assessment and Urine Collection

- ❑ Obtain the patient's vital signs. If abnormal, recheck and take appropriate action. Injuries causing pain or serious discomfort should be treated before starting the sexual assault exam.
- ❑ If a drug-facilitated rape is suspected, urine may need to be collected and preserved. Urine may be collected up to 96 hours post-assault. Have the patient urinate into a tamper-resistant, urine specimen container or cup that can be securely sealed. Label container with patient information.
- ❑ Obtain a urine specimen for pregnancy test on all patients of childbearing age. If the specific gravity of the urine is <1.015, a serum pregnancy test should be sent to the lab to assure accurate results.
- ❑ Perform a head-to-toe assessment for evidence of trauma to the body and patient complaint of pain, working your way literally from "head to toe." Pay particular attention to any area of concern based on the mechanism of injury and patient's history of assault.
- ❑ Document all injuries. Measure and describe all injuries indicating location of the injuries. Use the Body Map that is part of the Sexual Assault History Form. If available, photographic documentation of injuries is strongly recommended.

Blood Standard

- ❑ Draw blood specimen, approximately 0.5ml and transfer to pre-labeled card that is in the pre-labeled Blood Standard envelope. Blood stain should be about the size of a nickel or quarter coin.
- ❑ Allow to air dry. Do not use heat to dry. Dry in a secure place to minimize cross-contamination.
- ❑ Once dried, place this swatch into the pre-labeled Blood Standard envelope.

Head Hair Standard

- ❑ Pull at least twenty-five (25) head hairs and place in the pre-labeled Head Hair Standard envelope. Pull by hand near the patient's scalp. Include the root of the hair from different areas on the scalp, such as the front, middle, back, and both sides. Include grey hair. Be sure to collect various lengths and color samples. Hairs *must* be pulled. Scissors or tweezers damage the hair and the root is needed.
- ❑ If head hairs adhere to the examiner's gloves, place the entire glove in the pre-labeled Head Hair Standard envelope.

Oral Swabs

- ❑ Inspect the oral cavity first, documenting any injuries. Photograph noted injuries.
- ❑ If oral penetration is reported and/or suspected, swab gum line, margin between gums and cheek, the crevices between teeth, and under the tongue with cotton swabs provided in the Oral Swabs envelope.
- ❑ Do one swab at a time. Use the entire surface of each cotton-tip swab to maximize the amount of sample collected.
- ❑ Mark the first swab obtained with a black marker/Sharpie on the distal wooden portion of the swab stick.
- ❑ Place the swabs in a stable stand and let the 4 swabs air-dry. Once dried, place all 4 swabs back into the pre-labeled Oral Swabs envelope.

Genital Exam

- ❑ Place the patient in the appropriate position of comfort, dependent on age, to optimally allow you to visualize and perform the vaginal/rectal/penile examination.
- ❑ Inspect external genitalia and rectal area for visual signs of trauma. Document injuries on the Genital Map of the History Form and photograph injuries before obtaining any swab collection.
- ❑ If you are using a Colposcope, injury documentation should be done prior to obtaining any swabs.
- ❑ You will want to save the Table Sheet that the patient sat on while on the exam table as evidence.

Pubic Hair Combings and Comb

- ❑ The pubic hair may contain dried secretions from drainage or ejaculation. If the pubic hair is matted, representative samples should be cut and packaged separately in a pre-labeled Miscellaneous envelope. Clearly mark on the Miscellaneous envelope what was collected and from where.
- ❑ Comb the patient's pubic hair over the pre-labeled Pubic Hair Combings and Comb envelope so that the hair falls into the opened envelope.
- ❑ When complete, place comb back into envelope.
- ❑ You may ask the patient if he/she would prefer combing him/herself; however, the examiner must observe the combing.

Anal Swabs

- ❑ If rectal penetration is reported and/or suspected, examine the anal area first. Examination and evidence collection of the anal area is performed prior to genital because this area can be contaminated when inspecting and collecting vaginal specimens.
- ❑ Examine the rectal area for injury and document any noted injuries prior to obtaining swabs.
- ❑ Remove any foreign bodies and let air-dry before placing in envelope marked Miscellaneous. Clearly document on the Miscellaneous envelope where the evidence was obtained from.
- ❑ Obtain swabs of the rectal area with the cotton swabs provided in the envelope marked Anal Swabs.
- ❑ Indicate on the Anal Swab envelope whether swabs are collected from outer anal folds or from within the orifice. If both situations exist, package in separate envelopes and clearly mark the envelope where evidence was collected.
- ❑ Do one swab at a time. Use the entire surface of each cotton-tip swab to maximize the amount of sample collected. If particulate matter/fibers are on the swab, do not remove from the swab.
- ❑ Mark the first swab obtained with a black marker/Sharpie on the distal wooden portion of the swab stick.
- ❑ Place the 4 swabs in a stable stand and let the swabs air-dry. Once dried, place all 4 swabs back into the pre-labeled Anal Swabs envelope.

Vaginal Swabs

- ❑ If vaginal penetration is reported and/or suspected, examine the vaginal area for injury. Document injuries on the Genital Map of the History Form prior to inserting the speculum.
- ❑ Insert speculum and inspect for injury or foreign bodies. Document any injury within the vaginal canal.
- ❑ Colposcope documentation should be done prior to obtaining any swabs.
- ❑ Remove any foreign bodies and let air-dry before placing in envelope marked Miscellaneous. Clearly document on the Miscellaneous envelope where the evidence was obtained from.
- ❑ Obtain swabs of the vaginal area with the cotton swabs provided in the envelope marked Vaginal Swabs.
- ❑ Indicate on the Vaginal Swab envelope whether swabs are collected from outer labial folds or from within the orifice. If both situations exist, package in separate envelopes and clearly mark the envelope where evidence was collected.
- ❑ Do one swab at a time. Use the entire surface of each cotton-tip swab to maximize the amount of sample collected. If particulate matter/fibers are on the swab, do not remove from the swab.
- ❑ Mark the first swab obtained with a black marker/Sharpie on the distal wooden portion of the swab stick.
- ❑ Place the 4 swabs in a stable stand and let the swabs air-dry. Once dried, place all 4 swabs back into the pre-labeled Vaginal Swabs envelope.

Cervical Swabs

- ❑ Examine the cervical area for injury.
- ❑ Colposcope documentation should be done prior to obtaining any swabs.
- ❑ Obtain swabs of the cervical os with the cotton swabs provided in the envelope marked Cervical Swabs.
- ❑ Do one swab at a time. Use the entire surface of each cotton-tip swab to maximize the sample collected.
- ❑ Mark the first swab obtained with a black marker/Sharpie on the distal wooden portion of the swab stick.
- ❑ Place the 4 cervical swabs in a stable stand and let the swabs air-dry. Once dried, place all 4 swabs back into the pre-labeled Cervical Swabs envelope.

Male Genitalia Swabs

- ❑ If the patient is male and dependent upon patient history, collect penile, scrotum, and/or urethral swabs. The examiner will swab the primary source of potential foreign DNA. This may include the penile shaft, glans, scrotum, and/or urethral opening.
- ❑ Re-label the cervical and/or vaginal envelope to read "Penile." Use the swabs that are in that envelope.
- ❑ Do one swab at a time. Use the entire surface of each cotton-tip swab to maximize the sample collected.
- ❑ Mark the first swab obtained with a black marker/Sharpie on the distal wooden portion of the swab stick.
- ❑ Place the 4 penile swabs in a stable stand and let the swabs air-dry. Once dried, place all 4 swabs into pre-labeled Male Genitalia Swabs envelope.

Miscellaneous Evidence

- ❑ If there is any other evidence such as blood, dried secretions, loose hairs, material fibers, environmental debris (vegetation, dirt, gravel, glass), and/or tampons, collect, dry, and place in a pre-labeled Miscellaneous envelope. Clearly label the envelope to describe where evidence was collected.
- ❑ If the patient reports scratching the suspect, swab under the patient's fingernails with swab(s) that have been moistened with sterile water. Use one or two swabs per hand depending upon amount of visible debris. Use the entire surface of each cotton-tip swab to maximize the amount of sample collected. Place these swabs in a stable stand and let air-dry. Once dried, place swabs in a pre-labeled Miscellaneous envelope. If swabs are collected from both hands, package swabs collected from left and right hand in separate pre-labeled envelopes, with clear indication of where evidence was collected.

- ❑ If the patient reports any contact of bodily fluid, use swab(s) moistened with sterile water to collect samples from the patient's body where contact was reported. This includes areas where the patient reports being bitten or licked. Use one or two swabs per body part that patient reports contact. Use the entire surface of each cotton-tip swab to maximize the amount of sample collected. An Alternate Light Source or Woods Lamp may help visualize the body fluid. Place these swabs in a stable stand and let air-dry. Once dried, place swabs in a pre-labeled Miscellaneous envelope, indicating where the evidence was collected. If more than one swab is taken for any miscellaneous evidence, mark the first swab obtained with a black marker/Sharpie on the distal wooden portion of the swab stick.

MEDICATIONS

Preventative medications for emergency contraception and sexually transmitted infections should be offered to adults and for adolescents where child sexual abuse is not suspected. Testing for STD's in adults/adolescents for sexual assault is not required. Medications should be offered as a prophylactic measure. Attached (page 10) is a summary of medications that can be offered for Sexually Transmitted Diseases (STD) and Emergency Contraception. For a thorough guide on STD prevention and the recommended treatment for adolescents and adults, view Centers for Disease Control webpage at: www.cdc.gov/mmwr/preview/mmwrhtml/00050909.htm.

PATIENT DISCHARGE

- ❑ Determine where patient is to be discharged and make appropriate arrangement for transportation.
- ❑ Complete discharge instructions and give both verbal and written instructions to patient.
- ❑ Inform patient concerning community referrals such as Planned Parenthood, Public Health Office, and New Mexico AIDS Services. Work with the trained advocate to identify appropriate resources.
- ❑ Enclosed in this kit is the brochure "From Victim to Survivor." Listed on the back are contact numbers for local rape crisis services. Most programs offer four or five therapy sessions at no cost to survivors of sexual assault. The brochure has information about the New Mexico Crimes Reparation Commission, a state agency that can offer financial compensation for victims of crime. Be certain that the patient is given this brochure when discharged.

SEALING EVIDENCE

Clothing, Floor/Table Sheets, Small and Large Brown Bags

- ❑ Plastic bags should never be used for packaging evidence. Plastic retains moisture which allows the growth of bacteria and causes degradation of biological fluids. Use paper bags only.
- ❑ Place air-dried underwear in the pre-labeled Undergarments bag. Fold the top of the bag over twice and staple across the final fold. Place this secured bag in the larger pre-labeled Brown Bag.
- ❑ Place remaining air-dried clothing in the large pre-labeled Brown Bag.
- ❑ Fold Floor Sheet inward into small squares (to contain debris/loose evidence) and place in the pre-labeled Floor Sheet bag. Fold the top of the bag over twice and staple across the final fold. Place this secured bag in the larger Brown Bag.
- ❑ Fold Table Sheet inward into small squares (to contain debris/loose evidence) and place in pre-labeled Table Sheet bag. Fold the top of the bag over twice and staple across the final fold. Place this secured bag in the larger Brown Bag.
- ❑ Once all the Undergarments, Table Sheet, Floor Sheets bags and clothing are inside the large Brown Bag, fold the top of the large Brown Bag over twice and staple across the top of the final fold. Tape across this fold. The examiner must initial and date across the tape so that the writing overlaps from the tape onto the bag. The Crime Labs in New Mexico *cannot* accept evidence that does not have both the examiner's initials and the date across the taped seal.
- ❑ The examiner must complete the front label of this Brown Bag with signature, date, and time collected.

Swabs, Hair, Blood, Small Envelopes and Large White SAEK Envelope

- ❑ To preserve evidence, the swabs *must be air-dried prior to packaging*. Biological evidence degrades rapidly with moisture. *Do not use heat to dry.*
- ❑ Place all dry swabs in their appropriate pre-labeled envelopes.
- ❑ Seal all small white envelopes with a damp paper towel or water-moistened gloved finger. *Never lick envelopes!* Tape across the sealed flap of the envelope. The examiner must initial and date across the tape so that the writing overlaps from the tape onto the envelopes. Insert the sealed small white envelopes into the larger pre-labeled white SAEK Envelope.
- ❑ *Insert the completed Sexual Assault History form and the completed SAEK Check List into large white SAEK Envelope.* Seal this larger envelope with a damp paper towel or water-moistened gloved finger and tape across the sealed flap. The examiner must initial and date across the tape so that the writing overlaps from the tape onto the envelope. The Crime Labs in New Mexico *cannot* accept evidence that does not have both the examiner's initials and the date across the taped seal.
- ❑ The examiner must complete the front of the large white SAEK Envelope with signature, date and time collected.
- ❑ Clearly indicate on the outside of the large white SAEK Envelope and the large Brown Bag by filling in "Item 1 of 2" on the white SAEK Envelope and "Item 2 of 2" on the large Brown Bag.

Other Evidence Collected: Film and/or Urine

- ❑ Do not put urine or film into the SAEK Envelope or Brown Bag.
- ❑ Clearly mark urine and film with patient information and transfer to law enforcement as separate items, along with the SAEK Envelope and Brown Bag.
- ❑ Law enforcement is responsible for the processing of film.
- ❑ Law enforcement is responsible for transferring the SAEK Envelope, Brown Bag, Film and/or Urine to their appropriate Crime Lab.

ORDERING SEXUAL ASSAULT EVIDENCE COLLECTION KITS

The kits and packets should be treated as any other medical supply. Consistent, up-to-date inventory of Sexual Assault Evidence Kits in your medical facility will help prevent emergency requests for kits, which are usually impossible for the NMSCAP to fill. Please allow two weeks for delivery. Kits are free of charge to medical facilities within New Mexico. They may not be sold under any circumstances. You may order as many kits as you need and are able to store. Evidence kits for the suspected offender are also available.

These kits are designed, updated and assembled by the New Mexico Coalition of Sexual Assault Programs, Inc. with funding from the State of New Mexico, Department of Health, Division of Mental Health. This current version was updated in June of 2005 and is so noted on the outside of the SAEK envelope.

Please contact the coalition if you would like a staff in-service on evidence collection. You may also contact the Coalition if you need sample protocols for Chain of Custody or other aspects of conducting a sexual assault exam.

CONTACT

New Mexico Coalition of Sexual Assault Programs, Inc. (NMCSAP)
3909 Juan Tabo NE, Suite 6
Albuquerque, NM 87111
Toll-free, 1-888-883-8020 outside the Albuquerque calling area and 883-8020 in the calling area

SEXUALLY ABUSED CHILDREN

If the patient is under the age of eighteen years and there is a suspicion of child sexual abuse by a caregiver, family member, or person in authority, Child Protective Services (Tribal or Children, Youth, and Family) *must be contacted.* Not reporting suspected child abuse and neglect (including sexual abuse) is a crime. When filing the report, inform Statewide Central Intake if the alleged perpetrator has continued access to the child. Call the Statewide Central Intake toll-free 1-800-797-3260 or 841-6100 in the Albuquerque area.

A medical provider does not need the permission of a parent to do evidence collection on a child who has been sexually abused. Evidence in sexual crimes is considered "fleeting" and thus does not require a search warrant. The child is considered the "crime scene." A parent or guardian can be charged with aiding and abetting an alleged perpetrator by not allowing the exam.

The primary differences in using this Sexual Assault Evidence Kit with Child Sexual Abuse are

- The window for evidence collection is up to 72 hours while for adolescents/adults, the window is up to 5 days.
- The examiner does not treat for sexually transmitted infections. Sexually transmitted infections are evidence of the crime of sexual abuse. Cultures must be obtained prior to treatment with antibiotics.
- The examiner does not need to take a Blood Standard for patients under 13 years of age. Instead, the examiner should first take the appropriate Oral Swabs if oral penetration is suspected. Then, have the child rinse his/her mouth thoroughly. Clearly mark a Miscellaneous envelope with the patient's name and "Buccal Standard." Lastly, the examiner takes one swab to wipe the inside, fleshy part of the cheek. Use the entire surface of the cotton tip swab to maximize the amount of the child's buccal saliva obtained. Place the swab in a stable stand and let air-dry before placing it in the pre-labeled envelope.
- The examiner will not insert a speculum exam on a pre-pubescent child.
- The examiner should ask the child where secretions may have been left on their body and then swab those areas. The folds and creases in the child's vulvar area may be wiped with swabs to collect evidence if indicated.
- Photographs are critical documentation of a child's injuries.
- In documenting the history in the History Form, the examiner *must use the child's direct quotes* rather than the examiner's interpretation of the child's statement.

NEW MEXICO SEXUAL ASSAULT NURSE EXAMINER (SANE) PROGRAMS with emergency contact information

- Albuquerque SANE, 505-884-7263
- Santa Fe SANE, 505-989-5952
- Las Cruces SANE, 505-526-3437
- Roswell/Chaves County SANE, 505-625-1457
- Sexual Assault Services of NW NM (Farmington/San Juan County) SANE, 505-326-4700
- Clovis/Curry County SANE, 505-769-7335
- Portales/Roosevelt County SANE, 505-359-1800, Ext. 472
- Alamogordo/Otero County SANE, 505-491-1557
- Carlsbad SANE, 505-887-4121

Suggested Medications for Sexual Assault Patients for STD Prophylaxis and Emergency Contraception

Gonorrhea Prophylaxis in Adolescents and Adults (Female and Male)

Ciproflaxin (Cipro) 500 mg PO x 1

- **Do not** administer if the patient is pregnant or nursing
- **Safe** if patient >13 years and weighs 100 lbs or more

Cefpodoxime Proxetil Vantin 400 mg PO x 1

- **Administer** if patient is allergic to Cipro.
- **Safe** if pregnant or nursing
- **Safe** if <18 years old and less than 100 lbs
- **Administer** if male anally or orally penetrated.

Chlamydia Prophylaxis in Adolescents and Adults (Female and Male)

Azithromycin (Zithromax) 1 Gram PO x 1

- **Do not** administer if patient is allergic to Erythromycin.
- **Safe** if patient pregnant or nursing.

Doxycycline (Vibramycin) 100 mg PO BID for 7 days

- **Administer** if patient allergic to Zithromax.
- **Do not** administer if the patient is pregnant or nursing.

Amoxicillin 500 mg PO TID x 7 days

- **Administer** if allergic to Erythromycins (Zithromax).
- **Safe** if patient pregnant or nursing.

Trichomonas Prophylaxis in Adolescents and Adults (Female)

Metronidazole (Flagyl) 2 grams PO x 1

- **Do not** administer if ETOH has been ingested within 24 hours.
- **Do not** administer this medication if the patient is pregnant.
- If pregnant, **no** treatment.

Emergency Contraception in Adolescents and Adults (Female)

Levonsorgestrel (Plan B) 2 tablets (0.75 mg each) PO before the patient is discharged from the SANE Unit.

- **Do not** give after 5 days (120 hours) of assault.
- **Do not** give if patient is pregnant.
- **Safe** if patient nursing.
- **Must** obtain a urine pregnancy test prior to administering Levonorgestrel.
- **Offer** Emergency Contraception even if patient on birth control (Depo, BCP, Patch, Tubal ligation, Post-Menopausal, or Hysterectomy, etc.).
- **New Mexico Law requires** that the health care facility inform the patient about emergency contraception and provide the medication if requested by the patient.

Anal Discomfort Treatment in Adolescents and Adults (Female and Male)

Docusate Sodium (Colace) 100 mg capsule PO once daily for 7 days as a take home medication for patients who have been rectally penetrated.

Tucks 1 Pad up to six times daily for 7 days as needed for hemorrhoids as a take-home medication.

- **Do not** administer if allergic to witch-hazel.

APPENDIX B

Sexual Assault History Form – New Mexico Sexual Assault Evidence Kit (SAEK)

June 2005 (For most current version contact New Mexico Coalition of Sexual Assault Programs at 505-883-8020 in Albuquerque or 1-888-883-8020 toll free outside of Albuquerque.) NOTE: This is the form hospitals are encouraged to use. It accompanies the protocol in Appendix A. SANEs, with their specialized training, may use a more detailed form.

SEXUAL ASSAULT HISTORY FORM
NEW MEXICO SEXUAL ASSAULT EVIDENCE KIT (SAEK)

Patient In-Take

Patient Name: ______________________________ Exam Date: ______________

Gender: ▢ M ▢ F ▢ Transgender DOB: ______________ LMP: ______________

Ethnicity: ▢ Native Am. ▢ Hispanic ▢ African Am. ▢ Asian ▢ White (non-Hisp.) ▢ Mixed ▢ Other: ________

Did patient have consensual sex within previous five (5) days? ▢ Yes ▢ No If yes, ▢ vaginal ▢ oral ▢ anal

Date and time of Assault: ______________________ Location of Assault: ______________

Patient Post-Assault Hygiene Activity:

Urinated: ▢ Yes ▢ No ▢ Unknown

Defecated: ▢ Yes ▢ No ▢ Unknown

Douched/genital wash ▢ Yes ▢ No ▢ Unknown

Ate/Drank ▢ Yes ▢ No ▢ Unknown

Showered/Bathed ▢ Yes ▢ No ▢ Unknown

Brushed Teeth/Gargled ▢ Yes ▢ No ▢ Unknown

Suspect Information:

Suspect: ▢ Family Member ▢ Stranger ▢ Acquaintance ▢ Intimate/Ex-Intimate Partner ▢ Other: ______________

Suspect Gender: ▢ Male ▢ Female Number of suspects: ____________ Suspect Age(s): ______________

(If more than one suspect, write additional information on the back of the page)

Use of force, coercion or weapon? ▢ Yes ▢ No ▢ Unknown If yes, describe: ______________________

Patient's Description of Assault: ______________________________

____

____

____

____

____

____

____

____

____

Clothing Information

▢ Clothes not available (washed or lost).

▢ Patient declined to sumbit all, or part, of clothing into evidence.

▢ Patient *wearing* clothes worn during assault collected for SAEK.

▢ Patient *brought* clothing worn during assault collected for SAEK.

▢ Clothing worn at time of assault collected by law enforcement.

Identification and description of clothing collected:

▢ Shirt/Blouse ______________________

▢ Skirt/Dress ______________________

▢ Socks/Shoes (include #) ______________________

▢ Bra ______________________

▢ Underwear ______________________

▢ Pants ______________________

▢ Jacket/Coat ______________________

▢ Other: ____

Examiner's Name: ______________________ Date/Time: ______________

SEXUAL ASSAULT FORM, Continued
NEW MEXICO SEXUAL ASSAULT EVIDENCE KIT (SAEK)

Summary of Acts Described by Patient

Penetration of Female Genitalia:	Yes	No	Attempted	Unsure	Comments:
Penis	▢	▢	▢	▢	______
Finger	▢	▢	▢	▢	______
Foreign object	▢	▢	▢	▢	______
Penetration of Anus:	Yes	No	Attempted	Unsure	
Penis	▢	▢	▢	▢	______
Finger	▢	▢	▢	▢	______
Foreign object	▢	▢	▢	▢	______
Oral Copulation of Genitals:	Yes	No	Attempted	Unsure	
Suspect to patient	▢	▢	▢	▢	______
Patient to suspect	▢	▢	▢	▢	______
Oral Copulation of Anus:	Yes	No	Attempted	Unsure	
Suspect to patient	▢	▢	▢	▢	______
Patient to suspect	▢	▢	▢	▢	______
Masturbation:	Yes	No	Attempted	Unsure	
Suspect to patient	▢	▢	▢	▢	______
Patient to suspect	▢	▢	▢	▢	______
Suspect to self	▢	▢	▢	▢	______
Patient to self	▢	▢	▢	▢	______
Did Ejaculation Occur:	Yes	No	Attempted	Unsure	
Inside body orifice	▢	▢	▢	▢	______
Outside body orifice	▢	▢	▢	▢	______

Specify Location: ______________________________

Was a condom used? ▢ Yes ▢ No ▢ Unknown

Did patient injure suspect: ▢ Yes ▢ No ▢ Attempted If yes, describe: ______________________________

____

Environmental Debris: ▢ Yes ▢ No If yes, describe: ______________________________

Fingernail Evidence: ▢ Yes ▢ No If yes, describe: ______________________________

Miscellaneous Evidence ▢Yes ▢ No If yes, describe each type/location of miscellaneous evidence collected: ________

____

____

____

____

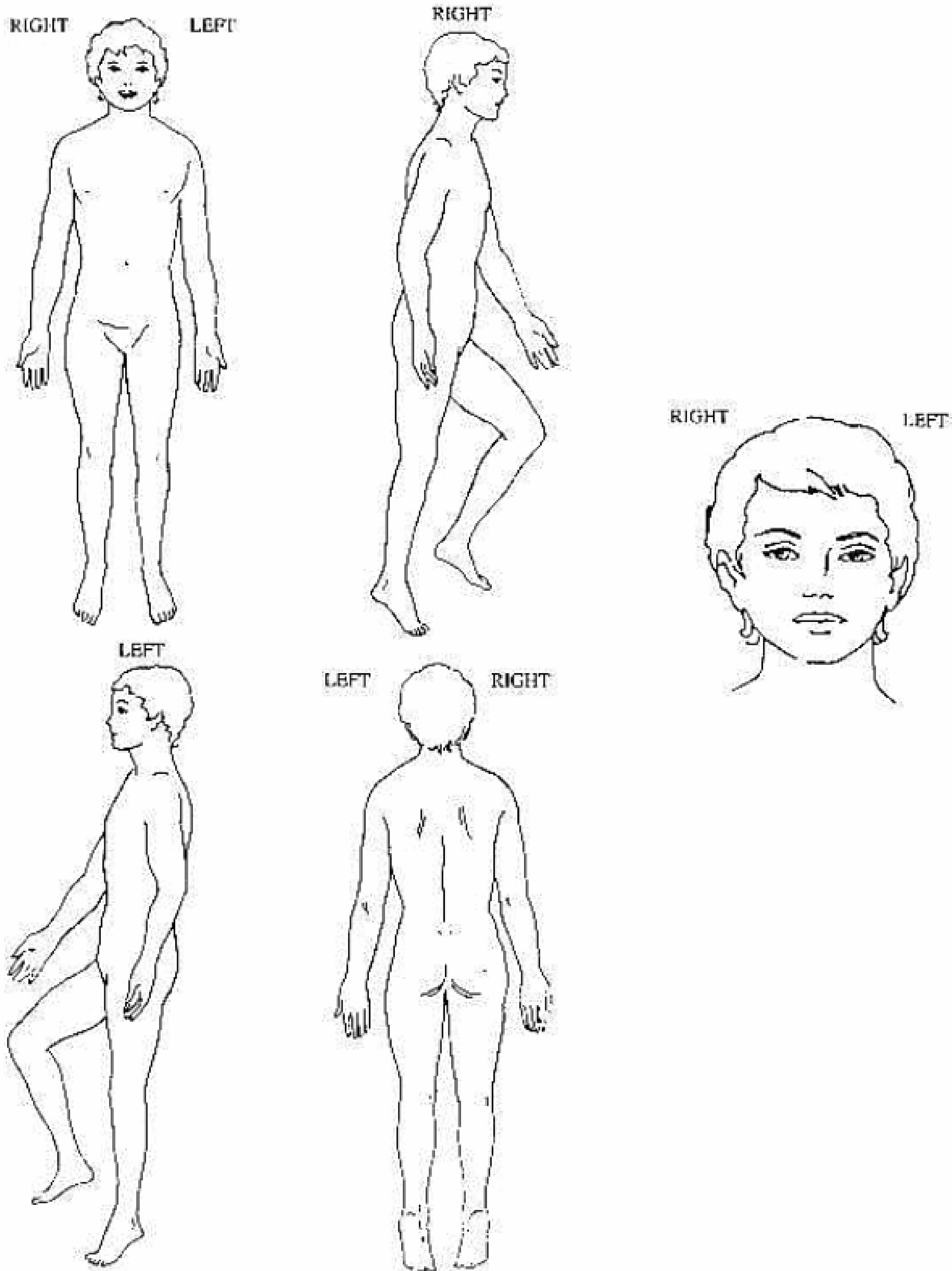
Urine collected for suspected drug facilitated assault: ▢Yes ▢ No

Photographs taken: ▢Yes ▢ No If yes, estimate number of photographs: ______________________________

Examiner's Name: ______________________________ Date/Time: ______________________

SEXUAL ASSAULT FORM, Continued
NEW MEXICO SEXUAL ASSAULT EVIDENCE KIT (SAEK)

BODY MAP: Use this body map to note physical assessment of patient. Note location of injuries. Describe injuries, including size, shape, color, presence of swelling, tenderness, redness, tears or abrasions, etc.

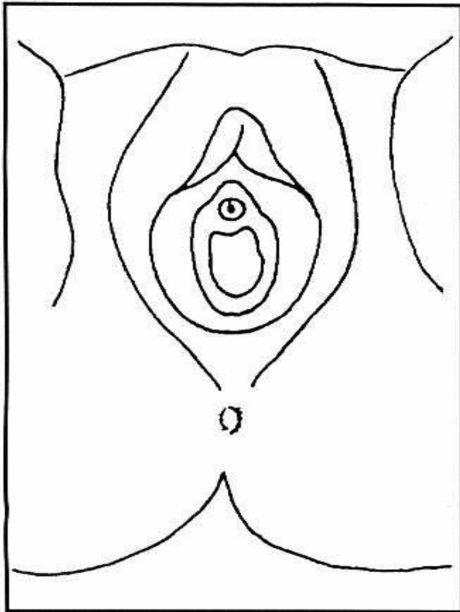


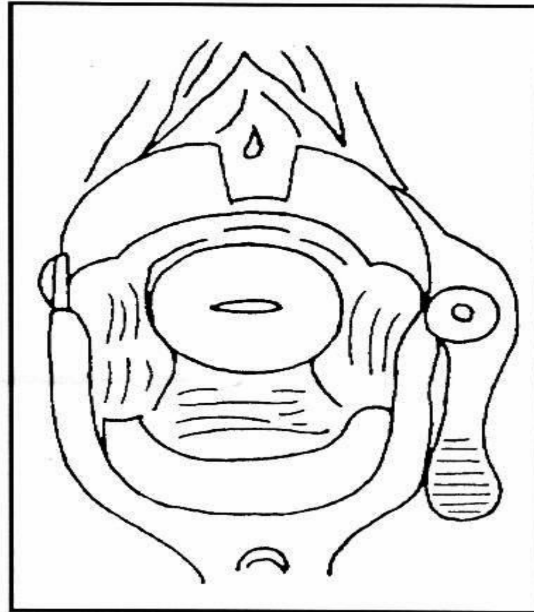
Examiner's Name: ______________________ Date/Time: ______________

SEXUAL ASSAULT FORM, Continued
NEW MEXICO SEXUAL ASSAULT EVIDENCE KIT (SAEK)

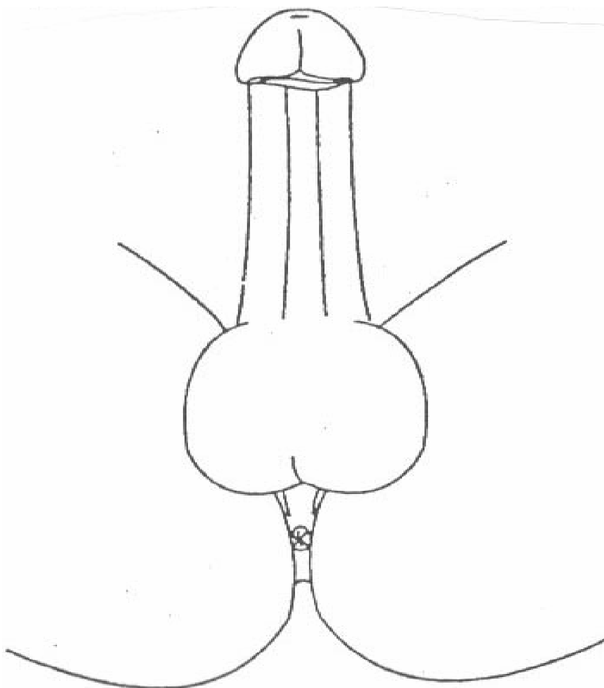
GENITAL MAP: Use the appropriate genital map to note physical assessment of patient's genitalia. Note location of injuries. Describe injuries, including size, shape, color, presence of swelling, tenderness, redness, tears, abrasions, etc.

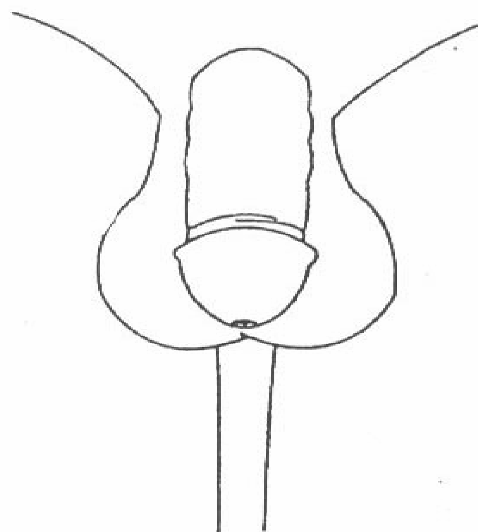
FEMALE





MALE





Place a copy of this completed 4-page form INTO the large, white 10" x 15" envelope of the Sexual Assault Evidence Kit (SAEK).

Examiner's Name: ______________________ Date/Time: ______________

APPENDIX C

New Mexico Statewide Resource Numbers from 2006 Responding to Sexual Assault, Domestic Violence, and Stalking: A Guide for Law Enforcement in New Mexico

(For most current version contact New Mexico Coalition of Sexual Assault Programs at 505-883-8020 in Albuquerque or 1-888-883-8020 toll free outside of Albuquerque.)

To Order Sexual Assault Evidence Kits,
Suspected Offender Evidence Kits, Or Child Protocol Packets

Call toll-to the New Mexico Coalition of Sexual Assault Programs at 1-888-883-8020 or within the Albuquerque area at 883-8020. This is not a crisis service. Orders will be filled and mailed within two weeks of the order. Be sure to order in a timely manner.

New Mexico Statewide Resource Numbers

All area codes are (505) unless otherwise indicated.

Clearinghouse on Sexual Assault and Abuse Resources:
Statewide…………………………….……………………..……1-888-883-8020
Albuquerque Area…….………………………………………….505-883-8020

Child Abuse Reporting:
Statewide Central Intake (SCI, available 24/7)……………………..1-800-797-3260
Albuquerque Area……………………………………………………..505-841-6100

Domestic Violence:
Statewide Crisis Line……………………………………...…...1-800-773-3645
NM Coalition Against Domestic Violence (Albuq)…………………...505-246-9240

Crime Victims Reparation Commission:
Statewide……………………….……………………………1-800-306-6262
Albuquerque Area……………………………………………………..505-841-9432

New Mexico Coalition of Sexual Assault Programs:
Statewide……………………………………………………1-888-883-8020
Albuquerque Area…………………………………………………. 505-883-8020

Crisis Response of Santa Fe:
Statewide……………………………………………………1-888-920-6333
Santa Fe Area……………………………………………..…...505-820-6333

Survivors of Homicide:
Albuquerque Area……………………………………………..……505-232-4099

Grief Intervention Services (O.M.I.):
Albuquerque Area……………………………………………………505-272-2485

NM State Police Mobile Crime Scene Unit:
Sergeant Art Ortiz (office)…………………..………………………505-841-9271
Sergeant Art Ortiz (cell)………………….…………………………..505-231-3766

Para Los Ninos, Pediatric Sexual Abuse Exam Team:
Statewide and Albuquerque………………………………………..……..505-272-6849

RAINN: National Sexual Violence Hotline:
National…………………………………………………………………1-800-656-4673

New Mexico Sexual Abuse Program Coordinators

Alamogordo
The Counseling Center
505-437-7404

Albuquerque
Central NM Rape Crisis Center
505-266-7711
505-268-5046 fax

Programs for Children and Adolescents
505-272-2190
505-272-2800 after 5pm

Sequoyah Adolescent Treatment Center
505-344-4673

Artesia
Artesia Counseling Center
505-764-9848
505-365-7606 crisis

Aztec
Desert View Counseling
505-334-3444
505-342-1802 crisis

Belen
Valencia Counseling Services, Inc.
505-864-1909
505-865-3359

Bernalillo
La Buena Vida
505-867-2383

Carlsbad
Carlsbad Mental Health
505-885-4836
505-885-8888 crisis

Clovis
Mental Health Resources
505-769-2345
1-800-432-2159 crisis
(After hours)

Deming
Border Area Mental Health Center
505-546-2174
1-800-426-0997 crisis

Espanola
Northern NM Family Crisis Center
505-753-1656
1-800-206-1656 crisis

Estancia
Valencia Counseling Services
505-384-0220
505-865-4739 crisis

Farmington
Presbyterian Medical Services Community Counseling
505-325-0238
505-325-1906 crisis

San Juan County Rape Crisis
505-599-6168

Gallup
Western NM Counseling Services
505-863-3828
1-800-649-0181 crisis

Grants
Cibola Counseling Services
505-287-7985
1-800-287-0212 crisis
(After hours)

Hobbs
Guidance Center of Lea County
505-393-3168
505-393-6633 crisis
505-392-0966 adolescents

Jemez Pueblo
Pueblo of Jemez Social Services
505-834-7117

505-437-7407 crisis
1-800-634-3666 crisis

Las Cruces
La Pinon Rape Crisis Center
505-526-3437
505-526-3437 crisis
1-888-595-7273 crisis

Southern NM Human Development
505-882-5101

Southwest Counseling
505-647-2800
505-526-3371 crisis

Las Vegas
Las Vegas Community Based Services
505-454-5115
505-425-1048 crisis
(After 5pm)

Los Alamos
Los Alamos Family Council
505-662-3264
505-662-4422 crisis

Los Lunas
Valencia Counseling Services
505-865-3359
505-865-3359 crisis

Portales
Mental Health Resource
505-359-1221
1-800-432-2159 crisis

Raton
Taos/Colfax Community Services
505-445-2754

Rio Rancho
Rio Rancho Family Health Center
505-896-0928
1-888-920-6333 crisis

Roswell
Counseling Associates
505-623-1480

Ruidoso
The Counseling Center
505-237-5038

San Felipe
San Felipe Behavioral Health & Family Services
505-867-9740

Santa Fe
Santa Fe Rape Crisis Center
505-988-1951
505-986-9111 crisis
1-800-721-7273 crisis

Santa Rosa
Las Vegas Medical Center Community Based Services
505-472-3768
505-425-1048 crisis

Shiprock
Home for Women and Children, Rape Crisis Service
505-368-5124

Silver City
El Refugio, Rape Crisis Services
505-538-2125

Border Area Mental Health Center
505-388-4412
1-800-426-0997 crisis

Socorro
Socorro Mental Health
505-835-2444

Taos
Community Against Violence
505-758-8082
505-758-9888 crisis

Taos Mental Health
505-758-1125

Truth or Consequences
S.T.A.R.T.
505-894-0889
505-894-5475 pager

Tucumcari
Mental Health Resources

New Mexico Sexual Assault Nurse Examiners Programs

Statewide SANE Coordinator
Connie Monahan
505-883-8020

Alamogordo
Otero/ Lincoln Cty SANE
505-443-7900
505-443-2156 crisis

Albuquerque
Albuquerque SANE Collaborative
505-883-8720
505-884-7260 emergency

Para Los Niños, UNM
Health Sciences Center
Pediatric sex abuse exams
Renee Ornelas, M.D.
505-272-6849

Carlsbad
Carlsbad Medical Center
505-887-4121

Clovis
9th Judicial District SANE
505-769-7335, ask for SANE Rep.

Farmington
Sexual Assault Services/Northern NM
505-325-2805
505-326-4700 crisis

Las Cruces
La Piñon SANE Project
505-526-3437
505-521-5549 office
1-888-595-7273 emergency

Lovington/Hobbs
Lea County SANE
505-396-6611 admin
505-390-6999 emergency

Portales
9th Judicial District SANE
505-359-1800

Roswell
Esperanza House SANE Project
505-625-1457

Santa Fe
Santa Fe St. Vincent SANE
505-995-4999
505-989-5952 crisis

Shiprock, Navajo Nation
Northern Navajo Medical Center SANE
505-368-6818

Criminalistics Labs

Albuquerque Police Department
Criminalistics Lab (serves Bernalillo County)
Albuquerque Police Department
Contact: Cathy Pfefferle, Forensic Scientist
505-823-4642

New Mexico Department of Public Safety Crime Lab
Contact: Susan Scholl, Forensic Serology/DNA Analyst
505-827-9136

New Mexico Safehouse Network

505-638-5478, 505-577-7878 message

Alamogordo
Kids, Inc., A Safehouse For Kids
505-437-8689
505-434-8886 fax

Albuquerque
The Children's Safehouse
505-271-0329
505-271-4957 fax

Clovis
The Oasis
505-769-7732
505-763-1474 fax

Carlsbad
Eddy County Safehouse
505-885-9763
505-628-8394 fax

Farmington
Childhaven
505-325-5358
505-327-1482 fax

Hobbs
Option, Inc.
505-397-1576
505-397-3640 fax

Las Cruces
Children's Safehouse of Las Cruces Family and Youth, Inc.
505-522-4004, 505-522-4005
505-522-9017 fax

Roswell
Esperanza House
505-625-1095
505-623-6189 fax

Santa Fe
Strong Heart Safehouse
505-988-1951
505-988-1906 fax

Taos
Community Against Violence
505-758-8082
505-758-9888 crisis

Taos Saferoom
505-758-2361
505-758-4051

New Mexico Domestic Violence Services

Alamogordo
COPE, Inc.
505-434-3622

Albuquerque
Enlace
505-246-8972
(Serving immigrant and Spanish speaking families)

Women's Community Association
505-247-4219

Resources, Inc.
505-884-1241

Morning Star House
505-232-8299

Artesia
Grandma's House
505-748-1198

Belen
Valencia Shelter For Victims of DV
505-864-3202

Bernalillo
Indian Pueblo Legal Service
505-867-3391

Santa Ana Pueblo DV Program
505-867-3301,
505-71-7057

Carlsbad
Carlsbad Family Crisis Center
505-885-4615

Clayton
Golden Spread Rural/Frontier Coalition
374-6207

Clovis
The Hartley House
762-0050

Crownpoint
Family Harmony Project
505-786-7031

Deming
The Healing House
505-546-6539

Dulce
Jicarilla Behavioral Health
505-759-3162

Espanola
Crisis Center of Northern
505-753-1656

North Central Community Based Services
505-756-2327

Farmington
Family Crisis Center
505-325-3549
505-564-9192 crisis

Navajo United Methodist: New Beginnings
505-325-7578

Gallup
Battered Families Service
505-722-6389

Grants
Roberta's Place
505-287-7724

Hobbs
Option, Inc.
505-397-1576

Jemez Pueblo
Jemez Domestic Violence Program
505-834-7117

Laguna
Laguna Family Services
505-552-9701

Las Cruces
La Casa
505-526-2819

La Casa (Anthony)
505-882-3008

Los Alamos
Los Alamos Responder Program
505-662-3264

Raton
Alternatives to Violence
505-445-5778

Rio Rancho
Haven House
505-896-4869

Roswell
Roswell Refuge For Battered Adults
505-627-8361

San Juan Pueblo
8 Northern Indian Pueblos Peacekeepers Program
505-753-4790

Santa Fe
Esperanza, Inc.
505-474-5536

Shiprock
Home For Women and Children
505-368-5124

Silver City
El Refugio
505-538-2125

Socorro
El Puente
505-835-0928

T or C
Domestic Abuse Intervention Center
505-894-3557

Taos
Community Against Violence
505-758-8082

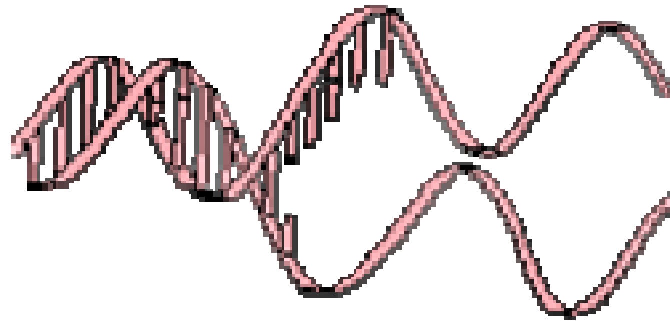
Tucumcari
Domestic Violence Program
505-461-4208

APPENDIX D

Forensic DNA Analysis for Non-Scientists

Prepared by the DNA analysts of the Albuquerque Police Department Crime Lab – 2007.

Forensic DNA Analysis



For Non-Scientists

Introduction

This document was prepared by the DNA analysts of the Albuquerque Police Department Crime Lab. It is intended to be used by persons unfamiliar with the scientific principles of Forensic DNA analysis, including District Attorneys, Defense Attorneys and Detectives. We have tried to limit the technical jargon to that necessary to understand our Serology and DNA Reports, and still describe what we do. Experts in Forensic DNA analysis will note that many specific steps have been left out of the descriptions, and that others seem vague. The purpose for this is not to mislead, but to prevent those who are unfamiliar with the science from getting lost in the details. Any suggestions for improving this document are welcome.

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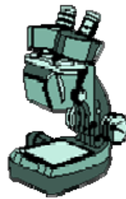
Overview of Forensic Serology



- **Forensic Serology** is the examination of body fluids for application in matters of the law.

- Serological analysis of a stain serves two purposes: 1) To indicate whether a stain is of bodily origin, and if it is, is it possibly blood, semen, saliva, feces or urine, and 2) To indicate if the stain might contain DNA to go on for DNA analysis.

- The first step is to examine the items of evidence for possible stains. Which items to be examined and what types of stains are looked for depend on the nature of the case and what examination has been requested.

- Generally, the stains of most interest would be those representing a transfer from the victim to the suspect; from the suspect to the victim; or from the victim/suspect to the scene.

- If semen, saliva or urine is suspected, an alternate light source is usually used during the examination, as these body fluids generally fluoresce ("light up") under light at a wavelength of 450 nm.

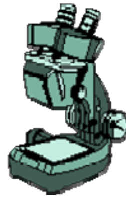
- Possible blood or semen stains are checked with a color-changing presumptive test. The usual presumptive test for blood is Leucomalachite Green, usually abbreviated “LMG”, or “L”. The presumptive test for semen is Acid Phosphatase, usually abbreviated “APOL”, or “AP”. Presumptive tests can have false positive and false negative results. Positive presumptive tests for blood and for semen are sometimes followed by confirmatory tests.

- The presence of blood is confirmed by Takayama crystals. The Ouchterlony Double Diffusion test can be used to determine the species of origin, including human/higher primates.

- The presence of semen is confirmed by the microscopic observation of spermatozoa, or in the case of non-sperm producing men, by the presence of P30. P30, also known as Prostatic Specific Antigen, is produced by the prostate gland. In normal circumstances, semen is the only body fluid with significant levels of P30.

- Presumptive tests for saliva, feces and urine may also be performed.

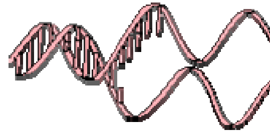
Overview of Forensic Serology (continued)



- During serological analysis, items of evidence with an unknown origin are assigned a designator that begins with the letter "Q" (for "questioned"). This designator appears on the serology report and is carried through the DNA report. If the item was previously assigned a designator, such as "cl-1" by a detective in the field, the two designators will be cross-referenced on the serology and DNA reports. Q1 is the first item examined in a case, Q2 is the second and so on. If Q1 is a large item, some part of which has a stain of interest, the stain will be assigned the designator Q1-1, meaning "the first stain from item Q1". The second stain of interest will be Q1-2, meaning "the second stain from item Q1", and so on.

- Before DNA analysis is begun, a DNA sample must be collected from relevant persons involved in the case. This sample is known as a "standard" and is given a designator beginning with the letter "K". "K1" is the first standard examined in a case, "K2" is the second and so on. It is important to remember that "relevant person" may include such people as a rape victim's sex partner, all males attending a party where a rape occurred, all persons involved in a fight that resulted in a homicide, etc.

What is DNA?



- **DNA** stands for **d**eoxyribo**n**ucleic **a**cid. DNA is a molecule made of other smaller molecules.

- DNA is the genetic material that makes each person an individual. It is the ultimate control system for all of the body's characteristics and functions. In the language of the profession, a section of DNA is said to "code" for a characteristic or function. That section of DNA is the **gene** for that characteristic or function.

- The shape of a DNA molecule is a double helix. Think of a ladder that has been twisted.

- **Zipper Analogy:** Another way to envision DNA is to think of a zipper that has been twisted. The zipper can be unzipped into its two halves. The zipper has 4 different colors of teeth: red, purple, black and **white**. In order for this zipper to zip up, black teeth must always mesh with **white** ones, and red ones must always mesh with purple ones. If the wrong color tooth is in the wrong place, the zipper can't zip (see Figure 1, pg 4).

- The smallest unit DNA is broken down to is the base pair, which, in the zipper analogy, corresponds to a single tooth (it is understood that the tooth has a partner that it meshes with on the other half of the zipper). A section of DNA is often referred to as being some number of base pairs long. The order of the base pairs (or teeth in the zipper) is vital for DNA to code properly. For example, a single wrong base is the cause of sickle cell anemia.

- The human body is made of trillions and trillions of cells of different types and different functions. For example, liver cells clear waste products from the blood stream, skin cells protect the body from environmental insult, and brain cells process external and internal stimuli. Almost all cells contain DNA. Even though a person's cells have different functions, they all contain the same DNA.

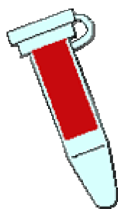
- Most cells contain two versions of the DNA, one inherited from the mother, the other from the father. So for each gene (also known as a **locus**), there are two versions. In rare instances, a person may have three copies of some of their DNA. An example of this is Down's Syndrome, which is caused by having an extra 21st chromosome. These individuals have three copies of the DNA from the 21st chromosome, instead of just two.

- The two versions of the gene may be different or they may be the same. If they are different, the person is **heterozygous** for that locus. If they are the same, the person is **homozygous** for the locus.

- All of the possible versions of a locus are known as **alleles**. For example, brown, blue, green, hazel, and violet are alleles of the eye color locus (gene).

Figure 1: DNA as a Zipper

Overview of DNA Analysis



- DNA analysis at APD is specific for higher primates (humans, gorillas and chimpanzees).

- Three different types of DNA reports have been issued by APD. The difference lies in what part of the DNA molecule is looked at and the method used to detect the DNA. The three types are:

  1. RFLP (**R**estriction **F**ragment **L**ength **P**olymorphism): Under "Type of Analysis", these reports list "RFLP". Profiles are visualized as a band pattern. RFLP analysis was done prior to July 1, 1998. This type of analysis is not included in this document. If information about RFLP DNA analysis is needed, please contact the APD DNA unit.
  2. DQα1/PM (DQα1 and **P**oly**M**arker): Under "Type of Analysis", these reports have "PCR". Profiles are visualized as a dot pattern. DQα1/PM analysis was done prior to July 1, 1998. This type of analysis is not included in this document. If information about RFLP DNA analysis is needed, please contact the APD DNA unit.
  3. STR (**S**hort **T**andem **R**epeat): Most of these reports do not list a type of analysis. Profiles are visualized as peaks on a graph. STR analysis was begun July 1, 1998 and is currently the only type of DNA analysis performed by APD.

- The first step in DNA analysis is to extract the DNA from the body fluid stain or tissue. A small amount of the stain is placed in a small test tube. In a series of steps, the cellular matter is washed off the material, the cells are broken open, and the DNA is separated and purified.

- Differential extraction is used for stains that contain sperm cells. This extraction method takes advantage of the fact that sperm cells are more resistant to breaking open than epithelial (skin) cells. Differential extraction results in a "D1" fraction that contains DNA *predominantly* from sperm cells (from the male) and a "D2" fraction that contains DNA *predominantly* from epithelial cells (from the female). Separation is not always complete; some epithelial DNA may remain with the sperm DNA and vise versa.

- The DNA extracted from each stain is quantified to make sure the optimal amount is used in the analysis.

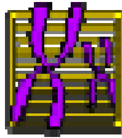
- Using STR analysis, a genotype or DNA profile is generated. A DNA profile of a person is a genetic description and is not dissimilar to a physical description of a person. A physical description might include gender, hair color, eye color, height, build, color of shirt, pants, shoes, cap, etc. A DNA profile includes gender and a "description" (in the form of numbers) of 9-13 genetic characteristics. The advantage of a DNA profile is that unlike some parts of a physical description, a DNA profile can't be changed!

- The profile from the questioned sample (i.e. stains from the evidence, designated with a "Q") may reveal that the DNA is from one person, or it may reveal that the stain contains the DNA

from more than one person. If the profile came from two or more people it is called a mixed profile. A stain that that came from just one person can have only one **donor**. A mixed stain can have multiple **contributors**.

- The profiles from the questioned samples are compared to the profiles from the known samples (from the victim(s) and suspect(s), designated with a “K”) and a determination is made as to whether each person is "excluded" or "cannot be excluded" as the donor or as a contributor for each stain (see Statistical Evaluation, pg 12).

What is PCR?



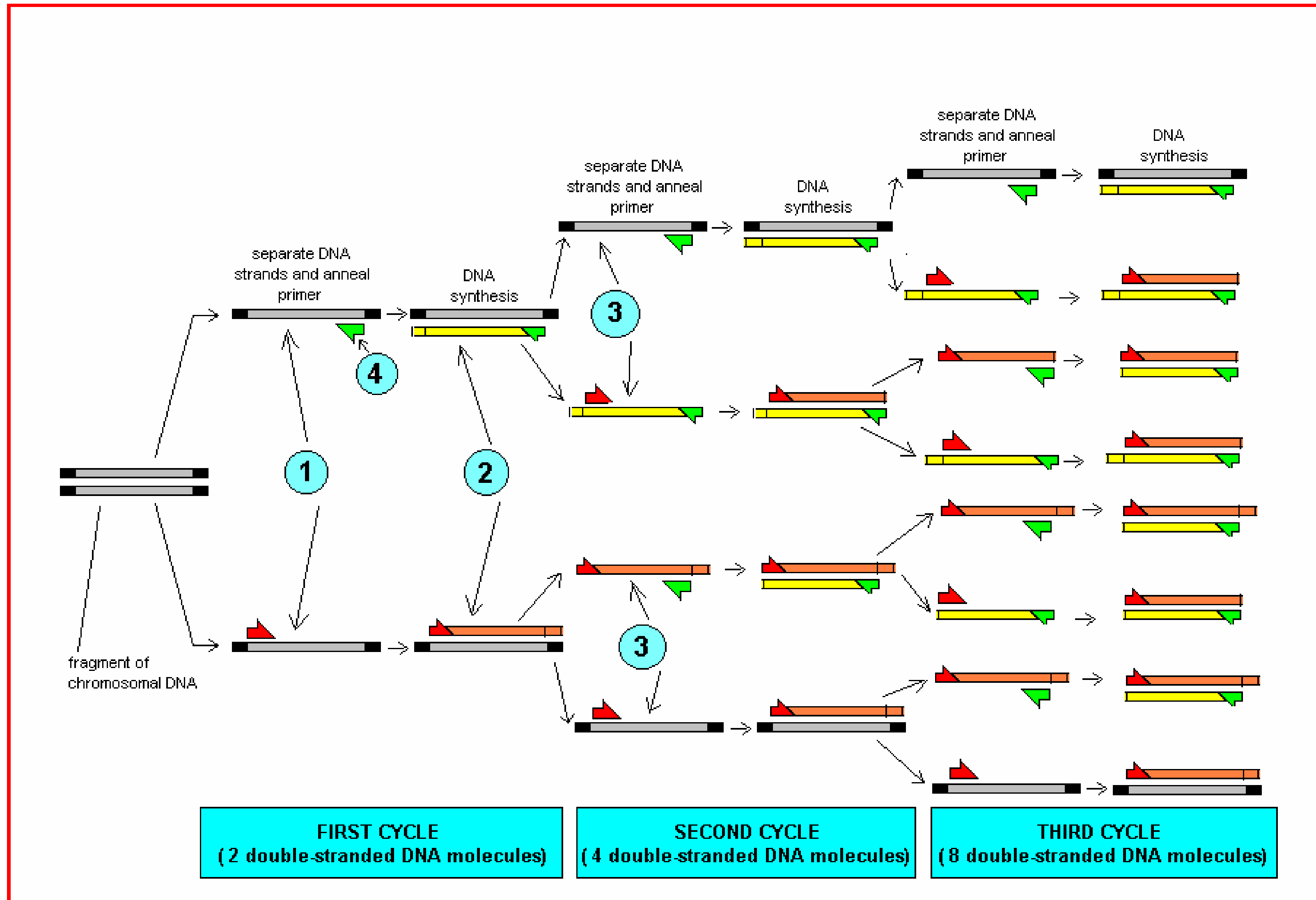
- **PCR** stands for **P**olymerase **C**hain **R**eaction. PCR is a process that is done in the laboratory. When the body is growing or healing injuries, it must make precise copies of its DNA. In the laboratory, we use a similar process to make millions of precise copies of the selected DNA that we have extracted from a sample.

- PCR allows a tiny amount of DNA to be **amplified** (increased) to quantities sufficient for analysis. With PCR, a bloodstain the size of a pinhead will often yield enough DNA for analysis.

- PCR works as follows (see Figure 2, pg 8):

  1. The DNA extracted from the sample is unzipped (see zipper analogy in “What is DNA?”). The two halves of the zipper become templates for new DNA.
  2. Starting with one half of the “unzipped” original DNA, a new, complementary half is constructed. From the zipper analogy, black teeth must match to **white** teeth, and red teeth must match to purple teeth. So if the original half of the DNA had a **white** tooth in the first position, then an enzyme puts a black one in the new half that is being built. If the next tooth is purple, then a red one is put in the new half. The other half of the original DNA is copied simultaneously. The result is two copies of the original DNA (both halves of the zipper).
  3. In the next cycle, these two copies are unzipped to form four templates, resulting in four copies. Each cycle doubles the number of copies from the previous cycle.
  4. Not all of the DNA from the original sample is copied. Only the sections to be analyzed are copied (See "What are STR’s", pg 9). **Primers** are used to select the sections to be copied and become incorporated into the copy. The primers also have a fluorescent molecular “tag” on them, which also becomes incorporated into the copied DNA.

Figure 2: Amplification by PCR



Each cycle of PCR amplification doubles the amount of target DNA. Twenty-eight PCR cycles are performed for STR analysis. The shaded numbers correspond to the steps described on page 7.

What are STR's?

- **STR** stands for **S**hort **T**andem **R**epeat.

- STR's are sections of DNA, or loci, that are located between, or in a few cases, within, other loci that are known to code for useful traits.

- STR's do not code for useful traits; they have no known function at this time.

- STR's are short pieces of DNA (2-7 base pairs long) whose sequence repeats several times. From the zipper analogy (see "What is DNA?" pg 3), think of a section of the zipper that is four teeth long, in the order of red, red, black, black, repeated 8 times, i.e. red, red, black, black; red, red, black, black; etc. 8 times. (It is left understood that there are corresponding teeth on the other half of the zipper.)

- The number of repeats varies from person to person. For example, at a particular locus, a person may have inherited 8 repeats from their mother and 17 repeats from their father. Then that person would have the 8 and 17 alleles for that locus. It is possible to inherit the same number of repeats from each parent (i.e. be homozygous).

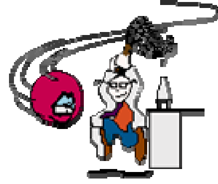
- STR's rely on PCR to amplify the sample DNA. The primers have one of three different fluorescent dyes (blue, green or yellow) attached to them, so the copied DNA ends up with fluorescent "tags" (see "What is PCR?" pg 7).

- The end result of this PCR is millions of pieces of DNA of various lengths. The length depends on which STR loci it is from, and how many repeats there were. In addition, each piece of DNA ends up with a fluorescent dye (blue, green or yellow) attached.

- APD routinely analyzes 9 STR loci (D31358, vWA, FGA, D8S1179, D21S11, D18S51, D5S818, D13S317 and D7S820), plus the Amelogenin locus, which is analogous to the sex chromosomes (X, X = female; X, Y = male). Additional loci many be analyzed as the need arises.

- Detection is by capillary electrophoresis (see "What is Capillary Electrophoresis?" pg 10)

What is Capillary Electrophoresis?



- **Capillary Electrophoresis** is an automated process used to separate, by length, the various pieces of copied DNA (see “What is PCR?”).

- Capillary Electrophoresis works as follows:

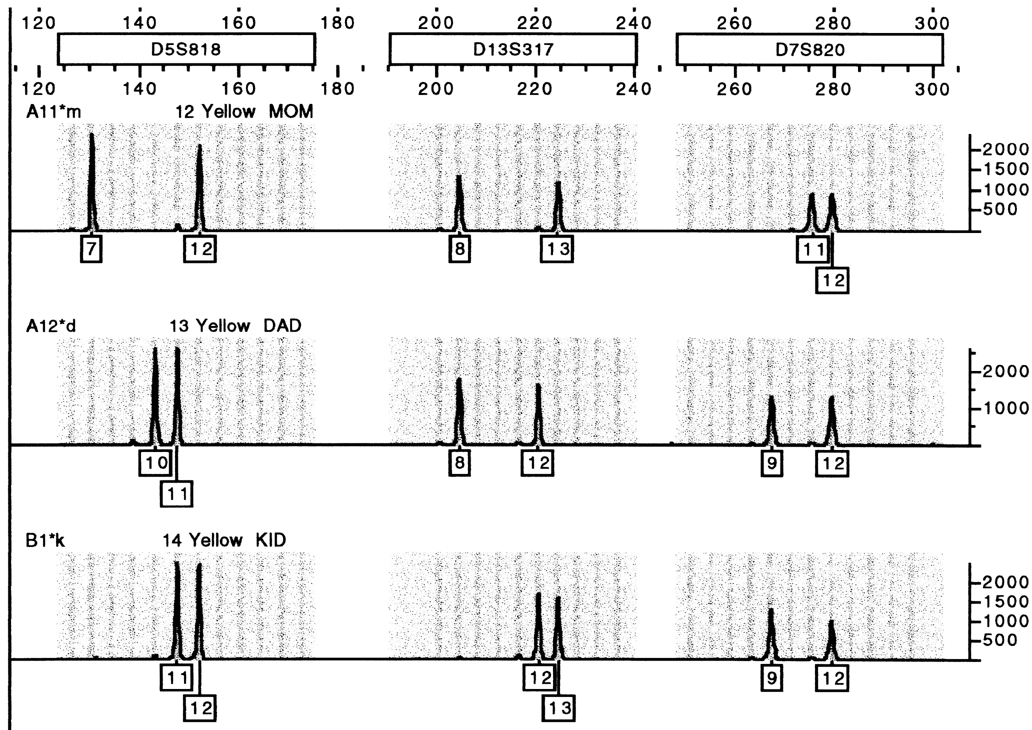
  1. A very, very thin tube, or capillary, is filled with polymer, which is like runny Jell-O.
  2. A mild electric current is applied to the polymer- filled capillary. One end of the capillary is in a small test tube containing the copied, fluorescent-tagged DNA (see “What are STR’s?” pg 9).
  3. DNA has a negative charge, so it migrates through the capillary, seeking the positive charge at the other end. The migration of big pieces of DNA is slowed down because the big pieces can't work their way through the polymer as fast as little pieces can. Therefore, the smallest pieces of DNA arrive at the other end of the capillary first, followed by progressively larger pieces.

- There is a clear window near the end of the capillary. As the pieces of DNA pass the window, a laser causes the attached dye "tag" to fluoresce. A special camera “sees” the color of the dye.

- As each sample is run, a computer collects information on what size each piece of DNA is (i.e. how long it took to reach the camera) and what color the attached dye is. This information is sorted, and an electropherogram (see Figure 3, pg 11) is generated for the sample. An electropherogram is a graphical representation of the genotype. A **genotype** is a description of the genetic make up for the loci being looked at. The information from the electropherogram can also be presented in tabular form (see Table 1, pg 11).

- The capillary is flushed out and filled with new polymer before another sample is run.

Figure 3: Example of an Electropherogram



Each shaded box represents one locus. Each numbered peak represents an allele (see "What is DNA?"). The allele number is also the number of times the STR repeated (see "What are STR's?" pg 9)

Table 1: Example of an Allele Table

Sample	STR Loci (Blue)							
	D3S1358		vWA		FGA			
MOM	15	16	16	20	20	22		
DAD	14	15	15	16	21	23		
CHILD	15	15	15	20	21	22		
	STR Loci (Green)							
	AMELOGENIN		THO1		TPOX		CSF1PO	
MOM	X	X	7	9.3	8	11	11	12
DAD	X	Y	9	9.3	8	11	11	12
CHILD	X	Y	7	9	8	11	11	12
	STR Loci (Yellow)							
	D5S818		D13S317		D7S820			
MOM	7	12	8	13	11	12		
DAD	10	11	8	12	9	12		
CHILD	11	12	12	13	9	12		

This data is from a family study. Note that for each locus, the child received one allele from each parent. For example, at the D3S1358 locus, the child is homozygous for the 15 allele. One copy came from the father and one copy came from the mother. The alleles for the "yellow" loci are shown in the electropherogram above.

Statistical Evaluation

- If the DNA profile is of probative value, it will be evaluated statistically. The statistical evaluation is intended to give jury members some idea of the significance of the reported findings.

- The DNA from a stain on an item of evidence may come from just one person or it may be a mixture from two or more people.
    1. If the DNA profile from a stain came from just one person, and that profile matches the DNA profile from Jane Doe's DNA standard, then the DNA report will read "Jane Doe cannot be excluded as the **donor** of the profile from the stain". Conversely, for those persons whose profile does not match to the stain, the report will read "Joe Brown is excluded as the **donor** of the profile from the stain".
    2. If the DNA profile from a stain came from two or more people, then anyone whose standard profile matches a significant portion of the stain profile cannot be excluded as a **possible contributor** to the profile from the stain. The DNA report will indicate either "Jane Doe is excluded as a possible contributor to the profile from the stain" or "Joe Brown cannot be excluded as a possible contributor to the profile from the stain".

- The statistical evaluation for a profile that came from two or more people is very different than for a profile that came from only one person.

- Statistics are generated from a database. The database contains information on how often (the frequency) each allele occurs in a particular ethnic population. The information in the database was obtained by performing DNA analysis on samples provided by volunteers who self-identified their ethnic group. For example, the frequency of the "12" allele at genetic locus D13S317 in African-Americans is 0.42122, but is 0.27577 in Caucasians. That is, 42.1% of African-Americans have a "12" allele at D12S317, but only 27.6% of Caucasians do (Texas DPS STR database).

- The type of statistical evaluation done for a profile that came from only one person is called a **random match probability**.
    1. This number tells you the probability that an (unrelated) individual selected at random will have the same DNA profile as the one found on the evidence.
    2. If the probability exceeds 273 billion, then to a reasonable degree of scientific certainty, the person is considered to be the **source** of the profile.

- If a DNA profile is a mixture, but it is evident from peak heights in the electropherogram that one person contributed significantly more than the other contributor(s), i.e. is the major contributor, then the random match probability can be used. This is only valid if the major contributor is clear at all loci.

- The type of statistical evaluation done for a profile that is a mixture from two or more people is called a **likelihood ratio**.
    1. The prosecution and the defense will probably have different scenarios, or **hypotheses**, for how the mixture came about. For example, for a bloodstain on a rape victim's jeans, the prosecution might say "the stain is a mixture of the victim

and the suspect" while the defense might say "the stain is a mixture of the victim and an unknown perpetrator".

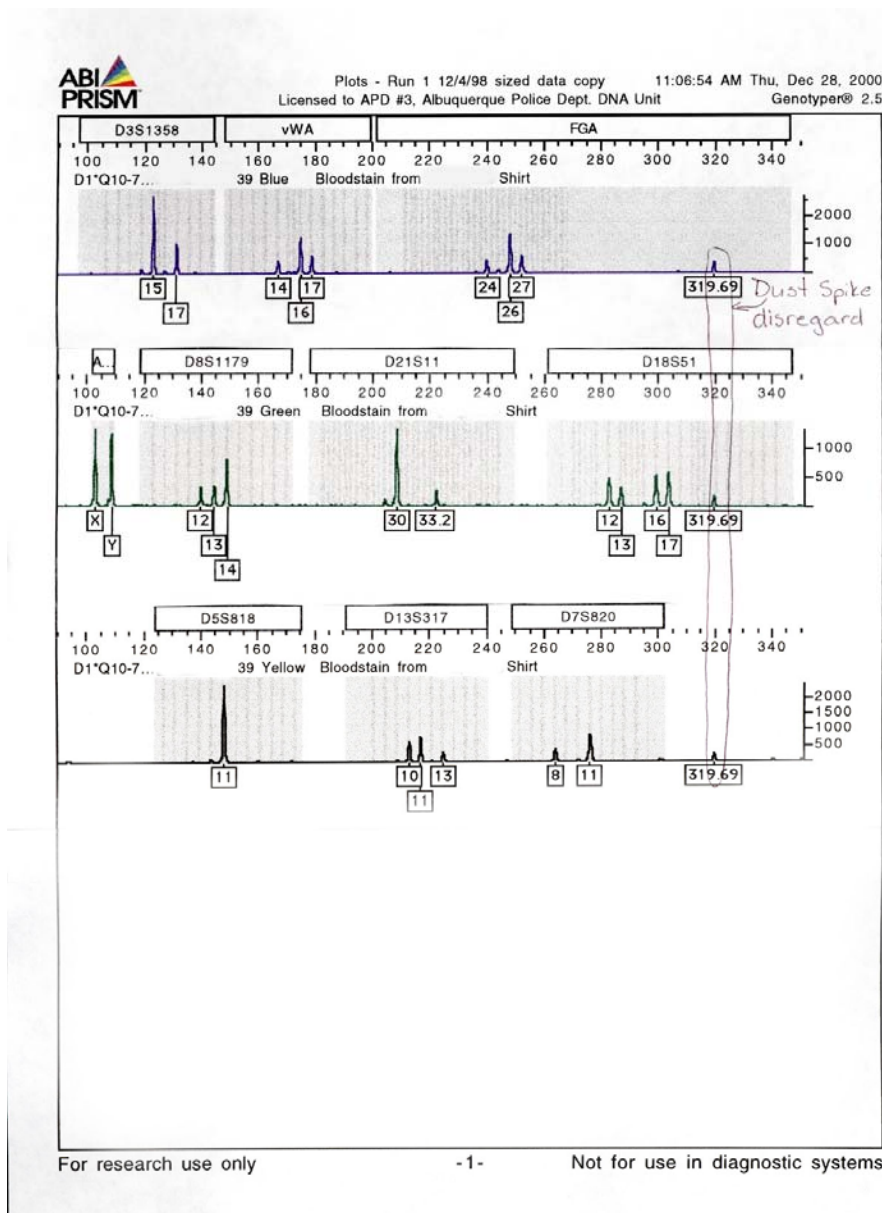
2. The likelihood ratio will mathematically evaluate which of the two hypotheses is the most likely, given the DNA profiles from the victim, the suspect and from the stain on the victim's jeans, and how often the alleles are known to occur.
3. A likelihood ratio greater than 200 favors the prosecution's hypothesis. The two hypotheses are equally likely if the ratio is close to 1.

Why are Mixed Profiles Different?

As DNA analysts, we are frequently asked why we treat mixed profiles (those where the DNA came from more than one person) differently. "DNA is DNA isn't it? Why can't you just say it matches so-and-so and give me an astronomical probability? Why do you waffle with the "possible contributor" terminology?" The following example will demonstrate why.

Figure 4 shows the profile from a bloodstain on a shirt found near a homicide scene. The DNA must have come from more than one person, because a person can (usually) have no more than two alleles (represented by peaks) at each locus (represented by the gray-shaded areas). The most likely number of contributors to this DNA profile is two.

Figure 4: Electropherogram of a Mixed Profile



This profile is from a bloodstain on a shirt found near the scene of a homicide

Why are Mixed Profiles Different? (continued)

Looking at the first locus (D3S1358), anyone who is a 15,15 a 17,17 or a 15,17 could have contributed to this mixture. At the next locus, vWA, anyone who has any combination of 14,16 and 17 could be a contributor. At the D18S51 locus, there are four peaks (the fifth peak is from a dust spike, a well-known, thoroughly-described phenomenon of STR's). The possible combinations are 12,12 or 13,13 or 16,16 or 17,17 or 12,13 or 12,16 or 12,17 or 13,16 or 13,17 or 16,17! A few of the possible profiles that could be combined to make the profile in Figure 4 are shown in Table 2.

Table 2: Examples of Profiles that Could be Contributors

Sample	Loci								
	D3S1358	vWA	FGA	D8S1179	D21S11	D18S51	D5S818	D13S317	D7S820
Target Profile	15,17	14,16,17	24,26,27	12,13,14	30,33.2	12,13,16,17	11	10,11,13	8,11
Contributor 1	15	14,16	24,27	12,13	30,33.2	12,13	11	11,13	11
Contributor 2	15,17	16,17	26	14	30	16,17	11	10,11	8,11
Contributor 1	15	14,16	24,27	12	33.2	12,17	11	10	8
Contributor 2	17	14,17	26,27	13,14	30,33.2	13,16	11	11,13	11
Contributor 1	15,17	16,17	26,27	14	33.2	12,13	11	10,13	8,11
Contributor 2	17	14,16	24	12,13	30,33.2	16,17	11	11,13	8

The target profile is the profile from the electropherogram in Figure 4. The profiles from each set of contributors 1 and 2 can be combined to form the target profile, yet all of the contributor profiles are different from each other.

In this example, the first set of profiles (in red) are the actual profiles of the victim and suspect, the others are made-up. There are other factors a DNA analyst considers when deciding the likely contributors that are beyond the scope of this presentation, but this example should demonstrate why mixed profiles are not as straight forward as we would like them to be. The rest of this example will demonstrate the strength of the likelihood ratio and why it is desirable to become familiar with its use. The likelihood ratio mathematically evaluates the evidentiary value of both the target profile and the profiles from the known standards.

In this example, we can present several scenarios, or hypotheses, as to who contributed their DNA to this bloodstain. We will say that two people contributed their DNA to the stain, as that is the most reasonable number of people given the data. Remember, the shirt was found on the ground near the homicide scene. The prosecutor and the police officer would probably say that the DNA came from the victim and the suspect. The defense may pose several scenarios: 1) the DNA is from the victim and a second unknown person ("the real perpetrator"), or 2) the DNA is from the suspect and a second unknown person ("yes, that's my client's blood on the shirt, but the other contributor is his girlfriend, not the victim", or 3) the DNA is from two unknown persons ("the shirt has nothing to do with the case at all"). If we use the first hypothesis for the defense the likelihood ratio stated in words would be: "The target profile is more likely to have arisen if it came from a mixture of the victim and the suspect than if it came from a mixture of the victim and an unknown individual. That likelihood is approximately 131 billion times greater in the Caucasian population". The results of this calculation and for other populations and hypotheses are given in Table 3, pg 16.

Why are Mixed Profiles Different? (continued)

Table 3: Examples of Likelihood Ratio Calculations

Defense* Hypothesis	Population Groups				Likelihood Ratio as a Statement
	Caucasian	Black	Southeast Hispanic	Southwest Hispanic	
The victim & an unknown person are the contributors	131 billion	1.99 trillion	63.4 billion	23.7 billion	"The target profile is more likely to have arisen if it came from a mixture of the victim and the suspect than if it came from a mixture of the victim and an unknown individual. That likelihood is approximately X times greater in the X population"
The suspect & an unknown person are the contributors	13.1 billion	9.39 billion	2.54 billion	888 million	"The target profile is more likely to have arisen if it came from a mixture of the victim and the suspect than if it came from a mixture of the suspect and an unknown individual. That likelihood is approximately X times greater in the X population"
Two unknown persons are the contrib-utors	2.62 quintillion	19.5 quintillion	166 quadrillion	15.4 quadrillion	"The target profile is more likely to have arisen if it came from a mixture of the victim and the suspect than if it came from a mixture of the two unknown individuasl. That likelihood is approximately X times greater in the X population"

*The same prosecution hypothesis (the victim and the suspect are the contributors) was used to calculate the likelihood ratios with three different defense hypotheses. For all, it is understood that the profiles of the victim, the suspect and the stain are fact. Note the effect of changing the number of unknown contributors from one to two in the third example.

Of course, we could do the same calculations and get similar numbers using the made-up profiles in Table 2. There are two problems with this however. First, we don't know for fact that there are humans with those profiles or whether they were anywhere near the scene of the crime, and second, it is unlikely that the made-up profiles would fit all the parameters that an analyst must consider (the "other factors" mentioned previously).

A valid criticism of the likelihood ratio is that there are many scenarios that could be proposed to explain the evidence. As the example above demonstrates, the more "unknown contributors" that are put into the equation, the less favorable the result is for the defense. The same effect occurs when the total number of proposed contributors is increased from two to three or more. The DNA analysts will choose hypotheses that adequately explain the evidence and that are the most favorable for the defense.

APPENDIX E

New Mexico SANE Programs

December 2007 (For most current version contact New Mexico Coalition of Sexual Assault Programs at 505-883-8020 in Albuquerque or 1-888-883-8020 toll free outside of Albuquerque.)

New Mexico SANE Programs

Statewide SANE Coordinator — Connie Monahan, conniem@swcp.com

Address:	Coalition of Sexual Assault Programs 3909 Juan Tabo Blvd. NE, Suite 6 Albuquerque, NM 87111	
Telephone:	505-883-8020	
FAX:	505-883-7530	

Albuquerque SANE Collaborative — (interim director), abqsane@qwest.net, Lydia Vandiver, lydiavandiver@msn.com

Mailing address:	P.O. Box 37139 Albuquerque NM 87176	
Located at:	625 Silver SW, Suite 2206 Albuquerque, NM 87102	
Telephone:	505-883-8720	
Emergency:	505-884-7263	
FAX:	505-883-8715	

Santa Fe St. Vincent SANE Program — Colleen Dearmin, colleen.dearmin@stvin.org

Mailing address:	St. Vincent Hospital 455 St. Michael Drive Santa Fe, NM 87505	
Located at:	6601 Valentine Way Santa Fe, NM 87508	
Telephone:	505-995-4999	
Emergency	505-989-5952	

Roswell Esperanza House SANE Project — Stephanie Breen, sgbreen@cableone.net

Mailing address:	P.O. Box 1582 Roswell, NM 88203	
Located at:	Esperanza House 305 West Tilden Roswell, NM 88203	
Telephone:	505-625-1457 or 505-625-1095	
Emergency:	505-622-SANE (7263)	

Las Cruces La Pinon SANE Project — Cathy Van Wyngarden, sanelapinon@zianet.com

Mailing address:	418 West Griggs Las Cruces, NM 88005	
Located at:	Memorial Medical Center 2450 South Telshor Las Cruces, NM 88011	
Telephone:	505-526-3437 (la Pinon) or 505-521-5549 (SANE office)	
Emergency	888-595-7273	

New Mexico SANE Programs, Continued

Sexual Assault Services of Northwest NM (Farmington)

Address:	622 West Maple, Suite D	Susan Jackson
	Farmington, NM 87401	sanjuansane@aol.com
Telephone:	505-325-2805	Kathy Barrett
Emergency	505-326-4700 or 1-866-908-4700	saneclinco@aol.com
FAX:	505-326-2557	

SANE of the 9th (Roosevelt and Curry Counties)

Address:	Roosevelt General Hospital	Amber Hamilton
	P.O. Drawer 868	Tawnya Burton
	Portales, NM 88130	RC_sane@yahoo.com
Telephone:	505-359-1800, ext 303	
Emergency:	505-359-1800, ext 472 or 505-769-7335	
FAX:	505-356-9200	

Otero and Lincoln County SANE

Address:	Gerald Champion Memorial Hospital	Tina Godby-Ware
	2669 North Scenic	godby-ware@charter.net
	Alamogordo, NM 88310	
Telephone:	505-443-7901	
Emergency:	505-491-1557	

Carlsbad Medical Center SANE

Address:	Carlsbad Medical Center	Carla Anderson
	2430 West Pierce Street	carla.anderson@triadhospitals.com
	Carlsbad, NM 88220	
Emergency Tele:	505-887-4121	
FAX:	505-887-4346	

Lea County SANE

Address:	Nor-Lea General Hospital	Sara Campbell
	1600 North Main	scambell@nlgh.org
	Lovington NM 88260	Nancy Morgan
Telephone:	505-396-6611	nmorgan@nlgh.org
Emergency:	505-390-6999	
FAX:	505-396-2863	

APPENDIX F

General Information about New Mexico Sexual Assault Nurse Examiner (SANE) Programs

December 2007 (For most current version contact New Mexico Coalition of Sexual Assault Programs at 505-883-8020 in Albuquerque or 1-888-883-8020 toll free outside of Albuquerque.)

Information about New Mexico Sexual Assault Nurse Examiner (SANE)

General Guidelines

- ✓ Medical attention always takes priority over the sexual assault exam.
- ✓ The SANE exam should be done within 5 days of the assault – generally, the sooner the better but the patient does have time to consider his/her needs.
- ✓ SANE nurses are on-call. They are not physically on-site. To dispatch a SANE nurse, call your nearest SANE unit.
- ✓ The SANE nurse needs informed consent from the sexual assault survivor. The patient must be able to understand, agree, and sign for the exam.
- ✓ The SANE nurse would like to speak directly with the patient to ensure consent. If this is not possible, the SANE will ask about patient's medical stability, ability to give informed consent, special needs, and will schedule a time and place to meet the patient.
- ✓ If the assault was recent, discourage the patient from eating, drinking, or showering – depending upon the nature of the assault. Encourage the patient to bring the clothes they were wearing when they were assaulted.
- ✓ SANE programs are equipped to do only one sexual assault exam at a time. Each exam can take 2 to 4 hours and some exams may take much longer.
- ✓ SANE Programs are based on patient consent: at each step of the sexual assault exam, the SANE nurse allows the patient to proceed or not.
- ✓ A sexual assault patient does not need to file a police report to receive SANE services
- ✓ There is no cost to the sexual assault patient for services provided by SANE
- ✓ Pediatric patients ages 12 and under may not need an *emergent* sexual exam. Law enforcement, child protective services, and the SANE will consult on how best to proceed with child sexual abuse cases.
- ✓ The SANE response may include documentation of injuries from the assault, collection of forensic evidence, and medical treatment for emergency contraception and sexually transmitted infections – the patient may choose which services he/she wants.

APPENDIX G

Qualifications for Being a New Mexico SANE – Adult/Adolescent

Revised September 2007 (For most current version contact New Mexico Coalition of Sexual Assault Programs at 505-883-8020 in Albuquerque or 1-888-883-8020 toll free outside of Albuquerque.)

Qualifications for Being a New Mexico SANE – Adult/Adolescent

The qualifications outlined below are the recommended minimum qualifications for being a Sexual Assault Nurse Examiner (SANE) in New Mexico for adult and adolescent sexual assault patients. These recommendations are outlined by the New Mexico Coalition of Sexual Assault Programs and members of the State SANE Task Force, and are based on national standards. Individual SANE Programs may have additional and/or advanced level qualifications for their employees or contractors.

PURPOSE OF A SANE

The Sexual Assault Nurse Examiner (SANE) will provide timely, non-judgmental, compassionate care to the sexual assault victim. The SANE exam may include a forensic exam, prophylaxis for pregnancy and sexually transmitted infections, photographic documentation, referrals for appropriate medical and psychological follow-up, support and participation in legal proceedings. The SANE uses the New Mexico Sexual Assault Evidence Kit (SAEK) for forensic collection within five (5) days of an assault.

COMMUNITY SANE PROGRAMS

For communities in New Mexico *with* an existing SANE program, a nurse must be sponsored by the SANE program to attend the statewide SANE training and either be hired or have the intent to be hired with the SANE program.

For communities *without* a formal SANE program, the SANE nurse must actively be starting the formal SANE Service Agreement, have prior support from the medical facility and other multi-disciplinary team members of the community, and coordinate with the New Mexico Coalition of Sexual Assault Programs for technical assistance, forms/protocols and site visits and plans for developing a SANE program.

SANE QUALIFICATIONS: Required

- Current New Mexico Registered Nurse Licensure or higher, with current CPR or BLS certified
- Individual or employment-based malpractice insurance (1,000,000/3,000,000).
- Minimum 3 years nursing experience required; specialty experience recommended, ranging from women's health, emergency department or intensive care, public health or psychiatry
- Completion of the New Mexico Statewide SANE 6-day didactic training
- Proof of demonstrated competency by a qualified preceptor in clinical components to include
  - Conducting normal genital exams, for both male and female
  - Shadowing an experienced SANE and being shadowed by an experienced SANE through actual sexual assault exams

SANE QUALIFICATIONS: Recommended/Strongly Encouraged

- BSN for education requirement preferred
- Demonstrated autonomy and professional judgment in nursing practice
- Trauma Nurse Core Curriculum (TNCC) or equivalent recommended for non-hospital-based SANEs
- Observation hours in a violent crime courtroom

SANE JOB RESPONSIBILITIES:

- Ability to triage patient to determine if medical exam is needed before forensic exam.
- Coordinate and advocate compassionate patient care by all agencies involved in sexual assault cases
- Perform and document sexual assault and forensic interview accurately.
- Perform complete physical and forensic examination to include head-to-toe assessment for trauma, detailed genital examination, forensic specimen collection and documentation, including photography, referrals as needed, and assess for mandatory reporting status and report when appropriate.
- Maintain chain of custody and adhere to evidence protocols as determined by SANE program
- Ensure patient/medial record confidentiality at all times.
- Maintain professional standards that do not create conflict of interest with employment or patient care.
- Administer/refer for appropriate prophylactic medications per protocol to prevent pregnancy and sexually transmitted infections.
- Provide competent testimony as fact witness to any/all cases performed while as a SANE and coordinate with attorneys during judicial process.
- Ability to respond to calls within first page per protocol as determined by SANE program.
- Commitment to work minimum scheduled number of shifts to maintain current, clinical competencies as determined by SANE program.

MAINTENANCE OF SANE CREDENTIALS

- Actively engaged in conducting SANE exams in New Mexico with no lapse of service greater than six months and conducting at least six exams per year.
- Med-test upon initial SANE practice and every other year
- Participate in periodic case review to include documentation and photographs
- Participate in SANE program staff meetings for on-going professional development
- Participate in community multi-disciplinary team for coordinated community response
- Obtain on-going clinical education hours relevant to sexual assault or forensics
- Membership in professional organization, such as the International Association of Forensic Nursing, strongly recommended
- Successful completion of SANE-A certification strongly recommended after two years of practice

SANE CERTIFICATION

- SANE certification for Adult-Adolescent (SANE-A) is provided by the International Association of Forensic Nursing (IAFN). SANE-A Certification is recommended after two years of SANE practice.
- Nurses who complete the New Mexico SANE training receive a certificate of completion for the training – not certification. The certificate of completion of the New Mexico SANE didactic training is required by the Coalition of Sexual Assault Programs for reimbursement of the SANE case fee.

RECIPROCITY FOR OUT-OF-STATE SANE TRAINING

- For SANE nurses trained out-of-state wanting to work with an existing New Mexico SANE Program, the individual SANE Program determines hiring and appropriate precept skills, providing necessary guidance and oversight for the out-of-state trainee.
- For SANE nurses trained out-of-state and wanting to work in a New Mexico community without an existing SANE program, the required SANE qualifications detailed on the first page apply.

APPENDIX H

Core Components of a SANE Medical Record

November 2005 (For most current version contact New Mexico Coalition of Sexual Assault Programs at 505-883-8020 in Albuquerque or 1-888-883-8020 toll free outside of Albuquerque.)

CORE COMPONENTS OF A SANE MEDICAL RECORD

As recommended by the New Mexico Coalition of Sexual Assault Programs and the New Mexico Statewide SANE Task Force

New Mexico has a standardized Sexual Assault Evidence Kit (SAEK) that provides for the acute medical response, injury documentation, and forensic collection of sexual assault patients. The New Mexico SAEK is to be used within 5 days for adolescents/adults and 72 hours for pediatrics.

As independent units, New Mexico SANE Programs have the autonomy to create, implement and modify their own documentation of the medical and sexual assault exam. To support consistency among the SANE programs, however, the New Mexico Coalition of Sexual Assault Programs – in coordination with the Statewide SANE Task Force – has outlined the following minimum core components that should be addressed in a SANE medical record. The following components are recommended, not required, and are based on national and state best-practices.

OVERARCHING PRINCIPLES OF SANE DOCUMENTATION

Any recommendation of core components to be addressed in a SANE medical record must address overarching, guiding principles of patient care, nursing competencies and forensic documentation. Specifically,

- The SANE exam and treatment are based on patient consent and choice.
- Each sexual assault is unique: SANE documentation needs to reflect the situational aspects of different patients and different types of assaults.
- Nurses are mandated reporters of suspected child sexual abuse and SANE documentation includes questions to assist the nurse's role in state reporting requirements.
- Nurses provide holistic care of the patient, including safe discharge and appropriate referrals, and SANE documentation includes questions to assist the nurse's determination of a safety plan for the patient, exposure risk for infectious diseases, and referrals for aftermath care.
- The SANE documentation is primarily a medical record that includes forensic documentation; however, the SANE medical record is not an investigatory tool.
- Some data on a SANE Medical Record are required to fulfill grant/funding obligations for statewide data collection and reporting.
- During the SANE exam, a patient may spontaneously disclose personal information or excited utterances which may or may not be pertinent to the sexual assault. It is recommended that the specially trained and objective SANE nurse exercise professional judgment in determining the type and level of patient information disclosed in the SANE Medical Record.

The SANE Medical Record will comprehensively address **Patient Consent**, including:

- Differences between a Full and Limited SANE exam, including the option to not collect evidence
- Consent to release evidence to law enforcement whether or not a police report is filed
- Notification that basic information about the sexual assault/information on the police report may be disclosed to inquiring sources
- Consent to release patient's name and telephone number for follow-up services
- Consent to receive or decline Emergency Contraception
- Information about HIPPA Regulations
- Information Crime Victims Reparation Commission (CVRC) Compensation

The SANE Medical Record will include basic **Patient Demographics**, such as

- Patient Name
- Patient Age
- Patient Gender
- Patient Home or Contact Address and Telephone Number
- Patient Ethnicity
- Referral source (as identified by patient: who told/encouraged them to seek SANE services)

The SANE Medical Record should document basic and relevant **Patient Medical History**, to include:

- Medications, status of vaccines, and known allergies
- Medical/surgical history
- Vital signs to include temperature, blood pressure, pulse, respirations, pain scale, etc.
- Disabilities
- Primary Care Provider
- Pre-existing injuries or symptoms of the genitalia and whether the patient has had consensual intercourse within the previous 5 days and to which orifice

The SANE Medical Record should document, in a check-off format for consistency, **Patient Demeanor**, to include:

- Specific, observable behavior, such as tearful, sobbing, smiling, flat, dazed, tense, calm, angry, responsiveness to questions, fidgeting, trembling, agitated, anxious, quiet, eye contact, etc.
- Abnormal appearance or dress, such as disheveled, clothes torn, clothes on backward, etc.

The SANE Medical Record will identify whether a **Police Report was Filed** at Time of Exam and to Which Agency

The SANE Medical Record will include **Victim Drug/Alcohol Information**

- Any drug or alcohol use within the previous 48 hours with amount and time of ingestion

The SANE Medical Record will address basic and relevant patient **Assault History** to include:

- Date, time, and location of assault
- Any recent loss of consciousness/loss of memory to suspect drug facilitated sexual assault
- Actual and attempted penetration of specific orifices
- Ejaculation and/or presence/absence of condom
- If the sexual assault was related to domestic violence to determine need for safety plan
- Type and level of coercion and force
- Patient narrative of event

The SANE Medical Record will clearly indicate any **Additional Personnel Present** for the interview and exam

- First names of individuals present, with identification of the persons' role or relationship, such as rape crisis advocate, staff-in-training, translator, guardian, parole officer, family members, etc., with indication of personnel present for initial interview and/or for exam

The SANE Medical Record will detail victim **Post-Assault Hygiene Activity**, in a check-off format for consistency

- Specific behavior to include relevant activities such as urinated, defecated, genital wash/wipe, clothing changed, showered, bathed, douched, removed/inserted tampon, diaphragm, condom, chewed gum, brushed teeth, gargled/mouthwash, vomited, smoked, ate, drank, etc.

The SANE Medical Record will include minimal information on the **Offender**, such as

- Number of offender/s
- Relationship of offender/s
- Age of offender/s
- Offender/s gender

The SANE Medical Record will list all **Evidence Collected**

- SAEK
- Clothing, which may include description and identification of color, photographs taken, and identification of how clothes were brought to the SANE unit (i.e., carried, worn, etc)
- Urine
- Photographs, including type (digital, 35 mm) and an estimated number of photos taken
- Miscellaneous evidence, such as environmental debris, fingernail scrapings, etc.

The SANE Medical Record will detail the type of **Medical Services Provided** to the sexual assault patient

- Emergency contraception
- Prophylaxis for sexually transmitted infections
- Vaccines (Tetanus, Hepatitis B)
- Other medications (Phenergan, Tylenol, Ibuprofen, Colace, Tucks)

The SANE Medical Record will document the visual **Assessment** of the patient, including description of injuries using the TEARS acronym

- Full body
- Genital
- Identification of the patient position during the genital exam
- Use of visualization adjuncts such as, filters, Toluidine Blue dye, magnification of colposcope, and number of photographs

The SANE Medical Record will include a copy of the **Discharge Instructions** that were given to the patient, including

- Synopsis of services rendered
- Medications administered
- Follow-up/referral services
- Safety planning discussed with patient

For state reporting purposes, the SANE documentation includes questions for the annual *Sex Crimes in New Mexico* report, funded by the New Mexico Department of Health Office of Injury Prevention and the New Mexico Crimes Victim Reparation Commission Violence Against Women Act Grants Office. For a full list of data fields abstracted from the SANE medical record for reporting purposes, contact the New Mexico Coalition of Sexual Assault Programs.

Given the variability among sexual assault patients, SANE programs may decide to incorporate additional information or create supplemental sheets in addition to the medical record. The Coalition recommends supplemental sheets for cases where patient age, gender, or specific patient complaints dictate the need for additional information, such as

- Separate pediatric chart or supplemental pediatric body maps
- Supplemental Tanner reference
- Supplemental male sheet
- Supplemental mouth sheet
- Supplemental hands/feet sheet
- Supplemental drug facilitated assault sheet
- Supplemental strangulation sheet
- Supplemental suicide assessment tool
- Patient satisfaction/feedback survey
- Progress note for the SANE to explain and describe the SANE exam from start to finish

APPENDIX I

SANE Drug-Facilitated Sexual Assault Form

June 2005 (For most current version contact New Mexico Coalition of Sexual Assault Programs at 505-883-8020 in Albuquerque or 1-888-883-8020 toll free outside of Albuquerque.)

SANE DRUG-FACILITATED SEXUAL ASSAULT FORM

The SANE nurse will complete this form at the time of the interview based on the patient's narrative and history and/or the signs and symptoms observed by the examiner.

Please circle: A: Patient History B: Observed A&B: Both

Disturbance Consciousne	**Memory Impairment**	**Neurological**	**Psycho physiological**	**GI/GU**
▢ Drowsiness A B	▢ Confusion A B	▢ Muscle relaxation A B	▢ Excitability A B	▢ Nausea A B
▢ Sedated A B	▢ Memory Loss A B	▢ Dizziness A B	▢ Aggressive behavior A B	▢ Vomiting A B
▢ Stupor A B	▢	▢Weakness A B	▢ Sexual stimulation A B	▢ Diarrhea A B
▢ LOC A B	▢	▢Slurred Speech A B	▢ Loss of inhibitions A B	▢ Incontinence Urine/Feces A B
▢	▢	▢ Paralysis A B	▢ Hallucinations A B	▢
▢	▢	▢ Seizures A B	▢ Dissociation A B	▢
▢	▢	▢ Pupil Size Reaction: _________	▢	▢

Date and time of suspected ingestion: ____________________

Comments about urine (1st void, delayed, etc.):____________________

Name of drugs taken (recreational, prescription or over the counter)	Last dose:
	Date: Time:
	Date: Time:

Comments: ____________________

____

____

Nurse: ____________________ Date/Time: ____________________

Patient Label

Supplemental Form: DFSA
SANE Initial ________

APPENDIX J

Notice of Requirement to Register as Convicted Sex Offender Pursuant to NMSA 29-11A-7

Sample form used in Second Judicial District. NOTE: This sample may not be applicable to all situations. For example, it provides for annual renewal of registration, however, under certain circumstances renewal is required every 90 days. The notice must be carefully tailored to meet the statutory requirements for the circumstances of each case.

SECOND JUDICIAL DISTRICT COURT
COUNTY OF BERNALILLO
STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff,

vs.

CRCR
DA#
STN:

[DEFENDANT],

Defendant.

NOTICE OF REQUIREMENT TO REGISTER AS CONVICTED SEX OFFENDER PURSUANT TO NMSA 29-11A-7

The court is going to advise you for the following requirements pursuant to NMSA 29-11A-7:

1. You are a convicted sex offender.

2. You are required by law to register with the sheriff's office in the county where you reside. If you will not have an established residence, you must register with the county sheriff for each county in which you will live or be temporarily located.

3. You must register no later than ten days after being released from the custody of the corrections department.

4. The law also requires that you register as a convicted sex offender no later than ten days after being placed on probation or parole.

5. If you change your residence you are required to notify the county sheriff no later than ten days after establishing your new residence.

6. If you change your residence to a different county in New Mexico you are required to register with the sheriff of the new county no later than ten days after establishing your new residence.

7. You are required to notify the county sheriff of the county you reside in if you intend to move to another state and you are required to register in the other state, pursuant to provisions of the Sex Offender Registration and Notification Act.

8. As a sex offender, you are required to give written notice of the change in residence to the county sheriff with whom you last registered no later than ten days after establishing your new residence.

9. Following your initial or first registration you are required to renew your registration as a sex offender annually with the county sheriff before December 31st of each calendar year.

10. You must disclose your status as a sex offender in writing when you begin employment, begin a vocation or enroll as a student at an institution of higher education in New Mexico to the county sheriff for the county in which the institution of higher education is located and to the law enforcement entity and registrar for the institution of higher education.

11. You must provide written notice of any change regarding employment, vocation or enrollment status at an institution of higher education to the county sheriff for the county in which the institution of higher education is located and to the law enforcement entity and registrar for the institution of higher education.

12. You must disclose your status as a sex offender in writing when you enroll as a student at a private or public school in New Mexico, to the county sheriff for the county in which the school is located and to the principal of the school.

13. You must provide written notice of any change regarding your enrollment status at a public or private school in New Mexico to the county sheriff and the principal of the school.

14. You must disclose your status as a sex offender in writing to your employer, supervisor or other person similarly situated, when you begin employment, begin a vocation or volunteer your services,

regardless of whether the sex offender receives payment or other compensation.

15. You are hereby advised that:

a. Failure to comply with this requirement to register is a fourth degree felony offense.

b. This notice today, to you, does not satisfy your legal duty to register as a sex offender.

Do you understand this?

Yes _________ No ___________

I HEREBY ACKNOWLEDGE that I have been advised by the Court to register as a sex offender per New Mexico law.

____
Defendant

____
District Court Judge

endorsed copy to:
Bernalillo County Sheriff's Office, Sex Offender Unit
State Probation and Parole
District Attorney's Office
Defendant's Counsel
Defendant (last known address)